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INDIAN CASES

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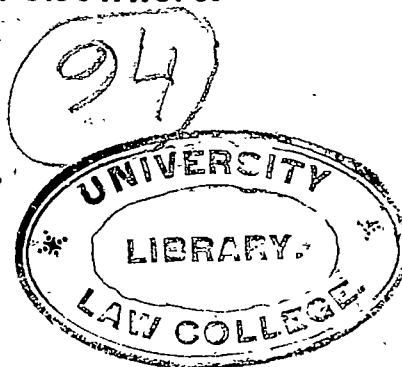
OF

The **PRIVY COUNCIL**, the High Courts of **ALLAHABAD**,
BOMBAY, **CALCUTTA**, **LAHORE**, **MADRAS**,
PATNA and **RANGOON**, the Chief Court of
ODDH, and the Courts of the Judicial Commissioners
of **CENTRAL PROVINCES** and **SIND**

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VOLUME 107, 1928.

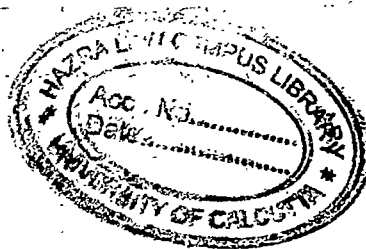


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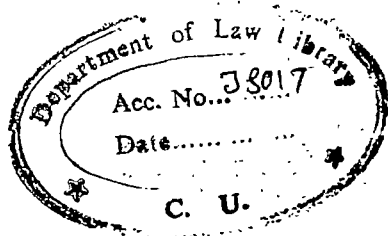
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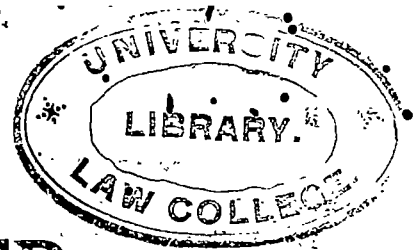


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27	Tan Seik Ke v. C. A. M. C. T. Firm	109 769	97	U Ba Pe v. U Po Sein	110 41
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39	K. B. v. Maung Tin Saw	109 675	113	V. P. R. V. Chokalingam Chettyar E. N. M. K. Chettyar Firm	107 461
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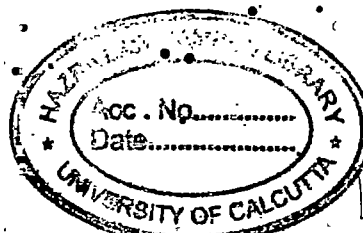


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130	Paruchuru Sudarasanacharyulu v. Kollimarla Suryanarayana	...	39 M. L. T. 628; 27 L. W. 42; A. I. R. 1928 Mad. 215.
132	Balasundarachari v. Kanniappachari	..	39 M. L. T. 413; A. I. R. 1927 Mad. 1165.
136	Board of Control, Tiruvalur v. Balajee Ammal	...	39 M. L. T. 579; A. I. R. 1928 Mad. 61; 27 L. W. 32.
141	Surappa v. Sundarama	..	A. I. R. 1923 Mad. 176.
145	Rup Nath Mandal v. Jagannath Mandal	...	9 P. L. T. 228; 7 Pat. 178; A. I. R. 1928 Pat. 227.
149	Shoukhi Sao v. Gaibi Sao	...	*Patna High Court.
151	Suraj Bali Singh v. Tilakdhar Singh	...	7 Pat. 163; A. I. R. 1928 Pat. 220; 9 P. L. T. 310; I. L. T. 40 Pat. 107.
152	Muhammad Fariduddin Ahmad v. Ahmad Abdul Wahab	..	7 Pat. 144; A. I. R. 1928 Pat. 255; 9 P. L. T. 383.
156	Natho Singh v. Lachu Singh		A. I. R. 1928 Pat. 233.
158	Tarachand Marwari v. Bengal Nagpur Ry. Co.	...	A. I. R. 1928 Pat. 259; 9 P. L. T. 616.
160	Chhanu Prasad Singh v. Emperor	...	29 Cr. L. J. 229; 9 A. I. Cr. R. 486.
161	Maung Po Pe v. Maung Kwa	...	5 R. 751; A. I. R. 1928 Rang. 80.
161	K. K. S. A. R. Firm v. Maung Kya Nyun	..	5 R. 675; A. I. R. 1928 Rang. 31.
163	U Po Nyun v. Ma Pwa Me	...	5 R. 662; A. I. R. 1928 Rang. 43.
165	Maung Pwa v. Maung Po Sa	...	5 R. 668; A. I. R. 1928 Rang. 44.
167	Maung Ba Gon v. Ma Pwa Thit	...	5 R. 747; A. I. R. 1928 Rang. 67.
168	S. R. M. M. A. Chettyar Firm v. Ma Pwa May	...	5 R. 666; A. I. R. 1928 Rang. 50.
169	C. R. M. A. Chettyar Firm v. K. R. S. V. Chettyar Firm	...	5 R. 757; A. I. R. 1928 Rang. 96.
172	Maung Tha Dun v. Po Ka	...	5 R. 768; A. I. R. 1928 Rang. 60.
173	Maung Po Si v. K. P. A. P. Firm	...	5 R. 764; A. I. R. 1928 Rang. 68.
175	Burma Railways Co. v. Maung Hla Tin	...	5 R. 813; A. I. R. 1928 Rang. 85.
177	Madaru v. Emperor	..	5 O. W. N. 29; 29 Cr. L. J. 230; A. I. R. 1928 Oudh 221; 9 A. I. Cr. R. 438.

178	Dukhi Singh v. Sarju Dei	...	4 O. W. N. 1225; A. I. R. 1928 Oudh 113.
180	Gaya Deen Singh v. Madho Singh	...	4 O. W. N. 1101; A. I. R. 1927 Oudh 553.
181	Mohammad Ali Khan v. Badrunnissa	...	4 O. W. N. 1106; A. I. R. 1928 Oudh 92.
181	Foster v. Foster	...	1-Luck. Cas. 685; A. I. R. 1928 Oudh 111.
191	Sheopal v. Chitoria	...	4 O. W. N. 1123; A. I. R. 1927 Oudh 615
192	Murlidhar v. Fakir Bukhs	...	*Oudh Chief Court.
193	Saba v. Dayaram	...	23 N. L. R. 183; A. I. R. 1928 Nag. 91.
193	Bapu Suryabhan v. Kisan	...	A. I. R. 1928 Nag. 136.
194	Mohanlal v. Satyabhama	...	23 N. L. R. 178; A. I. R. 1928 Nag. 89.
195	Pokhardas v. Ganpat Rao	...	*Nagpur Judicial Commissioner's Court.
198	Vithu v. Maroti	...	A. I. R. 1928 Nag. 92; 10 N. L. J. 266.
199	Sakhu v. Kashiba	...	A. I. R. 1928 Nag. 126.
201	Kaluram v. Gajasa	...	A. I. R. 1928 Nag. 182.
203	Ramchandra Nagoba v. Retiram	...	A. I. R. 1928 Nag. 184; 24 N. L. R. 122.
205	Govind v. Malkarjunappa	...	A. I. R. 1928 Nag. 133.
206	Secretary of State v. Nandalal	...	A. I. R. 1928 Nag. 52; 24 N. L. R. 87.
209	Official Assignee v. Abdul Hussain	...	A. I. R. 1928 Sind 95.
210	Nechaldas v. Official Receiver	...	*Sind Judicial Commissioner's Court.
211	Mahomed Kassim v. Natho Bhano	...	*Sind Judicial Commissioner's Court.
213	Chetumal Bulchand v. Noorbhoy Jafferji	...	A. I. R. 1928 Sind 89.
214	Udhavdas v. Devidas	...	A. I. R. 1927 Sind 100.
216	Budhar Pragji v. Rahimtulla Khan	...	A. I. R. 1923 Sind 93.
218	Naraindas & Co. v. Chandiram & Co.	...	A. I. R. 1928 Sind 86.
220	Donald Graham & Co. v. Basantram Jhingan	...	A. I. R. 1928 Sind 1.
221	Rajmal Trilokchand v. Isherdas-Kishenchand	...	A. I. R. 1927 Sind 247.
223	Adamali v. Abdulali	...	A. I. R. 1928 Sind 87.
225	M. A. Sassoon & Sons v. International Banking Corporation	...	53 M. L. J. 42; A. I. R. 1927 P. O. 195; 1 Luck. Cas. 241; 25 A. L. J. 665; 29 Bom. L. R. 1181; 46 O. L. J. 61; (1927) M. W. N. 618; 32 O. W. N. 30; 39 M. L. T. 659; 54 I. A. 317; 27 L. W. 582; 55 O. L. P. C.
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241	Har Prasad v. Emperor	...	L. R. 8 A. 170 Cr.; 9 A. I. Cr. R. 4; A. I. R. 1928 All. 139; 29 Cr. L. J. 232.
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243	Gulab v. Emperor	...	L. R. 8 A. 173 Cr.; 26 A. L. J. 95; 9 A. I. Cr. R. 16; A. I. R. 1928 All. 128; 29 Cr. L. J. 244.
243	Narsingh Das v. Gokul Prasad	...	25 A. L. J. 775; A. I. R. 1928 All. 140; 50 A. 113.
244	Hukum Chand v. Sital Prasad	...	25 A. L. J. 922; A. I. R. 1928 All. 52; 50 A. 232.
247	Sidh Gopal v. Behari Lal	...	25 A. L. J. 978; A. I. R. 1928 All. 65; 50 A. 284.
249	Najaf Ali Khan v. Muhammad Fazal Ali Khan	...	A. I. R. 1928 All. 255.
252	Sheo Gulam Puri v. Shiam Lal Bhagat	...	A. I. R. 1928 All. 257; 50 A. 485.
254	Kirtarath Rai v. Sripat Rai	...	A. I. R. 1928 All. 307.
257	Ganpat Tukaram Mali v. Sopana Tukaram Mali	...	30 Bom. L. R. 1; I. L. T. 40 Bom. 43; A. I. R. 1928 Bom. 35; 52 B. 88 F. B.
265	Sakharam Bala Nikam v. Thama Bala Nikam	...	29 Bom. L. R. 1571; 51 B. 1019; A. I. R. 1928 Bom. 26.
268	Huchangouda Rudragouda v. Kallava Kallappa	...	30 Bom. L. R. 38; 52 B. 132; A. I. R. 1928 Bom. 166; I. L. T. 40 Bom. 108.
272	Emperor v. Mahomed Hasan Ghanchi.	...	30 Bom. L. R. 86; 29 Cr. L. J. 231; 9 A. I. Cr. R. 491.
273	Matwal Das v. Nand Lal	...	A. I. R. 1928 Lah. 284.
273	Allan Robert Shaw v. Emily May Shaw	...	A. I. R. 1928 Lah. 320.
274	Babu Singh v. Gurbaksh Singh	...	A. I. R. 1928 Lah. 249.
275	Plungun v. Jasodhan	...	*Lahore High Court.
276	Jai Dev Singh v. Jai Singh	...	A. I. R. 1928 Lah. 445.
276	Durga Datt-Jagan Nath v. Ganesh Das-Ishar Das	...	A. I. R. 1927 Lah. 648.
278	Ganesh Das-Ishar Das v. Basheshar Lal-Bansi Dhar	...	A. I. R. 1927 Lah. 697.

280	Pir Bakhsh v. Ghulam Bibi	...	A. I. R. 1928 Lah. 305; 9 Lah. 352; 29 P. L. R. 475.
281	Narain Singh v. Gurbakhsh Singh	...	A. I. R. 1923 Lah. 119; 29 P. L. R. 399; 9 Lah. 306.
282	Wali Muhammad v. Fazal Dad	..	*Lahore High Court.
283	Rallia Singh v. Parshotam Singh	...	A. I. R. 1928 Lah. 536.
284	Gopal Singh v. Mangal Singh	...	A. I. R. 1928 Lah. 341.
284	Rajo v. Ali	...	*Lahore High Court.
285	Devi Dial v. Rattan Devi	...	29 Cr. L. J. 235; A. I. R. 1923 Lah. 294.
285	Gulab v. Emperor	...	29 Cr. L. J. 235; A. I. R. 1928 Lah. 660.
286	Emperor v. Muhammad Akbar	..	A. I. R. 1928 Lah. 64; 29 Cr. L. J. 236; 9 A. I. Cr. R. 490.
288	Batan Singh v. Emperor	..	29 Cr. L. J. 238; 9 A. I. Cr. R. 435.
289	Muppidathi Ammal v. Muthuswami Pillai	...	A. I. R. 1928 Mad. 126; I. L. T. 40 Mad. 263.
290	Murugiah Pillai v. Pakkiri Pillai	...	A. I. R. 1928 Mad. 499; I. L. T. 40 Mad. 271.
291	Commissioner of Income-Tax, Madras v. Trichinopoly Permanent Fund	...	A. I. R. 1927 Mad. 1078; 53 M. L. J. 881; I. L. T. 40 Mad. 263 F. B.
293	Karupanna Konar v. Rangaswami Konar	...	A. I. R. 1928 Mad. 105.
295	Ramaswami Ayyangar v. Rama Nathan Chettiar	...	A. I. R. 1928 Mad. 684; I. L. T. 40 Mad. 230.
298	Abdul Salam Saheb v. Batchu Veerabhadra Raju	...	A. I. R. 1928 Mad. 129.
301	Meenakshi Ammal v. Iswaram Iyer	..	39 M. L. T. 530; 53 M. L. J. 903; A. I. R. 1928 Mad. 121; 27 L. W. 238; (1928) M. W. N. 50.
302	Bansilal Abberchaud v. Sriranganacharammal	...	I. L. T. 40 Mad. 59; A. I. R. 1928 Mad. 456.
303	Elavallath Potayur v. Thiruvazhiyot Valappa	...	39 M. L. T. 371; A. I. R. 1928 Mad. 24; 54 M. L. J. 151; 27 L. W. 798.
305	Ghansham Singh v. Emperor	..	6 Pat. 627; A. I. R. 1928 Pat. 100; 9 A. I. Cr. R. 460; 29 Cr. L. J. 239.
310	Badlu Pathak v. Sibram Singh	...	9 P. L. T. 241; 7 Pat. 155; A. I. R. 1928 Pat. 234.
313	F. A. Savi v. Sabitri Thakurain	...	6 Pat. 282; 8 P. L. T. 615; A. I. R. 1927 Pat. 363.
319	Sogia v. Kitaban	...	7 Pat. 141; A. R. 1928 Pat. 224; 9 P. L. T. 467; I. L. T. 40 Pat. 105.
320	Muhammad Reza v. Rajballabhnath Singh	..	9 P. L. T. 240.
321	Raj Bachan Singh v. Sooraj Kunwar Ram	..	4 O. W. N. 1179; A. I. R. 1927 Oudh 618.
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330	Rajendra Bakhsh Singh v. Bahu Rani	...	A. I. R. 1928 Oudh 260.
333	Debi Dayal v. Manao	...	5 O. W. N. 78; 29 Cr. L. J. 244; A. I. R. 1927 Oudh 632; 9 A. I. Cr. R. 532.
333	Ram Sidh Singh v. Bakoodas	...	4 O. W. N. 1196; A. I. R. 1928 Oudh 101.
335	Ghani Ahamad Khan v. Mehdi Begam	...	1 Luck. Cas. 645; A. I. R. 1927 Oudh 617.
337	Jewan Lal Daga v. Nilmani Chaudhuri	..	26 A. L. J. 124; 30 Bom. L. R. 305; (1928) M. W. N. 154; 54 M. L. J. 325; 47 C. L. J. 302; A. I. R. 1928 P. C. 80; 32 C. W. N. 565; 27 L. W. 740; 7 Pat. 305 P. C.
344	Sunmonu v. Disu Raphael	...	54 M. L. J. 391; 47 C. L. J. 333; A. I. R. 1927 P. C. 270; 27 L. W. 824 P. C.
346	Royal Bank, Canada v. Joseph Salvatori	...	47 C. L. J. 300; A. I. R. 1927 P. C. 272; 30 Bom. L. R. 760 P. C.
347	George Richards Laffer v. Francis Arnold Gillen	...	47 C. L. J. 327; A. I. R. 1927 P. C. 275 P. C.
347	Manche Anege Akue v. Mancho Kojo Ababio IV	..	47 C. L. J. 337; A. I. R. 1927 P. C. 262; 30 Bom. L. R. 755 P. C.
349	Arunachala Nayadu v. Balakrishna	..	A. I. R. 1927 P. C. 266; 47 C. L. J. 576 P. C.
349	Kojo Pon v. Atta Fua	...	47 C. L. J. 333; A. I. R. 1927 P. C. 264 P. C.
352	Carl Franz Adolf Otto v. Wing On & Co. Ltd.	...	47 C. L. J. 263; A. I. R. 1923 P. C. 83; 30 Bom. L. R. 753 P. C.
353	Carmen v. O'Brien	...	54 C. 1041; A. I. R. 1928 Cal. 97; 29 Cr. L. J. 245; 9 A. I. Cr. R. 471.
355	Bhodai Sheikh v. Barada Kanta Dutta	...	46 C. L. J. 570; A. I. R. 1928 Cal. 116; 55 C. 602.
357	Krishna Chandra Dutta v. Dina Nath Biswas	...	54 C. 1064; A. I. R. 1928 Cal. 94.
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365	Abdul Ghani v. Sansar Chand	..	A. I. R. 1928 Lah. 101.
366	Nanak Chand v. Gaman	...	A. I. R. 1928 Lah. 351.
388	Tek Singh v. Emperor	...	29 Cr. L. J. 248.
390	Atma Devi v. Shib Devi	..	A. I. R. 1928 Lah. 244.

391	H. Bharucha v. Municipal Committee, Lahore	...	29 Cr. L. J. 250; A. I. R. 1928 Lah. 270; 9 A. I. Cr. R. 501; 9 Lah. 394.
392	Gopal Mal v. Gopal Singh-Hari Singh	..	A. I. R. 1928 Lah. 378.
393	Bishen Chand v. Bisben Devi	...	A. I. R. 1928 Lah. 96.
394	Rup Singh v. Official Receiver, Jhang	...	A. I. R. 1928 Lah. 82; 29 P. L. R. 122; 10 Lah. L. J. 156.
395	Abdul Aziz v. Punjab National Bank, Ltd., Lahore	...	*Lahore High Court.
396	Ramji Das v. Jai Ram Das	...	A. I. R. 1928 Lah. 301.
397	Sakina Begam v. Muhammad Walli Ullah Klaw	...	A. I. R. 1928 Lah. 456.
400	Munshi Ram v. Ghulam Dastgir	...	A. I. R. 1928 Lah. 423.
401	Gurumoorthi Iyer v. P. S. Subramaniam	...	*Madras High Court.
412	Sinthamani Chetti v. Arunachalam Chettiar	...	A. I. R. 1927 Mad. 1060.
417	Balam Nookamma v. Sadireddi	...	53 M. L. J. 863; A. I. R. 1928 Mad. 233.
417	Munuswami Mudali v. Jawarmal Sowcar	...	39 M. L. T. 652; A. I. R. 1927 Mad. 1180.
419	Nagarathnammal v. Ohinnu Sah	..	(1927) M. W. N. 750; 53 M. L. J. 861; A. I. R. 1928 Mad. 127.
420	M. K. Sowbhagyammal v. Komalangi Ammal	...	27 L. W. 167; J. L. T. 40 Mad. 51; 54 M. L. J. 332; A. I. R. 1928 Mad. 803.
423	Krishnaswami Ayyar v. Raghaviah Chetty	...	53 M. L. J. 679; 26 L. W. 687; 39 M. L. T. 472; A. I. R. 1928 Mad. 43.
428	President, District Board, Anantapur v. Ismail Sahib	...	27 L. W. 28; 29 Cr. L. J. 251; A. I. R. 1927 Mad. 1195; 9 A. I. Cr. R. 456; 51 M. 512; 55 M. L. J. 201.
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431	Paramanandachari v. Veerappan	...	39 M. L. T. 611; A. I. R. 1928 Mad. 213.
431	Upputuri Punneyya v. Polavarapu Lingayya	...	A. I. R. 1928 Mad. 496; I. L. T. 40 Mad. 261.
433	Gopaldas Versimal, <i>In re</i>	...	A. I. R. 1928 Sind 90.
433	Shivaldas Hotchand v. Japan Cotton Trading Co.	...	A. I. R. 1928 Sind 94.
433	Firm of Uttamchand-Brijlal v. Firm of Balmokand	...	*Sind Judicial Commissioner's Court.
439	Sunderji Bhimji, <i>In re</i>	...	A. I. R. 1928 Sind 105.
440	Rahimbux-Kaderbux v. Topandas-Harbhagvandas	...	A. I. R. 1928 Sind 103.
442	Utma Mallick Vishendas, <i>In the matter of</i>	...	A. I. R. 1928 Sind 114.
446	Lalchand v. Issersing	...	A. I. R. 1928 Sind 126.
449	Krishna Reddi v. Gandavaram Raghava Reddi	...	32 C. W. N. 3; 53 M. L. J. 700; J. L. T. 40 Mad. 1; A. I. R. 1927 P. C. 257 P. C.
453	Jaffer Ali Bhaloo Lakha v. Standard Bank of South Africa, Ltd.	...	47 C. L. J. 292; A. I. R. 1928 P. C. 135; 30 Bom. L. R. 762 P. C.
455	Municipal Council, Sydney v. Margaret Alexandra Troy	...	47 C. L. J. 284; A. I. R. 1928 P. C. 128 P. C.
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467	Chandra Nath Sen v. Nagendra Nath Ganguly	...	A. I. R. 1928 Cal. 263.
468	Makbul Ali v. Sasi Kumar Malla	...	A. I. R. 1928 Cal. 305.
469	Kasiraddin Paramanik v. Kasir Mandal	...	A. I. R. 1928 Cal. 227.
469	Jotirmoy Goswami v. Guru Gobinda Goswami	...	A. I. R. 1928 Cal. 273.
470	Daliluddi v. Matahar Ali	...	A. I. R. 1928 Cal. 254.
471	Mujibuddin v. Reajuddi Matbar	...	*Calcutta High Court.
473	Jajneswar Karmakar v. Kailash Chandra Ghose	...	*Calcutta High Court.
474	Barsik Nandi Mandal v. Gurudas Pal	...	46 C. L. J. 573; A. I. R. 1928 Cal. 107.
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477	Sambhunath Basak v. Abdul Kader	...	A. I. R. 1928 Cal. 247.
479	Madhab Chandra Dutta v. Jainoo Ram	...	A. I. R. 1928 Cal. 231.
481	Basant Singh v. Shhibba Mal	...	10 Lah. L. J. 17.
482	Farzand Ali v. Emperor	...	29 P. L. R. 33; 29 Cr. L. J. 252; 9 A. I. Cr. R. 520.
485	Hari Kishan v. Kanshi Ram	...	29 Cr. L. J. 254; 9 A. I. Cr. R. 540; A. I. R. 1928 Lah. 664.

486	Rup Narain v. Shibbu Mal	...	*Lahore High Court.
487	Hira v. Tek Chand	...	10 Lah. L. J. 21.
488	Bhagela Shah v. Sita Ram	...	A. I. R. 1928 Lah. 444.
489	Ahmad Din v. Fatima Bibi	...	A. I. R. 1928 Lah. 490.
490	Behari Lal v. Chuni Lal	...	*Lahore High Court.
491	Rahmat Ali Shah v. Rikhi Kesh	...	A. I. R. 1928 Lah. 113.
492	Indian Merchants Bank, Ltd, Amritsar v. Anup Chand	...	A. I. R. 1928 Lah. 26.
493	Saudagar Mal-Lachman Das v. Bahadur Chand-Hari Chand	...	A. I. R. 1928 Lah. 442.
494	Kirpa Ram v. Nand Lal	...	A. I. R. 1928 Lah. 413.
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497	Pochiraju Kannamma v. Mannava Machamma	..	(1927) M. W. N. 909; 27 L. W. 156; A. I. R. 1928 Mad. 297.
499	Pattathil Sankunni Mannadiar v. Pattathil Krishna Mannadiar	...	27 L. W. 93; I. L. T. 40 Mad. 70; A. I. R. 1928 Mad. 465; 51 M. 320; 54 M. L. J. 682.
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510	Panchapakesa Ayyar v. Ayyaswami Ayyar	...	*Madras High Court.
511	Jammula Narayanamurthi v. Nilambara Prudhivisinghi Santo	...	39 M. L. T. 614; A. I. R. 1928 Mad. 226
512	Bontu Appala Naidu, <i>In re</i>	...	27 L. W. 83; A. I. R. 1928 Mad. 167; 29 Cr. L. J. 257; 51 M. 339; 9 A. I. Cr. R. 503; 54 M. L. J. 714.
513	Damodardas v. Rodba	...	A. I. R. 1928 Nag. 203.
514	Domaji v. Tulsiram	...	A. I. R. 1928 Nag. 179.
516	Waman v. Vishnu	...	A. I. R. 1928 Nag. 151.
517	Vyakatesh v. Annasa Lad	...	23 N. L. R. 143; A. I. R. 1928 Nag. 1; 11 N. L. J. 49.
522	Dharmu v. Dalsingh	...	A. I. R. 1927 Nag. 352.
522	Rushi v. Rushi	...	23 N. L. R. 192; A. I. R. 1928 Nag. 87.
524	Rampratap Khandewal v. Govind Bari	...	*Nagpur Judicial Commissioner's Court.
525	Narain Das Bhagwandas & Co. v. Kalyanji Mawaji & Co.	...	A. I. R. 1928 Nag. 173; 24 N. L. R. 55.
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528	Honia Mali v. Chindhia	...	*Nagpur Judicial Commissioner's Court.
529	P. K. Sen v. Emperor	...	29 Cr. L. J. 253; A. I. R. 1928 Pat. 293.
529	Tulsi Mahto v. Emperor	...	29 Cr. L. J. 259; A. I. R. 1928 Pat. 249; 9 A. I. Cr. R. 513.
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INDIAN CASES.

1928.

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PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.
November 29, 1927.

Present:—Viscount Sumner, Lord
Atkinson, Lord Sinha, Sir John Wallis
and Sir Lancelot Sanderson.

P. C. MUTHU CHETTIAR

—PLAINTIFF—APPELLANT

versus

K. V. MEENAKSHISUNDARAM AYYAR
AND OTHERS—DEFENDANTS

—RESPONDENTS.

Construction of document—Cardinal principle—Documents must be read as a whole—Compound interest—Interpretation of words "interest on interest" in mortgage-deed.

It is one of the cardinal principles of construction of written documents that they must be construed as a whole; each provision they contain must receive attention; and from their several provisions the true intention of the parties to them is to be ascertained. [p. 4, col. 1.]

Observations of Lord Ellenborough in *Barton v. Fitzgerald* (1) and in *Sicklemore v. Thistleton* (2) and of Lord Halsbury in *Elderslie Steamship Co., Ltd. v. Borthwick* (4) relied on.

The phrase 'he shall pay interest on interest' occurring in a mortgage-deed is ambiguous; and does not necessarily connote a liability to pay compound interest. These words may fairly enough refer to interest to be borne by a sum in arrear, if that sum was payable as interest. [p. 4, col. 2.]

Appeal from a judgment and decree of the High Court, Madras (Ramesam and Jackson, JJ.), dated the 18th January, 1924, allowing an appeal from the judgment of the Subordinate Judge, Dindigul, dated the 30th October, 1920, and made in Original Suit No. 77 of 1919.

FACTS.—The said suit was brought by the assignee of a mortgage, dated the 28th January, 1911, for a mortgage-deed for Rs. 21,532-8-6. During the pendency of the suit defendants paid into Court

Rs. 12,500. The Subordinate Judge made a decree for a further sum of Rs. 12,301-9-6 but, on appeal, the High Court held that by the said payment into Court the mortgage was discharged, and made a decree accordingly dismissing the suit.

Against the last-mentioned decree the plaintiff preferred this appeal to His Majesty in Council, and the question thereon was as to the rate of interest due under the mortgage. The plaintiff-appellant's contention was that compound interest on the mortgage amount was chargeable at 12 per cent. with monthly rests from June, 1912. The High Court negatived this contention as being inconsistent with the terms of the mortgage as duly construed. In their judgment the learned Judges said:—"The only point for consideration in this appeal is the construction of Ex. 'A', the deed of mortgage sued upon", and they expressed their conclusion as follows:—

"We think the proper construction of the clause is when each amount of monthly interest became overdue, it should carry interest at 12 per cent. up to payment there being no further rests. It is conceded by the parties that the amount tendered, viz., Rs. 12,500 was enough to cover the sum due up to the date of tender and the plaintiff is not entitled to any further sum."

Mr. De Gruyther, K. C. (with him Mr. Narasimham), for the Appellant.—It is a question of construction. We are entitled to charge interest on interest. Whether you call it compound interest, or interest on interest, we are entitled to the interest we claimed.

[LORD ATKINSON.—That is compound interest: adding interest on interest.]

[SIR JOHN WALLIS.—You are not to have monthly rests. The Subordinate Judge in his judgment puts the plaintiff's contentions very clearly.]

Mr. *De Gruyther*, cited s. 83, Transfer of Property Act, as regards payment into Court.

If you look at the accounts, all we have actually done is to charge interest on arrears of interest due.

[LORD SINHA.—Are you entitled to charge compound interest?]

[LORD ATKINSON.—Interest on interest means interest on arrears. That is the right way to look at it.]

[LORD SINHA.—If you claim monthly rests, that has to be specifically provided for in the deed.]

[LORD ATKINSON.—You must expressly indicate and provide for rests.]

[LORD SINHA.—Take an ordinary English contract. Unless you provide for rests, you cannot charge compound interest.]

[LORD ATKINSON.—Compound interest, with monthly rests, amounts to a fabulous sum.]

[LORD SINHA.—I doubt if in the case of an English deed you could charge interest with monthly rests unless it was so provided for in the deed itself.]

Mr. *De Gruyther* referred to Tamil Dictionaries as to the meaning of the vernacular words in dispute.

Mr. *K. Brown*, for the Respondents.

JUDGMENT.

Lord Atkinson.—This is an appeal against a decree of the High Court of Judicature at Madras, dated the 18th January, 1924, allowing an appeal from the judgment of the Subordinate Judge of Dindigul, dated the 30th October, 1920. The suit was brought by the assignee of a mortgage dated the 28th January, 1911, for a mortgage-decree of Rs. 21,532-8-6. During the pendency of the suit the defendants paid into Court Rs. 12,500. The Subordinate Judge made a decree for a further sum of Rs. 12,301-9-6, but on appeal the High Court held that by the payment into Court the mortgage was dis-

charged, and made a decree accordingly dismissing the suit. Against the last-mentioned decree the plaintiff (hereinafter referred to as the appellant) has preferred this appeal, and the question in it is the rate of interest due under the mortgage.

It is essential to examine closely the provisions of the two instruments upon which the appellant's title, to relief purports to be based. The first of these is a hypothecation bond dated the 28th January, 1911, by which Subramania Ayyar (the father of the respondents) purchased a house therein described for the sum of Rs. 20,000 from one Padmanabha Nayudu, of which sum it was by the said bond provided that the sum of Rs. 10,000 should remain outstanding on mortgage of the properties so purchased. On the 27th July, 1912, the purchaser, Padmanabha Nayudu, by written instrument, assigned his afore-said mortgage to the present appellant. It is stated in this instrument and apparently not disputed that the mortgagor had, on the 9th April, 1912, paid in part discharge of the mortgage-debt a sum of Rs. 1,000, and that the interest which had accrued on the mortgage debt up to the end of May, 1912, had been duly paid by or on behalf of the mortgagor. On the 11th February, 1917, a sum of Rs. 12,500 was tendered to the mortgagee in discharge of the mortgage. It is not disputed now that this sum was, upon the construction of the mortgage-deed adopted by the High Court, sufficient to discharge the mortgage-debt due up to that date, but the appellant refused to receive it, stating that it was insufficient. On the 21st August, 1919, the appellant instituted a suit against the mortgagor and his son, alleging, amongst other things, that, according to the terms of the deed of assignment and according to law, the first defendant was bound to pay the interest accruing on the mortgage-debt at the rate of 8-annas per month, and that on default in paying this interest the defendant was bound to pay the entire balance of the mortgage-debt due at the date of this default with compound interest thereon at the rate of Re. 1 per cent. per mensem from the date of default up to the date of payment, which liability, up to the date of the plaint, was, he alleged, found to be Rs. 21,532-8-6. In respect of this debt he prayed for the usual decree for this amount with subsequent interest thereon and costs.

On the 28th November, 1919, the said defendant filed a statement of defence in which he alleged, *inter alia*, that the plaintiff's construction of the clause in the deed of assignment providing that on default of payment of interest due at any time the appellant was entitled to compound interest at 1 per cent. with monthly rests, was preposterous and penal, that the tender made by him was adequate and proper, that the plaintiff was not entitled to further interest after the date of the tender, and that he, the respondent, was prepared to pay the sum of Rs. 12,500 if the plaintiff would accept it in full discharge of his claim. On the 30th October, 1920, the learned Subordinate Judge of Dindigul delivered judgment in the case, holding that on the proper construction of the vernacular words used in the document (*i. e.*, the deed of transfer), it was clear that compound interest at 12 per cent. was agreed upon, that the rate of interest, payable under the suit-bond in default of payment of interest every month, was 12 per cent. compound interest. He also held that there was an attempt to tender some amount on the 11th February, 1917, but that Rs. 12,500 was not actually before the plaintiff, and that the tender was neither legal nor valid, and he accordingly allowed the plaintiff's claim. A formal decree was drawn up for the amount claimed by the plaintiff with further interest and costs less the sum of Rs. 12,500 paid into Court by the first defendant, and on the 4th July, 1920, drawn out by him. Their Lordships, for reasons to be presently stated, are quite unable to take the same view as the learned Subordinate Judge took as to the proper construction of this suit-deed, as it is styled—this deed of assignment.

The learned Judges in the High Court, fortunately, their Lordships think, took an entirely different view from that of the learned Subordinate Judge. They held that the proper construction of the clause in the suit-bond, on which the question in controversy was treated as turning, was to this effect, that when each amount of monthly interest became overdue it should carry interest at 12 per cent. up to payment, there being no further rests; that it was conceded by the parties that the amount tendered, Rs. 12,500, was enough to cover the sum due at the date of tender, and that the plaintiff was not entitled to any further sums; that it was admitted

before them that the sum of Rs. 12,500 deposited in Court had been drawn out by the plaintiff. They accordingly set aside the decree of the Court below and held that the plaintiff was not entitled to any further decree. Their Lordships think that the conclusion at which the learned Judges of the High Courts arrived was sound and right, but on the question of the proper mode of construing the suit-bond there are some important considerations which were not fully dealt with by either Court.

When default is once made on the occasion of the first rest, the debtor thenceforth pays interest not merely on the original debt he owed, but upon a composite debt including the original debt *plus* the added interest. Now in the present case the loan of Rs. 10,000 is made for three years with interest at 8 annas percent. per mensem. This interest is to be paid before the 10th of every month, and a receipt obtained, but if default should be made in payment in this manner, or in getting a receipt, the rate of interest is doubled. But on what is it to be paid? If it be as compound interest the interest in arrear has sunk into the principal, and the 12 per cent. must be paid on this composite sum. If, on the contrary, interest is only to be paid on the interest in arrear and there is no such sinking, then the rate of interest on the original debt remains unchanged at 8 annas per cent. and is not doubled. Moreover, if the unpaid interest sinks into the principal debt, the debtor loses all right to have it separated again from that debt and dealt with independently. He must, therefore, pay interest on the composite sum at double the rate reserved upon the principal sum for the whole three years. From the date of default 8 annas per cent. per mensem could no longer be paid on anything.

It is scarcely possible, their Lordships think, to conceive that men of ordinary intelligence could put themselves in such a hopeless position, and a construction of the document which brings out these results must, they think, be erroneous.

Again, it appears to their Lordships that the Subordinate Judge allowed his mind to be concentrated too much on the words "pay interest on interest" used in the sentence, "If he fails to pay in that manner he shall pay 'interest on interest' at the rate of 1 per cent." These words

fairly enough refer to interest to be borne by a sum in arrear, if that sum was payable as interest.

But it has been long ago, and many times, decided that written documents must be construed as a whole; that each provision they contain must receive attention and from their several provisions the true intention of the parties to them is to be ascertained.

In *Barton v. Fitzgerald* (1) Lord Ellenborough said :—

"It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex ante cedentibus et consequentibus*: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense."

Again, in *Sicklemore v. Thistleton* (2) Lord Ellenborough again said :—

"According to the authority of *Browning v. Wright* (3) covenants ought to be construed with due regard to the intention of the parties as it is to be collected from the whole context of the instrument, so as to make one entire and consistent construction of the whole."

In the case of *Elderslie Steamship Co., Ltd. v. Borthwick* (4) Lord Halsbury said :—

"My Lords, I do not think it necessary to quote any authority in this case. Construing this instrument (*i. e.*, the Bill of Lading) and applying to it the ordinary canons of construction, I must move your Lordships that this appeal be dismissed. It seems to me that if what has been called the large print had stood alone I should not have had the smallest doubt that it would have carried the shipowner the whole way. I can give no other construction to it than that which the words express; but the difficulty in his way is that he has thought proper to execute an instrument which has two different sets of phrases in it, and one rule of construction which must prevail is that you must give effect to every part of a document if you can—you must read it as a whole. Mr.

Carver has ingeniously spoken of independent contracts and independent paragraphs and so on, but we must remember that this is one contract, and each of the parts of this contract must be read so as to give effect to the whole if it can."

Applying these principles of construction to the present case, their Lordships do not think that such dominating force and meaning can be given to the ambiguous phrase "interest on interest" as would lead to results, which clash with the plain and clear objects and meaning of the natural and unambiguous provisions of the document.

Their Lordships will, therefore, humbly advise His Majesty that the appeal must be dismissed. The appellant must pay the costs.

K. J. R.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. Douglas, Grant and Dold.

Solicitors for the Respondents:—Messrs. Chapman, Walker and Shephard.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

July 28, 1927.

Present:—Lord Shaw, Lord Sinha and Sir John Wallis.

GAURI SHANKAR AND OTHERS—
DEFENDANTS—APPELLANTS

versus

JIWAN SINGH AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Hindu Law—Joint family—Sale for family necessity—Part of consideration not applied for purposes of necessity—Sale, whether liable to be set aside.

A sale of joint family property will not be set aside merely because a part of the proceeds is not proved to have been applied to purposes of necessity. The real question that has to be considered is whether the sale itself was justified by necessity. If the purchaser has acted honestly if the existence of a family necessity for the sale is made out, and the price is not unreasonably low, he (the purchaser) is not bound to account for the application of the price. [p. 7, cols. 1 & 2.]

The practice under which, although it be completely established that by far the most substantial part of the consideration was for family necessity, yet if a certain balance of the price remains unaccounted for, or insufficiently proved, then by that result the parties' interests are judged; and the sale is set aside, conditionally upon the re-payment by the vendor or his

(1) (1812) 15 East 530; 104 E. R. 944; 13 E. R. 519.

(2) (1817) 6 M. & S. 9 at p. 12; 105 E. R. 1146; 18 E. R. 280.

(3) (1799) 2 Bos. & Pul. 13; 126 E. R. 1128; 5 E. R. 521.

(4) (1905) A. C. 93; 74 L. J. K. B. 338; 53 W. R. 401; 92 L. J. 274; 21 T. L. R. 277; 10 Asp. M. C. 25; 10 Com. Cas. 109.

representatives of the substantial part referred to is erroneous. [p. 6, col. 2]

Sri Krishn Das v. Nathu Ram (1), followed.

Transactions of sale of family property which in their real essence and substance, are sales made for family necessity, will not be narrowly scrutinized, especially when such transactions have stood unchallenged for a considerable length of time and go back beyond the stage at which direct evidence could possibly be expected from the vendees. [p. 7, col. 1.]

Where a sale of family property for the sum of Rs. 4,000 was justified by necessity to the extent of Rs. 3,500 and there was an unaccounted balance of Rs. 500 and the High Court held the sale invalid, subject to the condition of payment to the vendees of the items proved (namely), the said sum of Rs. 3,500:

Held, that the sale could not be set aside. [p. 7, col. 2.]

Appeal from a judgment of the High Court, Allahabad (Lindsay and Kanhaiya Lal, JJ.), dated the 30th March, 1925, reversing that of the Subordinate Judge, Mainpuri, dated the 19th January, 1922.

FACTS.—On the 26th February, 1910, Lal Singh, father, and Nawab Singh, uncle, of the plaintiff, sold the property in dispute to defendants Nos. 1 to 3 for a consideration of Rs. 4,000. The plaintiff alleged that the property in question was joint ancestral property and that it had been sold without legal necessity, and he brought the present suit on the 11th July, 1921, for possession of the property by cancellation of the sale-deed. The defence substantially was that the sale was for legal necessity. Three items went to make up the consideration of Rs. 4,000 recited in the sale-deed. The first item was one of Rs. 3,135 left with the vendees for payment to a prior mortgagee. The second item of Rs. 65 was recited in the deed to have been paid to the vendors before the date of the execution of the sale-deed, and lastly, a sum of Rs. 800 in cash was said to have been paid to the vendors at the time of registration before the Sub-Registrar. The Subordinate Judge dismissed the suit, holding on the evidence that the entire consideration money was obtained for family necessity. With reference to the third item of Rs. 800, the Subordinate Judge said:—"It is proved by the Auraiya Treasury (register) called in by the contesting defendants that sums amounting to a total of Rs. 535-2-4 were paid by the vendors into the Treasury about land revenue from the 2nd March, 1910, to 15th August, 1910. The balance out of Rs. 800 has not been very well-accounted for, but in view of the fact that a very large portion of the consideration for the sale in question

has been proved to have been required by the vendors for legal necessity and that there is not even an insinuation that either of the vendors had a bad moral character, I have no hesitation in holding that the entire consideration was obtained for family necessity. It is also to be considered that the suit has been brought long after the execution of the sale-deed when it is not easy for the vendees to adduce strong and perfectly satisfactory evidence about each item of the sale consideration. I decide the issue in favour of the defendants-vendees." The plaintiff appealed from the said decree to the High Court. The learned Judges of the High Court stated that the plaintiff's Counsel had to admit that the sum of Rs. 3,135 was left for the discharge of the earlier mortgage and could not be impeached as that sum constituted an antecedent debt which was binding on the plaintiff. They agreed with the Subordinate Judge that the item of Rs. 65 also constituted legal necessity. With reference, however, to the item of Rs. 800, they did not concur in the view taken by the Subordinate Judge. They held that Rs. 257-14-8 out of that sum had been deposited in the Government Treasury on the 2nd of March, 1910, on account of land revenue. As to the other payments by Nawab Singh (vendor) into the Auraiya Treasury in July and August, 1910, on account of land revenue, the learned Judges were inclined to think that they were deposited on account of the *rabi* instalment and disallowed these items apparently on the ground that the sale-deed recited that the executants had to pay the revenue for *kharif*. They further held with reference to the balance of this item that it was the duty of the vendees or one of them at least to have entered into the witness-box and deposed as to his knowledge of the objects for which this money was taken, and that not having done so and the burden of proof being on the vendees they must take the consequences. They, therefore, found that legal necessity and antecedent debt were shown to have existed to the extent of Rs. 3,457-14-8. The learned Judges concluded their judgment as follows:—

"The balance which is unaccounted for is a sum of Rs. 500 odd and is a substantial amount. Following the practice, therefore, of this Court in cases of this kind, we think the proper line to take is to give the plaintiff a conditional decree. We, therefore,

allow the appeal, set aside the order of the Court below and give the plaintiff a decree declaring that if he pays into Court for payment to the vendees within three months from the date of this decree the sum of Rs. 3,457-14-8, he will be entitled to possession of the property in dispute. If payment is not made within that time his suit will stand dismissed. We do not allow the plaintiff's costs either here or in the Court below, but we direct that if he fails to pay the sum above-mentioned within the period limited the suit shall stand dismissed with costs in all Courts to the defendants-vendees."

The defendants-vendees appealed to His Majesty in Council from the said decree of the High Court.

Mr. Wallach, for the Appellants:—The whole of the consideration money was paid for legal necessity.

Even on the finding of fact of the High Court that out of the sale consideration of Rs. 4,000, Rs. 3,457-14-8 were for an antecedent debt and legal necessity, the plaintiff's suit ought to have been dismissed.

[SIR JOHN WALLIS.—In *Sri Krishn Das v. Nathu Ram* (1) the Board set aside a most extraordinary doctrine enunciated by the Allahabad High Court.]

[LORD SHAW.—The practice followed by the Allahabad High Court was entirely wrong.]

The principle of *Krishn-Das's* judgment applies to the present case.

[SIR JOHN WALLIS.—The Board have laid down that a sale will be upheld although the property is worth a little more than the consideration money. The mere fact that necessity is not proved for a small part of the consideration, cannot vitiate the sale. That is the underlying principle in such cases.]

The respondents were not represented at the hearing.

JUDGMENT.

Lord Shaw.—This appeal concerns property which is undoubtedly family property. It was sold for family necessity,

so alleged, at the price of Rs. 4,000. There is no allegation made upon the record, or suggested in any respect, that the property was sold for the payment of any debts for immoral purposes. The only question is as to family necessity.

A certain practice appears to have crept up in the Allahabad High Court of investigating and settling these cases upon the principles of accounting. If, upon a strict accounting, it is found that, although it be completely established that by far the most substantial part of the consideration was for family necessity, yet if a certain balance of the price remains unaccounted for, or insufficiently proved, then by that result the parties' interests are to be judged, and the sale is set aside, conditionally upon the re-payment by the vendor or his representatives of the substantial part referred to.

It is manifest that this practice imperils transactions of sale which, in their real essence and substance, are sales made for family necessity.

The present case is interesting as illustrative of the point. It may be that in all cases of family necessity sums have been expended which, after a lapse of years, cannot be verified by entries in books or the like. It is, therefore, important to notice that in the present case the transaction of sale stood unchallenged for upwards of 11 years. The sale took place on the 26th February, 1910, and it was not until the 11th July, 1921, that this sale was put in challenge and the Court was asked to declare it void as not having been for family necessity.

In the course of the investigation, the case as to family necessity with regard to the major portion of the accounts was completely satisfied. Both Courts held that payment was made to extinguish a prior mortgage-bond, and the amount due thereunder was Rs. 3,135. Both Courts further agree in holding that the Rs. 65 was paid to the vendors before the execution of the sale deed.

The Judge who tried the case stated his conclusion upon the largest item thus:—"It is, therefore, clear that the bond of the 17th April, 1906, was executed by Meharban Singh and his sons for family necessity." He also makes the same clear statement with regard to the Rs. 65. As to the third item of Rs. 800, he holds it to be proved

(1) 100 Ind. Cas. 130; 54 I. A. 79; 25 A. L. J. 80; A. I. R. 1927 P. C. 37; (1927) M. W. N. 89; 38 M. L. T. 48; 4 O. W. N. 184; 8 P. L. T. 210; 31 O. W. N. 462; 49 A. 149; 29 Bom. L. R. 825; 45 O. L. J. 386; 52 M. L. J. 720; 26 L. W. 856 (P. C.).

by the Auraiya Treasury, and its official who was called in, that sums amounting to a total of Rs. 535 were paid by the vendors into the Treasury before the 15th August, 1910. The small balance of between two and three hundred rupees, the learned Judge says, has not been very well-accounted for; but, in view of the fact that a large portion of the consideration for the sale has been proved to have been required for legal necessity, he has no hesitation in holding that the entire consideration for the sale was such necessity. He adds this pregnant remark: "It is also to be considered that the suit has been brought long after the execution of the sale-deed, when it is not easy for the vendees to adduce strong and perfectly satisfactory evidence about each item of the sale consideration." These views of the Subordinate Judge have the approval of their Lordships.

The learned Judges of the High Court, however, in accordance with the practice to which allusion has been made, state that on their estimate of the consideration for sale, they do not reach the conclusion that the entire amount of the Rs. 4,000 is proved to have been justified by necessity. They admit the bond and the item of Rs. 3,135 thereunder. They admit the payment of Rs. 65. They further give credit for the payment of certain Government and other dues exigible upon the property; but they consider that there is an unaccounted balance of Rs. 500. Having reached that amount, the learned Judges of the High Court then pronounce the sale invalid, subject to the condition of payment to the appellants of the items proved.

Their Lordships think this practice to be erroneous. It is to be noted that a judgment which finally summed up the entire law on this subject was pronounced by this Board on the 10th December, 1926, in the case of *Sri Krishn Das v. Naihu Ram* (1). The judgment of the High Court had been given about twenty months sooner, namely, on the 30th March, 1925. In their Lordships' view, had the *Krishn Das* judgment been pronounced prior to the judgment of the High Court, that Court would have, in view of it, reached a different conclusion. In that case a considerable body of authority was considered by the Board; and the result was in substance that a sale of joint property will not be set aside merely because a

part of the proceeds is not proved to have been applied to purposes of necessity. The real question that has to be considered is this: Whether the sale itself was justified by necessity. Their Lordships cannot go back upon that decision. If the purchaser has acted honestly, if the existence of a family necessity for sale is made out, and the price is not unreasonably low, he (the purchaser) is not bound to account for the application of the price. They, however, take the case, even upon the footing, which might well be challenged, that Rs. 500 out of the price of Rs. 4,000 had not been fully accounted for. Granted that it was so, then the balance of Rs. 3,500 out of Rs. 4,000 is surely a justification of sale for a family necessity proved up to that amount.

In those circumstances their Lordships will humbly advise His Majesty that this appeal should be sustained, the decree of the High Court set aside with costs, and that of the Subordinate Court restored. The first respondent (the plaintiff) will pay the costs of the appeal.

K. J. R.

Appeal allowed.

Solicitor for the Appellants:—Mr. H. S. L. Polak.

PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL
COMMISSIONER'S COURT.

November 24, 1927.

Present:—Lord Shaw, Lord Sinha and
Sir John Wallis.

MARTAND RAO—DEFENDANT—
APPELLANT

versus

MALHAR RAO—PLAINTIFF—RESPONDENT.

Impartible estate—Proof of impartibility—Re-grant, effect of—Amgaon zemindari (Central Provinces)—Onus of proof of special custom modifying ordinary law of succession—"Raj"—Value of "opinions" in official reports.

A special custom modifying the ordinary law of succession must be ancient and invariable and must be established to be so by clear and unambiguous evidence. [p. 9, col. 2.]

Observations of Lord Justice James in *Umritnath Chowdhry v. Goureenath Chowdhry* (4), relied on.

Where there is a dispute, with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance according to which custom the estate is to be held by a single member and, as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom. [p. 9, col. 2.]

If an impartible estate existed as such from before the advent of British rule, any settlement or re-grant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession by special custom. [p. 10, col. 1.]

The word '*raj*' by itself does not necessarily imply impartibility. [p. 11, col. 2.]

Unless considerable age can be ascribed to any particular *zemindari*, of whichever class it may be, it cannot claim to be governed by either ancient or invariable custom. [*ibid.*]

Neither by the terms of the grant, nor by territorial or family custom, any more than by its inherent nature, can the *zemindari* of Amgaon (in the Central Provinces) be considered an impartible estate subject to the rule of single succession. [p. 13, col. 2; p. 14, col. 1.]

[History of the *zemindari* tenure in the Central Provinces discussed.]

Although official reports are valuable and in many cases the best evidence of the facts stated therein, *opinions* therein expressed should not be treated as conclusive in respect of matters requiring judicial determination, however eminent the authors of such reports may be. [p. 9, col. 2.]

Appeal from a judgment of the Nagpur Judicial Commissioner's Court (Batten, J. C., and Hallifax, A. J. C.) in First Civil Appeal No. 45 of 1920 dated the 23rd February, 1923, and reported as 84 Ind. Cas. 658, reversing that of the District Judge, Bhandara, dated the 1st March, 1920.

FACTS.—The material facts are given in their Lordships' judgment, and also in the report of the case in the Court* below.

The main question for determination on the appeal to His Majesty in Council was whether the *zemindari* of Amgaon was impartible or partible. The District Judge decided that the *zemindari* was partible, but on appeal the Judicial Commissioners held that it was impartible and made a decree declaring that the respondent, who was the plaintiff in the suit, was solely entitled thereto. They concluded their judgment in the following words:—

"The Amgaon *zemindari* before the Thirty Years' Settlement was of the nature of a *raj* and, therefore, impartible and subject to the rule of single succession,

the other members of the family of the *zemindar* of the moment being entitled to a suitable maintenance and not to any specific share in the income [*Bajinath Prasad Singh v. Tej Bali Singh* (1).] It was an estate of an exactly similar character that was conferred by Government on the *zemindar* at the Thirty Years' Settlement [*Rewa Prasad Sukal v. Deo Dutt Ram Sukal* (2).] In addition a custom had, by that time, grown up in the Amgaon family that the estate should be held as an estate of that nature and subject to those conditions. Nothing occurred at the Thirty Years' Settlement or has occurred since, to alter the nature of the grant or to affect the validity of the family custom [*Rao Kishore Singh v. Gahenabai* (3).]"

Messrs. Lowndes, K. C., Parikh and P. A. Pandit, for the Appellant.

Messrs. De Gruyther, K. C., Dube and N. B. Niyogi, for the Respondent.

JUDGMENT.

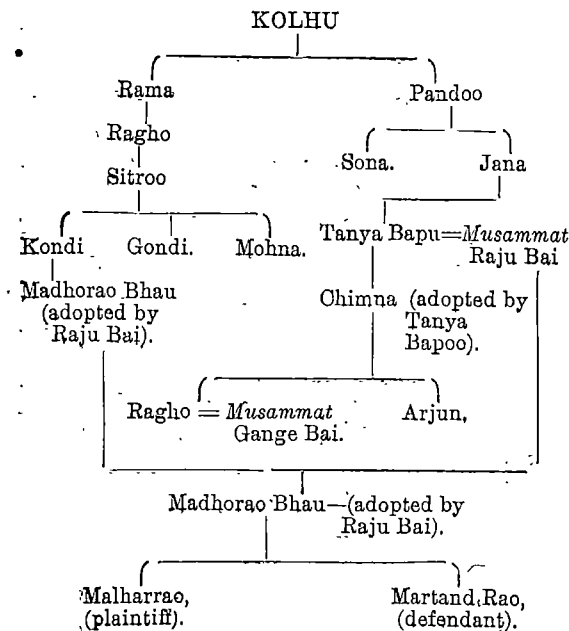
Lord Sinha.—This is an appeal against a judgment and decree, dated the 23rd February, 1923, of the Court of the Judicial Commissioner, Central Provinces,* reversing a judgment and decree, dated the 1st March, 1920, of the Court of the District Judge, Bhandara.

The suit in which the said decrees were made was brought by the plaintiff, Malhar Rao, against his younger brother, Martand Rao, claiming that, on the death of their father, Madho Rao, he alone was entitled to succeed to the Amgaon Estate, situate in the Bhandara District of the Central Provinces, to the exclusion of his younger brother, on the allegation that by the terms of the grant under which the estate was held, and by a family custom and also by a territorial custom, the said estate was impartible and succession thereto was governed by the rule of lineal primogeniture, and that the younger brother was entitled to suitable maintenance only and not to any specific share in the estate.

(1) 60 Ind. Cas. 534; 43 A. 228; 19 A. L. J. 317; 33 C. L. J. 388; 40 M. L. J. 387; (1921) M. W. N. 300; 25 C. W. N. 564; 2 P. L. T. 257; 23 Bom. L. R. 654; 3 U. P. L. R. (P. C.) 35; 29 M. L. T. 358; 48 I. A. 195 (P. C.).
(2) 27 C. 515; 27 I. A. 39; 4 C. W. N. 582; 2 Bom. L. R. 558; 7 Sar. P. C. J. 653; 14 Ind. Dec. (N. s.) 338 (P. C.).

(3) 53 Ind. Cas. 630; 15 N. L. R. 175; 37 M. L. J. 562; 17 A. L. J. 1077; 26 M. L. T. 494; 1 U. P. L. R. (P. C.) 94; (1920) M. W. N. 82; 24 C. W. N. 601 (P. C.).

The pedigree of the family from its founder, Kolhu Kunbi, including the Amgaon branch (under Pandoo) and the other branches, is given below :—



Seventeen issues were framed by the trial Court, of which the following four only are material at this stage, viz., Issues Nos. 1, 2, 9 and 10 :—

(1) Was the *zemindari* of Amgaon conferred on Pandoo by the Bhonsla Raja subject to the condition that it was to be impartible and to devolve on the eldest son, females having no right of succession, as alleged by the plaintiff, or was it conferred on Sonba (or Sona) without any condition being attached to the grant as alleged by the defendant?

(2) In the time of the Bhonsla Raj, whenever a *zemindari* was granted, did the grant always carry with it the conditions mentioned in para. 5 of the plaint (i. e., impartibility and single succession) and also the incident of inalienability?

(9) Was devolution to *zemindari* property governed by the rule of primogeniture in the family of Pandoo and Kolhu; if so, are the parties bound by the said custom?

(10) Is there a territorial custom to the effect that *zemindari* property is impartible, inalienable and devolves by the rule of primogeniture as alleged by the plaintiff; if so, are the parties bound by the said custom?

After having considered the evidence

minutely and elaborately on each of these issues, the District Judge held in favour of the defendant on all the four issues and dismissed the plaintiff's suit with costs. On appeal, the method adopted by the Appellate Court was different.

As their Lordships understand the judgment of the Judicial Commissioners, they accepted as conclusive the opinion which they considered to have been expressed in certain Official Reports of great authority that the estate in question was in the nature of a *raj*, and they then proceeded to consider whether the evidence adduced in the case in any way displaced that opinion. This is an inconvenient, if not an erroneous, method, and their Lordships consider it necessary at the outset to point out that, though such Official Reports are valuable and in many cases the best evidence of facts stated therein, opinions therein expressed should not be treated as conclusive in respect of matters requiring judicial determination, however eminent the authors of such Reports may be.

There are certain propositions of law by reference to which this case must be decided and their Lordships consider that they can all be taken as well-settled.

(a) When there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance according to which custom the estate is to be held by a single member and, as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom.

(b) Any such special custom modifying the ordinary law of succession must be ancient and invariable and must be established to be so by clear and unambiguous evidence. To use the words of Lord Justice James in the case of *Umrithnath Chowdhry v. Goureenath Chowdhry* (4) :—

"The custom must be proved by something like what we should call in this country immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back."

(4) 13 M. I. A. 542 at p. 549; 15 W. R. P. O. 10; 6 B. L. R. 232; 2 Suth. P. O. J. 381; 2 Sar. P. O. J. 618; 20 E. R. 653.

(c) That if an impartible estate existed as such from before the advent of British rule, any settlement or re-grant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession by special custom.

As regards the first issue, the District Judge came to the conclusion that the estate of Amgaon was granted by the Bhonsla or Mahratta government of Nagpur in favour of one Sonba (or Sona) without any condition attached to it as regards devolution.

On the second issue he found that the plaintiff had adduced no evidence in support of his allegation that in the time of the Bhonsla Raj, whenever a *zemindari* was granted, the grant always carried with it the condition of succession by lineal primogeniture and inalienability. He accordingly found against the plaintiff on both the first and second issues.

On the ninth issue, the plaintiff's case was that, in the Amgaon family itself, taking either Pandoo or Sonba to be the original grantee, there was a custom of succession by lineal primogeniture which had grown up, having been derived from the parent stock of the Kampta *zemindari*, which started with one Kolhu, father of Pandoo and grandfather of Sonba, other descendants of whom came to be proprietors of two other *zemindaris*, viz., Palkhera and Kirnapur, where the same custom also prevailed. The District Judge held that the family custom relied upon by the plaintiff had not been proved.

On the tenth issue, the District Judge's conclusion, after an exhaustive survey of evidence in regard to territorial custom as set up by the plaintiff, was summarised in para. 92 of his judgment as follows:—

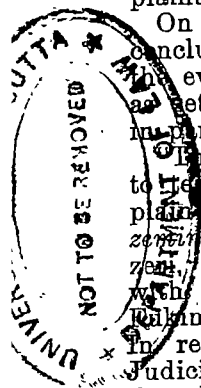
"The above is all the evidence in regard to territorial custom as set up by the plaintiff. It shows that a number of *zemindaris*, viz., Bijli, Chichwada, Gangazari, Jambhli, Palkhera, Nausari along with Maneri and Karanja, Arjuni and Kalkmeta have been actually partitioned. In regard to Chichgarh *zemindari*, the Judicial Commissioner has held that, though it cannot be divided by metes and bounds, the co-sharers of the *zemindari* are

entitled to divide the profits thereof in proportion to their respective shares. In regard to Chutia, Palasgaon, Chichwada and Bijli, it has been held that those *zemindaris* are not impartible and that the co-sharers are entitled to share the profits of the *zemindari*. In regard to Gondumri, the present *zemindar* had actually made an application to have it partitioned between himself and his co-sharers, but the application had to be filed owing to the commencement of the settlement operations. With reference to Bhadra *zemindari*, the learned Judicial Commissioner had held that it is not impartible and that half share thereof could be attached and sold in execution of the decree against Faizud-din, brother of the *zemindar*. It has also been shown that the history of succession in the *zemindaris* of Kampta (including Deori-Kishori and Warad) and Hatta does not justify a finding that those *zemindaris* are impartible and governed, as regards succession, by the rule of primogeniture. In the face of this evidence—and there is no other evidence before me in proof of territorial custom—it would be simply absurd to contend that the territorial custom set up by the plaintiff has been proved. On the contrary, the proof is exactly the other way. My finding on issue No. 10, therefore, is that the plaintiff has failed to prove the territorial custom pleaded by him in this case."

The Judicial Commissioners, in consequence of the method they adopted, did not record their findings on the issues specifically in the same way as the District Judge. They summarise their judgment as follows:—

"The Amgaon *zemindari* before the Thirty Years' Settlement was of the nature of a *raj* and, therefore, impartible and subject to the rule of single succession, the other members of the family of the *zemindar* of the moment being entitled to a suitable maintenance and not to any specific share in the income.....In addition a custom had, by that time, grown up in the Amgaon family that the estate should be held as an estate of that nature and subject to those conditions. Nothing occurred at the Thirty Years' Settlement or has occurred since, to alter the nature of the grant or to affect the validity of the family custom."

Their Lordships presume that by the first portion of their finding the Court of



the Judicial Commissioner came to the conclusion that the Amgaon estate was from its nature a *raj* and, therefore, impartible. In that view, it was unnecessary for them to consider whether it was so also by virtue of a territorial custom (Issue No. 10). But inasmuch as they say that their "decision will almost certainly govern nearly all the estates of the group known as the *zemindaris* of Bhandara and Balaghat or the Wainganga *zemindaris*," it may be taken that they found Issues Nos. 1, 2 and 10 all in favour of the plaintiff, though they do not say so specifically.

As already stated, the Appellate Court founded their conclusion chief upon a view of certain Official Reports put forward in the plaintiff's supplementary statement. This is what they say:—

"Now it is perfectly clear from the history of the estates given in the 'Report on the Zemindaris and other Petty Chieftaincies in the Central Provinces' submitted to the Government of India in 1863 by Sir R. Temple and in the Bhandara Settlement Report of 1868 and from the summaries of that history in the Note [by Sir Reginald Craddock] already mentioned, that before 1860 the Wainganga *zemindaris* were of exactly the same nature as the Chanda, Raipur and Bilaspur *zemindaris* and the Ohhindwara Jagirs, with a difference only in degree; indeed their difference from some if not all of the estates classed as Feudatories was of degree only and not of quality. Every one of these estates was before the Settlement a real *zemindari* of the nature of a *raj*..... Such an estate is impartible and subject to the rule of single succession, and does not admit of any coparcenary."

Their Lordships have carefully examined the Reports in question, as well as the earlier Report by Sir Richard Jenkins dated 1827 and a later history contained in the District Gazetteer for Bhandara by Mr. Russell, I. C. S., all referred to in the judgment of the District Judge.

Sir R. Jenkins was British Resident at the Mahratta Court of Nagpur from 1810, and submitted a Report to the Government of India on the whole administration of the Nagpur State, then conducted under British supervision, in the course of which there is given an instructive history of the Province and all the institutions thereof. Sir R. Tem-

ple was Chief Commissioner of the Central Provinces after the British annexation in 1854, and submitted his Report to the Government of India with a view to the forthcoming Revenue Settlement for 30 years. Mr. Lawrence was the officer-in-charge of that Settlement. Sir Reginald Craddock, afterwards Chief Commissioner, recorded, as Secretary to the Local Government a Note for Government use on the status of the *zemindars* of the Central Provinces which goes exhaustively into the whole question.

All these Reports were freely referred to at the Bar, and their Lordships consider that, so far as they contain a historical narrative of the *zemindari* of Amgaon as well as the other *zemindaris* in the Central Provinces referred to therein, they are of great value, and probably the best available history thereof under the circumstances.

Before considering these Reports, their Lordships think it necessary to note that the word "*raj*" by itself does not necessarily imply impartibility. The State of Nagpur itself, though undoubtedly a *raj*, was not impartible, but was repeatedly divided, and when we consider that of these *zemindaris*, more than a hundred in number, some existed from before the time of the Gond Rajas, viz., from the time of the Rajputs who preceded the Gonds, some were created by the Gond Rajas, and some by the Bhonslas, who did not obtain the sovereignty of Nagpur till after 1750, it would follow that, as regards antiquity at least, there is very great difference between these estates, by whatever name they may have been called.

It may or may not be correct that many of these *zemindars* were merely holders of office with no interest in the soil. It is always difficult at this distance of time to distinguish between *zemindaris* of which the holders were entitled to the soil as ancient Chieftains, and cases where from office-holders or rent-collectors they developed in course of time into proprietors of the soil. But it is settled law that unless considerable age can be ascribed to any particular *zemindari*, of whichever class it may be, it cannot claim to be governed by either ancient or invariable custom.

Now, after a consideration of all these Reports, their Lordships are unable to accept the conclusion of the Judicial

Commissioners that the Amgaon estate was of the nature of a *raj* and, therefore, impartible.

It is obvious that there is considerable difference both as regards nature, origin and quality between the different *zemindars*. It is true that in some parts of R. Temple's Report he described the *zemindars* generally as "dependent Chiefs" and said that "although there may be differences in the origin of some of the tenures, and also differences of degree, the status of their holders will be found in every case to be now essentially the same." But he was far from expressing the view that every one of them was of the nature of a *raj*, and was, on the contrary, urging that even those who had been previously independent Chieftains had by that time been reduced to the position of either *talukdars* or mere *malguzars*.

With regard to the *zemindaris* of the Wainganga District, with which only this case is concerned, this is what Sir R. Temple said in Appendix B:—

"The larger *zemindars* in this class do not hold their tenures by any very ancient or strong title.

"The first seven *zemindaris*, viz., (1) Kampta, (2) Hatta, (3) Amgaon, (4) Binjhli, (5) Pulkhaira, (6) Purara, and (7) Tikheri-Malpuri were originally included in Kampta; and Kampta was not technically a *zemindari* until A. D. 1843. It seems, indeed, to have been rather of the nature of a *talukdari* tenure. The tract was known as the Kampta Taluk, and its holder was designated a Patel..... Kampta was certainly reported by Mr. Jenkins as a *zemindari*; but nevertheless his Report bears out the above remarks. And, moreover, the holder's petition in A. D. 1843 begs for, and the Raja of Nagpur's *takid* (injunction) in reply confers, the title of *zemindar* for the first time on payment of a heavy *nazar*."

And further on:—"On the whole, the *zemindars* of the Wainganga District present, from one point of view, a weaker aspect as Chiefs than the *zemindars* of other classes.... They were situated nearer the seat of Government, and, being in a comparatively open and accessible country, they obtained less lenient terms than the *zemindars* of Chhattisgarh, or the Chiefs of Sambalpur, or the hill Thakurs of Ohhindwara."

With regard to Amgaon, it is stated in the same Appendix as follows:—

"This originally formed part of the Kampta Estate, the second holder of which, Gondu Patel, brother of Ram Patel, in the time of Raghoji I, apportioned Amgaon to his nephew, Sau Patel. In A. D. 1819, Sau Patel was succeeded by his nephew, Tania Bapu, who died in 1838. After this the estate remained under Government management for four years, owing to a dispute about the succession, but in A. D. 1843 the late Raja of Nagpur continued the estate, which then for the first time was called a *zemindari*, to an adopted son of Tania Bapu, named Chimna Patel. This individual died in A. D. 1862, and was succeeded by his son Raghoba, a minor."

It would appear from Mr. Lawrence's Settlement Report that Amgaon was not a part of Kampta Taluka, as Sir R. Temple thought. The plaintiff admitted this fact in his supplementary statement, but whichever is correct, Sir R. Temple or Mr. Lawrence, Amgaon was not conferred on Pandoo, but on his son Sonba by a *patta* or *painama*, dated 1796. It may well be doubted whether an estate of which the origin dates back only to 1796 could claim at the time of the Thirty Years' Settlement in 1863 that it was governed by an ancient and invariable custom.

It appears, moreover, from Sir Reginald Craddock's Note that after a good deal of correspondence between Sir R. Temple, as Chief Commissioner of the Central Provinces, and the Government of India, it was finally decided that only holders of certain estates, should be recognised as Feudatories, and all others as ordinary subjects. *Sanads* were granted to the former, expressly mentioning that the succession was in their case to be a single heir. That provision was omitted in the case of *sanads* to most *zemindars* of the second class, amongst whom was included the Amgaon *zemindar*, though with regard to some others like Chanda that condition was expressly attached.

The learned Judicial Commissioners appear to have fallen into an error in considering that it was "due to some mistake or a series of mistakes that a *sanad* on the lines of what is known as the Chanda Patent was never given to the proprietors of the Wainganga *zemindaris*." It was the result not of mistake, but of a classification deliberately made in view of the nature,

origin and status of the different *zemindaris* in the Central Provinces.

Having regard to the fact that these experienced officials were dealing with *zemindaris* in the Central Provinces which belonged to all the three classes of *zemindars* previously mentioned, it would be strange if they were all found to be "of the same kind, with a difference only in degree," as the Judicial Commissioners assumed.

On a careful perusal, however, of all these Reports, their Lordships find that, so far from finding them all to be of "the nature of a *raj*, it was found necessary to divide and classify them (a) as *Feudatories*, having semi-sovereign rights in some degree (real *Rajas*), and (b) ordinary subjects. These last were again sub-divided into—

(a) Those who were recognised to have proprietary rights unrestricted, such as the *zemindars* of Balaghat and Bhandara.

(b) With proprietary rights restricted, such as the *zemindars* of Chanda, Bilaspur and Ohhindwara.

(c) Those whose proprietary rights were not yet recognised, e. g., Sambhalpur.

There are passages here and there both in Sir Richard Jenkins' Report and Sir R. Temple's Report which speak of all these *zemindaris* indiscriminately as Chiefs or Chieftains; but on a complete perusal it becomes apparent that they are clearly and carefully distinguished, and when the origin of the *Kampta zemindari* and the *Amgaon zemindari*, of which the former is sometimes, but wrongly, said to be the parent, as given in these Reports, is considered, it becomes fairly obvious that they are of both such comparatively modern origin (not earlier than 1796 and possibly as late as 1843 when they first obtained recognition as titular *zemindaris*), and the circumstances under which they came into existence and continued are such that they could not possibly be classed as appertaining to the category of sovereign or semi-sovereign Chiefs whose possessions were necessarily impartible.

Their Lordships agree with the decision of the District Judge on Issues Nos. 1, 2 and 10, and consider that neither by the terms of the grant, nor by territorial custom, any more than by its inherent nature, can the *zemindari* of Amgaon be considered an impartible estate.

There remains for consideration Issue No. 9—the question of family custom, which the District Judge rightly considered as

the most important issue in the case. Plaintiff sought to make out this custom, first, by proving that in the family which was in possession of Amgaon itself this custom grew up, and, secondly, that it was derived from the parent stock—the family of Kolhu, the original grantee of the *Kampta zemindari*.

The custom alleged by the plaintiff was that in the Amgaon family only the *zemindari*, but nothing else, passed according to the rule of primogeniture.

The District Judge finds on the evidence that every instance of devolution in the family was in strict accordance with the ordinary rules of Hindu Law governing succession, and that not a single *zemindar* from Sonba downwards left more than one heir at his death; and, therefore, there was not one instance of anomalous or irregular succession in the Amgaon family. Their Lordships see no ground to differ from this conclusion.

As regards instances of such irregular succession in other branches of the family of Kolhu, the District Judge dealt with Palkhera and Kirnapur, which were two *zemindaris* belonging to other branches of the family of Kolhu.

With regard to Palkhera, it appears that it did not afford even a single instance of succession by primogeniture, and that there had been in fact a division of the *zemindari* amongst the sons of Deoo.

With regard to Kirnapur, it would appear that succession had in many instances up to 1846 depended entirely on the will of the Sovereign power. Further, at the Thirty Years' Settlement, proprietary rights were recognised as being vested in three brothers, and not in one of them only.

There have been certain decisions with regard to some of these Bhandara *zemindaris* in the Judicial Commissioner's Court at Nagpur which are referred to in both the judgments in this case. They are not altogether consistent and were necessarily based on the evidence adduced in those particular cases. Their Lordships do not think it would serve any useful purpose to examine these decisions for the purposes of this case.

On a consideration of the whole evidence, their Lordships are unable to concur in the conclusion of the Judicial Commissioners that by the time of the Settlement a custom had grown up in the Amgaon family that the estate should be held as an impartible

estate subject to the rule of single succession. They agree with the District Judge that the family custom relied upon by the plaintiff has not been proved.

Their Lordships, therefore, humbly advise His Majesty that the judgment and decree of the Judicial Commissioners dated the 1st March, 1920, should be set aside and the judgment of the District Judge restored. The plaintiff-respondent must pay the costs of the appeal in the Judicial Commissioners' Court, as also of this appeal.

K. J. R.

Appeal allowed.

Solicitors for the Appellant:—Messrs. T. L. Wilson & Co.

Solicitor for the Respondent:—Mr. H. S. L. Polak.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

November 11, 1927.

Present:—Lord Sinha, Lord Blanesburgh and Sir John Wallis.

Musammât RAMANANDI KUER—
PETITIONER—APPELLANT

versus

Musammât KALAWATI KUER—
OPPOSITE PARTY—RESPONDENT.

Probate and Administration Act (V of 1881), s. 50—Revocation of Probate, grounds for—Citation on minor—Procedure—Inference from non-registration of Will—Construction of Indian Statutes founded on English Law—Probate in 'common form' and 'solemn form'—Onus of proof of genuineness of Will.

Where there is a positive enactment of the Indian Legislature, the proper course is to examine the language of that Statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English Law upon which it may be founded. [p. 16, col. 1.]

The Succession Act of 1865 and the Probate and Administration Act of 1881 (now consolidated by the Succession Act of 1925), while to a large extent embodying the rules of the English Law, yet depart in many particulars from those rules; and in the progress of the development of the law and practice in testamentary cases, the ecclesiastical origin of this jurisdiction of the Courts in England has been completely discarded; and the Indian Legislature has gradually evolved an independent system of its own, largely suggested, no doubt, by English Law but also differing much from that law, and purporting to be a self-contained system. [p. 16, col. 2.]

In interpreting, therefore, the statutory provisions of the Indian Legislature relating to testamentary cases, the Courts should proceed to examine the language of the Indian Statute uninfluenced by any consideration derived from the English Law upon which it may be founded. [p. 16, col. 1.]

Observations of Sir Arthur Wilson in *Kurrutulain Bahadur v. Nuzbat-ud-Dowla Abbas Hossein Khan* (1), relied on.

The introduction into Indian practice of the difference in English Law between the grant of Probate in 'common form' and in 'solemn form', is to be deprecated. [p. 16, col. 1.]

Upon an application for Probate of a Will, the citation issued must be properly and effectively served, that is to say, so served as would give to the person whose interests are, or may be, adversely affected an opportunity either to oppose the grant of Probate or to require the Will to be proved in his presence. [p. 18, col. 1.]

Where a Will of which Probate is sought affects the interest of a minor, the prudent course for the proponent is to take steps to have the Will proved *per testes* (i.e., in solemn form) in the presence of an independent guardian *ad litem* for the minor. [p. 17, col. 1.]

Although registration of Wills is not compulsory, non-registration may, when coupled with other suspicious circumstances, throw considerable doubt upon the genuineness of the document. [p. 18, col. 2.]

Probate of a Will having been granted to the defendant, the plaintiff instituted proceedings under s. 50 of the Probate and Administration Act, 1881, (now re-enacted as s. 263 of the Succession Act, 1925), for revocation of the Probate on two grounds, viz. (1) that citations were not served on her before the grant of Probate, and (2) that the Will was a forgery. The issues raised in the case were: (1) Was no citation served upon the plaintiff? (2) Is the Will propounded by the defendant, genuine or other wise?

Held, (1) that if these issues were tried separately and the plaintiff succeeded on the first issue, that in itself, would be sufficient for revoking the Probate; but it would still be open to the defendant to prove the Will and, if he succeeded, the Probate would stand. If, on the other hand, the plaintiff failed on the first issue, that would not preclude him from proceeding to prove his second ground, viz. that the Will was forged, and the Probate would stand or fall, according to the result; [p. 16, col. 2.]

(2) that the fact that these two issues were not tried separately, and evidence was given by each party in support of their respective cases on both issues together did not, under the circumstances, pre-
judice either party; [p. 17, col. 1.]

(3) that in view of the finding of their Lordship for the plaintiff on the first issue, the onus of proof on the second issue as to whether the Will was forged or genuine, was upon the defendant; [p. 17, col. 1.]

(4) that the defendant had failed to discharge the onus. [*ibid.*]

[Independently of any question of onus, their Lordships were of opinion, on the facts of this case, that the Will was a fabricated document.]

Appeal from a judgment of the High Court Patna (Dass and Adami, JJ.) dated the 16th March, 1925, reversing that of the District Judge, Patna, dated the 18th January, 1924.

FACTS.—The main question for determination on the present appeal was the genuineness or otherwise of a Will alleged to have been executed by the appellant.

father, Alak Prakash, on the 2nd February, 1913. The District Judge, who saw and heard the witnesses, found that it was not the Will of Alak Prakash but a fabricated document". The High Court took the opposite view.

Messrs. *De Gruyther, K. C.*, and *Dube*, for the Appellant.

Messrs. *Lowndes, K. C.*, and *Wallach*, for the Respondent.

JUDGMENT.

Lord Sinha.—Harangi Singh of Bihar, a small town in the District of Patna, had two sons (1) Alak Prakash and (2) Gyan Prakash. Alak Prakash was given in adoption to Angat Singh, a wealthy inhabitant of the same town. On Angat's death, Alak Prakash, still a minor, inherited from him properties of considerable value. Harangi with his family, including Gyan Prakash, thereupon came to live with Alak Prakash in Angat's house and managed the properties as Alak's guardian till the latter attained majority. But even after that Harangi and Gyan continued to live with Alak Prakash in his house.

On the 27th February, 1913, Alak Prakash died of phthisis at Patna, leaving a young widow, Thakurani Kuer, and an infant daughter, Ramanandi Kuer, the appellant. In May following, an anonymous petition, purporting to come from a well-wisher of the minor daughter of Alak Prakash was sent to the Collector of Patna, in which it was stated that Harangi was trying to secure the property for his second son.

That petition was sent for enquiry to the Sub-Divisional Officer of Bihar, who, on the 1st June, 1913, called upon Harangi Singh "to state what he has to say to these allegations" in the petition, fixing the 16th June next for hearing. On that date a petition for two weeks' time was filed on the ground that Harangi Singh had gone on a pilgrimage to Jagannathji (Puri). Time was allowed till the 1st July, but on that day the enquiry was not further proceeded with, inasmuch as on the day previous, *viz.*, the 30th June, 1913, application had been made to the District Judge of Patna on behalf of Gyan Prakash Singh for Probate of a Will alleged to have been executed by Alak Prakash on the 2nd February, 1913. A general citation was affixed to the house of the deceased and another to the Court House in July. Affidavits by two out of the twelve attesting witnesses to the Will were filed on the 30th July, 1913. Notices were

issued to the widow and daughter of the testator and a report was made by the serving officer showing that service of the notices was acknowledged on behalf of Thakurani Kuer "for self and as guardian of Ramanandi Kuer" by one Awadh Bihari Singh, who described himself as the sister's son of Thakurani Kuer. Thereafter the order for grant of Probate was made by the District Judge on the 23rd August, 1913, though questions having arisen as to the amount of Probate duty payable, Probate was not actually issued till the 26th March, 1914.

By the terms of this Will the property was bequeathed to the son of Alak Prakash if any should be born to his wife Thakurani Kuer. In default of such male issue, one village was bequeathed to Thakurani Kuer for life, with remainder to the daughter Ramanandi and her issue with ultimate remainder in default of issue of Ramanandi to Gyan Prakash Singh. Another village was bequeathed in trust to Gyan Prakash Singh for vaguely defined charitable purposes, while the residue, forming the bulk of the property was bequeathed absolutely to Gyan Prakash.

After Probate had been granted, the name of Thakurani Kuer was entered in the Collector's Registers in respect of the village bequeathed to her, while Gyan Prakash's name was similarly entered in respect of the remaining properties.

Harangi Singh died in 1916 and Gyan Prakash died on the 23rd November, 1918, leaving a minor widow, the respondent, Kalawati Kuer. So long as Harangi and Gyan Prakash lived, Thakurani, the widow, and Ramanandi, the daughter of Alak Prakash, lived under their care and protection in the house of Alak Prakash, exactly as they would have done if Alak Prakash had not been legally separated by adoption from his natural father and brother but continued to form with them members of a joint Hindu family.

On the death of Gyan Prakash, his widow, Kalawati Kuer (who was then a minor) was entitled to succeed him, but there was an agreement in writing on the 21st December, 1918, purporting to be executed by her and Thakurani Kuer whereby the estate was to be divided equally between them for life, with remainder to the daughter, Ramanandi. This agreement was probably not legally enforceable as Kalawati was a minor at the time and at any rate it was not acceptable to the father and other

relations of Kalawati Kuer, who removed her from the influence of Thakurani Kuer, in a manner which led to proceedings in the Criminal Courts. Disputes having thus arisen, proceedings for revocation of the Probate were in contemplation when Thakurani died. On the 10th January, 1922, proceedings were actually instituted under s. 50 of Act V of 1881 on behalf of the minor Ramanandi Kuer for revocation of the Probate, on two grounds principally, *viz.*, (1) that citations were not served either on her or on her mother, Thakurani, before the grant of Probate and (2) that the Will was a forgery. Objections were filed on behalf of Kalawati Kuer and issues were framed, of which two only are material for present purposes, *viz.*:

(1) Was no citation served upon the plaintiff, *i. e.*, Ramanandi Kuer? Had she no knowledge of the Probate proceedings? Was she not properly represented in the Probate proceedings?

(2) Is the Will propounded by the opposite party, *i. e.*, Kalawati Kuer, the widow of Gyan Prakash, genuine or otherwise?

There has been some divergence of opinion in the Courts in India as regard the law and procedure governing cases for revocation of Probate, due in part to the introduction into Indian practice of the difference in English Law between the grant of Probate in common form and Probate in solemn form. It is worse than unprofitable to consider how far, if at all, that distinction has been incorporated into Indian Law. It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that Statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English Law upon which it may be founded.

These observations apply with peculiar force to testamentary cases which are governed by the Indian Succession Act of 1865 or the Probate and Administration Act of 1881 (both now repealed by the Succession Act of 1925). As Sir A. Wilson observed, in delivering the judgment of this Board in the case of *Kurrutulain Bahadur v. Nuzbat-ud-Dowla Abbas Hossein Khan* 1) these Acts while to a large

extent embodying the rules of English Law on the subject yet departed in many particulars from those rules; and in the progress of the development of the law and practice in testamentary cases, the ecclesiastical origin of this jurisdiction of the Courts in England has been completely discarded; and the Indian Legislature has gradually evolved an independent system of its own, largely suggested, no doubt, by English Law but also differing much from that law and purporting to be a self-contained system.

Now so far as the present case is concerned, the law is to be found in the Probate and Administration Act of 1881. Section 50 of that Act, so far as it is relevant, runs as follows:—

"The grant of Probate...may be revoked or annulled for just cause.

"Explanation.—'Just cause' is—

1st, that the proceedings to obtain the grant were defective in substance;

2nd, that the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case."

The relevant Illustrations to the section are:—

"(b) The grant was made without citing parties who ought to have been cited.

(c) The Will of which Probate was obtained was forged or revoked."

It is apparent that the plaintiff in this case set up both these grounds for revocation. The first issue as framed comes under Illustration (b) and the second issue under Illustration (c).

If these issues were tried separately and the plaintiff succeeded on the first issue, that in itself would be sufficient for revoking the Probate; but it would still be open to the defendant to prove the Will and, if she succeeded, the Probate would stand.

If, on the other hand, the plaintiff failed on the first issue, that would not preclude her from proceeding to prove her second ground, *viz.*, that the Will was forged, and the Probate would stand or fall, according to the result.

It is obvious that the question of onus of proof is, therefore, of great importance in this case, and the District Judge as well as the High Court on appeal rightly lay stress as to the onus on each of these two issues, which might have been tried separately but were not so in fact, as evidence was given by each party in support of their respective

(1) 33 C. 116; 9 C. W. N. 938; 1 C. L. J. 594; 2 A. L. J. 758; 15 M. L. J. 336; 7 Bom. L. R. 876; 32 I. A. 244; § Sar. P. C. J. 889 (P. C.).

ive cases on both issues together and not separately. Their Lordships agree with the Courts below that in the circumstances of this case neither party was prejudiced by the procedure adopted.

In considering the evidence on each of the two issues set out above, their Lordships bear in mind that the application for revocation was made eight years after the grant, and after the persons principally concerned in the original proceedings, viz., Harangi Singh, Gyan Prakash, Thakurani Kuer and most of the witnesses to the alleged Will were dead, and that in accordance with the practice of the Indian Courts, some portion of the original records of the Court in the Probate proceedings, including the affidavits of the two attesting witnesses, had been destroyed. These are all circumstances which would make it difficult for the defendant to prove her case.

On the other hand, certain other circumstances have to be considered in favour of the plaintiff. The Will, if not absolutely inofficious, is adverse to the interests of the widow of the alleged testator and his only child. The former was an illiterate *pardanashin* lady, and the latter a child only two years old when the testator died. Both mother and child were living under the immediate protection of those who were propounding the Will and, so far as appears from the evidence, there were no relations of the widow either in her husband's adoptive family or on her father's side who could protect their interests as against those of Harangi Singh and Gyan Prakash. It is true that Thakurani Kuer afterwards more or less acquiesced in the provisions of the Will and in any case took no active steps against the Will so long as Harangi and Gyan were alive; but having regard to all the circumstances, their Lordships are unable to draw any inference therefrom adverse to the plaintiff. And as against the difficulties in the defendant's way by reason of lapse of time, death of parties and witnesses and the destruction of records, it has to be remembered that much of it might have been avoided by prudent action on the part of the propounder, e. g., by taking proper and necessary steps to have the Will proved *per testes* in the presence of an independent guardian for the infant daughter. Their Lordships cannot endorse the view taken by Mr. Justice Das that, if a guardian *ad litem* had been assigned for

her, Thakurani Kuer would have been so appointed, if all the circumstances were fully placed before the Court.

On the first issue, the conclusion of the District Judge may be best given in his own words:—

"I cannot definitely find that the citation was not served upon her (Thakurani Kuer) but I do not consider that it has been proved that she was served or that she had any knowledge of the application for Probate."

As regards the daughter, he considered that:

"If the special citation had been properly served upon Thakurani Kuer, Ramanandi would have been properly represented in those proceedings."

On these findings, it is hardly correct to say, as Mr. Justice Das does, that the District Judge was satisfied that citation was properly served on Thakurani. It would be more accurate to say that though the District Judge was doubtful as to the actual service, he did not feel justified in definitely finding that she had not been served with the citation. In other words the District Judge found himself unable to come to any conclusion whether the notice was actually served upon her or not. The High Court considered that the failure on the part of the plaintiff to examine Awadh Behari was fatal to her case that no citation was served on Thakurani.

This renders it necessary to examine the position of Awadh Behari.

Mr. Justice Das was not prepared to hold that Awadh Behari was related either to Thakurani, as defendant's witnesses deposed, or to Harangi Singh, as plaintiff's witnesses said; but he concluded that Awadh Behari was more or less under the control of the plaintiff and should have been called by her as a witness on her behalf, chiefly for the reason that there was evidence of her own witnesses on two points (1) that at the dates when these proceedings were going on before the District Judge, Awadh Behari was actually in the service of Thakurani's sister as a cook and (2) that Awadh in Thakurani's lifetime signed many documents on her behalf.

Their Lordships think little importance can be attached to the first; nor to the second either inasmuch as all the documents in question, except one, were signed at a time when Thakurani was still living

as a dependent female member of the family of which the actual head was either Harangi or Gyan. The only document referred to in this connection and bearing date subsequent to the death of Gyan Prakash is Ex. P, which Awadh signed on behalf of both Thakurani and Kalawati and in which he described himself as the sister's son of Thakurani and as brother of Kalawati—both statements being equally incorrect.

It would rather appear from the evidence that Awadh Behari, though belonging to the same caste occupied at the time of the alleged service the position of a servant in the family, and was presumably under the control of the male head thereof and subject to his direction.

Under these circumstances, their Lordships do not consider that the plaintiff could be reasonably required to call Awadh Behari as her witness for the purpose of contradicting his own previous statement.

In their Lordships' opinion, even if some kind of formality was gone through on the occasion when service of notice is said to have been effected, it was not such as would give to the person alleged to have been served an opportunity either to oppose the grant of Probate or to require the Will to be proved in her presence. In the peculiar circumstances of the case the service, if any, was of no greater effect in law than personal service on an infant of tender years.

The result is that the first issue must be decided in favour of the plaintiff.

With regard to the second issue as to whether the Will was forged or genuine, the onus of proof depends upon the finding on the first issue. If citations were not served, i. e., properly and effectively served, on Thakurani, the daughter is entitled to ask that Probate which was obtained in her absence should be re-called and the executor or his representative called upon to prove the Will in the present proceeding. In other words, the onus of proving that the Will was genuine is in view of their Lordships' conclusion upon the first issue upon the defendant. It was candidly admitted by Counsel on the latter's behalf that if it was held that the onus was on her to prove the genuineness of the Will, he could not contend that she had discharged that onus. He rested her case on the ground that the

onus was on the plaintiff to prove that the Will was forged, and that the plaintiff's evidence fell short of proving that the Will was a forgery even if the circumstances connected with it might appear suspicious.

Their Lordships have, however, come to the conclusion that apart from any question of onus, the plaintiff has succeeded in proving that the Will is not a genuine document for the reason given below.

It is a circumstance which cannot be ignored that though care was taken to obtain as many as 14 attesting witnesses to the Will, the simple precaution of getting the Will registered at the local registration office was not adopted, even though registration of Wills is not compulsory. Nor can it be considered anything but unusual and suspicious that no doctor or lawyer attested this Will, specially in view of its provisions practically disinheriting the widow and the only daughter and the serious nature of the illness. Immediately after the testator's death, Harangi Singh purported to act as proprietor of the estate in paying Government revenue and in granting receipts to tenants of the estate—a position wholly inconsistent with the provisions of the Will. Then again the Will was not produced or Probate applied for until Harangi Singh had been called upon to explain his above-mentioned conduct. There is further the evidence of at least three witnesses, viz., Khan Bahadur Saujid Mahomed Nur of Bihar and Babu Dhanukdhari Tewana, Pleader of Bihar, that after the Collector directed enquiry to be made into the allegations made in the anonymous petition mentioned earlier in this judgment, Harangi Singh tried to get these witnesses to attest a Will in favour of Gyan Prakash. The District Judge, before whom these witnesses were examined, believed their evidence. Their Lordships do not agree with the High Court that their story is inherently improbable or that any suspicion attaches to it because they did not of their own motion inform the authorities of such contemplated forgery.

There is a total lack of evidence as regards the preparation of the draft and the engrossment of the Will and the whole case for the Will rests on the bare testimony of two out of the four attesting witnesses, whom the trial Judge did not believe. The two other attesting witnesses

admitted their signatures on the Will but alleged that their signatures were obtained by Harangi Singh by false representations as to the nature of the document, which they did not read at the time when they put their signatures upon it. The story related by these two latter may not be worthy of credit in all respects, and if it rested by itself would be of little use to the plaintiff's case. The District Judge also rightly refused to attach any importance to such evidence as was given as to the signature on the Will not being that of Alak Prakash. It was certainly not expert evidence in any sense.

But the crucial point in the case is—where was Alak Prakash living on the 2nd February, 1913, (the date of the alleged Will)—at Patna, or in Bihar?

The plaintiff's case is that at the date of the alleged execution of the Will, Alak Prakash was in Patna under the treatment of Dr. Jyotish Chandra Sen, L. M. S. (Calcutta), who practised at Patna, and also of Dr. Barat, a teacher of the Temple Medical School.

On the defendant's side, a number of witnesses were called to prove that Alak Prakash came to Patna on the 4th or 5th February, that while there he was treated only by *hakims* and not by any doctors, and that he did not stay in that quarter of Patna which is called Jhauganj but in quite a different quarter called Badshahganj.

Both the District Judge and the High Court have disbelieved these witnesses for the defendant and found that Alak Prakash rented a house in Jhauganj-Patna, and was treated, not by *hakims*, but by Dr. Sen and Dr. Barat. The District Judge came to the conclusion upon the evidence that Alak Prakash was at Patna before the 2nd February and, therefore, that the story of his having executed the Will at Bihar on that date was false.

The High Court, however, came to a different conclusion, and Mr. Justice Dass says with regard to that part of the case:

"The critical question then is, did Alak Prakash come to Patna before the 2nd February, 1913? On this point the petitioner relies on the evidence of Dr. J. C. Sen and Dr. Barat.....Dr. Barat is an Assistant Surgeon and is a witness of undoubted position and respectability. His evidence is to the effect that he was called to see a patient of Dr. J. C. Sen at

Jhauganj in a house on the bank of the Ganges. He visited the patient in consultation with Dr. J. C. Sen on four or five occasions spread over one or two weeks. He made a report on the urine of the patient on the 13th February, 1913.....I have no doubt whatever that Dr. Barat actually treated Alak Prakash and made a report on the urine of Alak Prakash. But the report is dated the 13th February, 1913, and it is impossible on the evidence of Dr. Barat to say that Alak Prakash came to Patna before the 2nd February, 1913. I entirely accept the evidence of Dr. Barat, but, in my opinion, it does not touch the point which we have to consider in this case. I now come to the evidence of Dr. J. C. Sen."

Then, after quoting the evidence of Dr. Sen, the learned Judge proceeds:

"Giving his evidence on the 20th December, 1921, and without any documents to support his evidence, Dr. J. C. Sen was able to say that Alak Prakash came to Patna six weeks or two months before his death (in 1913). He admits that he has no documentary record of his treatment of Alak Prakash. It may be that Dr. Sen has a prodigious memory, but, in my opinion, it would be most unsafe to act on this evidence given nine years after the death of Alak Prakash in support of the case of the petitioner that Alak Prakash was not residing in Bihar on the day on which he is alleged to have executed the Will. In my opinion, it has not been established that Alak Prakash was not actually residing in Bihar on the 2nd February, 1913."

Apart from the fact that there is other evidence to prove that Alak Prakash resided in Patna for nearly two months before his death, it does not appear to their Lordships that in the case of Dr. Sen, it was such a prodigious feat of memory as the learned Judge supposed. Alak Prakash was an old patient of Dr. Sen who had treated him three years before his death, and had been to Bihar three or four times to treat him, the last time in December, 1912. When Alak Prakash came on the last occasion to Patna, he rented a house on the banks of the river which Dr. Sen had himself occupied before and which was under half a mile from the house in which Dr. Sen was himself residing. He visited him three or four times daily all the time he remained in Patna. He said that he treated him in Patna,

for two or three weeks before calling in any consultant and that Dr. Barat came in as consultant during the last two or three weeks of the illness, and that Colonel Sunder also came three or four times, i. e., after the first two or three weeks of Alak Prakash's stay in Patna.

The District Judge who saw and heard Dr. Sen in the witness-box believed his evidence on this material point, and their Lordships consider it impossible to reject it without ascribing to a member of an honourable profession deliberate falsehood, for which no ground has been made out.

Taking the whole of the evidence and considering the position of both the doctors concerned, their Lordships agree with the finding of the trial Court that Alak Prakash was in Patna and not in Bihar on the 2nd February, 1913, and that the Will bearing date the 2nd February, 1913, of which Probate was granted on the 25th March, 1914, is not the Will of Alak Prakash Singh and is a fabricated document.

Their Lordships will, therefore, humbly advise His Majesty that the judgment of the High Court should be set aside and the judgment of the District Judge restored, with costs of the appeal to the High Court and of this appeal.

K. J. R.

Appeal allowed.

Solicitors for the Appellant:—Messrs. T. L. Wilson & Co.

Solicitors for the Respondent:—Messrs. W. W. Box & Co.

[*Note*.—Proceedings for the revocation of a Probate are "miscellaneous proceedings" (cf. s. 141, Civil Procedure Code, 1908), and although the procedure is generally regulated by the Civil Procedure Code (see s. 55 of the Probate and Administration Act, 1881, now s. 268 of the Succession Act, 1925), there is no "suit" and, consequently no 'plaintiff' or 'defendant'. According to the practice of the Indian Courts, the party applying for revocation of Probate is called "petitioner" and the executor or person opposing the petition is generally styled "opposite party". In the above judgment, however, their Lordships throughout refer to the parties as 'plaintiff' and 'defendant' respectively. In this connection, reference may usefully be made to s. 83 of the Probate and Administration Act (now s. 295 of the Succession Act, 1925), as regards procedure in contentious cases.—K. J. R.]

PRIVY COUNCIL.

APPEAL FROM THE LAHORE HIGH COURT.

December 2, 1927.

Present:—Viscount Sumner,
Lord Sinha, Sir John Wallis and
Sir Lancelot Sanderson.

BHAGWAN SINGH AND OTHERS—

DEFENDANTS—APPELLANTS

versus

UJAGAR SINGH—PLAINTIFF

—RESPONDENT.

Hindu Law—Widow—Alienation—Necessity—Consent of father, whether binding on son—Attestation of deed, when estoppel—Appellate Court—Finding of fact by trial Court which saw and heard witnesses, not to be lightly reversed.

Where a Hindu widow, holding the usual 'widow's estate' in her deceased husband's property, executed a mortgage of it, and it was found that the income from the lands at the material time was hardly sufficient to meet the ordinary expenses of the family, that she had no alternative and was compelled to resort to borrowing in order to meet the extraordinary expenses of the marriages of her daughters:

Held, on the evidence, that necessity for the alienation had been established. [p. 22, col. 2.]

Where the managing member of a joint Hindu family acting not only on behalf of himself, but also on behalf of all the members of the family who were alive at that time consented to and acquiesced in a mortgage executed by a Hindu widow:

Held, that his son, who was not then born, was not entitled to contest the validity of the mortgage, inasmuch as at the time when it was executed he had no interest in the family property. [p. 24, col. 2.]

Wasantrao v. Anandrao (2) and *Anandrao v. Wasantrao* (3) and *Baboo Beer Kishore Suhye Singh v. Baboo Hur Bullub Narain Singh* (4), distinguished.

Attestation of a deed by itself estops a man from denying nothing whatever except that he witnessed the execution of the deed, and by itself it does not show that he consented to the transaction which the document effects. When, however, in addition to the fact that he attested the deed, there is evidence to show that he took an active part in the consultation which resulted in the transaction and acquiesced in it afterwards, it is a legitimate inference to draw from such evidence that he not only witnessed the execution of the mortgage by the mortgagor, but also that he consented to the transaction. [p. 24, col. 1.]

On a question of pure fact, namely, whether the signature on a certain document was genuine, the trial Court, which had the opportunity of seeing the witnesses give their evidence, accepted their evidence and decided in favour of the genuineness of the signature. The learned Judges of the High Court, who did not see the witnesses, rejected their evidence and came to the contrary conclusion:

Held, by the Judicial Committee, that there were no cogent reasons for overruling the finding of fact arrived at by the trial Court. [p. 23, col. 2.]

• Appeal from a judgment of the High Court, Lahore (Harrison and Zafar Ali, JJ.), dated the 22nd July, 1923, reversing

that of the Subordinate Judge, Gujranwala, dated the 18th October, 1918.

Messrs. *De Gruyther, K. C.*, and *Dube*, for the Appellants.

Mr. *Raikes*, for the Respondent.

[**LORD SINHA.**—Bhagwan Singh was acting for himself and as managing member of the family, in consenting to the mortgage. Whatever he did, he did on behalf of the family and his two nephews. It was a recognition of the mortgage by himself and the two boys.]

Mr. *Raikes* refers to s. 115 of the Indian Evidence Act.

[**LORD SUMNER.**—Estoppel against the father is estoppel against all.]

[**LORD SINHA.**—Bhagwan Singh recognized the mortgage on behalf of the family.]

[**SIR LANCELOT SANDERSON.**—This Board has held that mere attestation of a deed is not an estoppel. We must distinguish that case here.]

Mr. *Raikes* cites *Pandurang Krishnaji v. Markandaya Tukaram* (1).

[**LORD SINHA.**—Here we have much more than mere attestation.]

JUDGMENT.

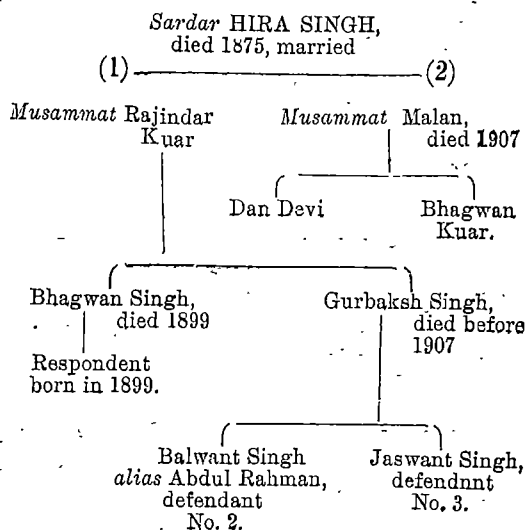
Sir Lancelot Sanderson.—This is an appeal by the legal representatives of Bishen Singh, who was the defendant No. 1 in the suit, against the judgment and decree of the High Court of Judicature at Lahore, dated the 22nd July, 1923. The High Court's judgment reversed the judgment and decree of the learned Subordinate Judge, who tried the suit.

The suit was brought in July, 1917, by the plaintiff, Ujagar Singh, against Bishen Singh and two other defendants, *viz.* Abdul Rahman Khan, sometimes called Balwant Singh, and Jaswant Singh, sons of Gurbaksh Singh, to recover possession of the land mentioned in the plaint, situate in the Gujranwala District, which was alleged by the plaintiff to have been part of the ancestral property of Hira Singh, the grandfather of the plaintiff.

The plaintiff alleged that the defendants Nos. 2 and 3 had a half-share in the said property, but that, by reason of a private partition, they had taken other lands in exchange for their share in the suit land, that consequently they had no further in-

terest therein, and that they have recognised the claim of the plaintiff to the lands in suit, which had been held by *Musammatal Malan*.

The defendant, Bishen Singh, was in actual possession of the lands in suit, and relied upon a mortgage executed on the 6th May, 1896, by *Musammatal Malan*, who was one of the widows of Hira Singh. A pedigree of the family is included in the respondent's case in this appeal, and is as follows:—



The plaintiff alleged that *Musammatal Malan* had no power of alienation of the land in dispute and that he was in no way bound by the mortgage.

The defendant, Bishen Singh, then put in a further pleading, alleging that *Musammatal Malan* mortgaged the land for valid necessity, for payment of debts, and for expenses incurred in connection with the marriages of her daughters.

The defendant further stated that if the mortgage money, interest and costs were paid he had no objection to release the land.

The learned Subordinate Judge held that *Musammatal Malan* had limited powers of alienation but that the mortgage was executed for valid necessity, and that it was binding on the plaintiff. He held further that the suit was barred by the Indian Limitation Act.

(1) 65 Ind. Cas. 954; 49 O. 334; 26 O. W. N. 201; 3 U. P. L. R. (P. C.) 85; 20 A. L. J. 305; 42 M. L. J. 436; 15 L. W. 486; 30 M. L. T. 249; 35 O. L. J. 409; 24 Bom. L. R. 557; 18 N. L. R. 1; A. I. R. 1922 P. O. 20; 49 I. A. 16 (P. O.).

In the ordinary course the plaintiff's suit would have been dismissed, but the learned Judge said that "Having

regard to the fact that the case has been dragged on for pretty long time, and the defendant No. 1 is not disinclined to redeem the lands provided he is paid his charges and the costs of improvements, I think the plaintiff may be allowed to redeem the lands in this case."

He accordingly made a decree in the plaintiff's favour for possession of the land in dispute, provided the plaintiff paid Rs. 8,734-4-0 in addition to the cost of buildings to be determined thereafter which had been built by the defendant, Bishen Singh; and he directed that the parties should bear their own costs.

Both the plaintiff and the defendant, Bishen Singh, appealed to the High Court; the two appeals were heard together, and disposed of by one judgment on the 22nd July, 1923.

The learned Judges of the High Court were of opinion that no necessity whatever had been proved for the mortgage. They, therefore, allowed the plaintiff's appeal, and gave the plaintiff a decree for possession of the land in suit without any payment.

The defendant's cross-appeal was dismissed, and it was directed that his representative should pay the plaintiff's costs in both appeals and in the trial Court.

The High Court did not deal with the question of limitation; but this is now of no importance in view of the fact that the learned Counsel who argued this appeal on behalf of the appellants stated that he did not rely on that point.

In the first place the question of necessity may be dealt with.

The learned Judges of the High Court came to the conclusion that *Musammat Malan* had ample funds to meet the expenses of the marriages of her daughters, and that the defendant No. 1 had failed to establish any necessity whatever for borrowing money.

This opinion was largely based upon the interpretation which the learned Judges placed upon what is referred to in the judgment as "the estimate."

Their Lordships were informed that the so-called "estimate" is contained in a statement made by one Amir Shah before a Munshi in certain proceedings in which Bishen Singh was the decree-holder and *Musammat Malan* was the judgment-

debtor. The learned Judges said that—"At the time, therefore, that the money was borrowed the income of the widow, far from having been Rs. 1,921, as shown in the estimate, must have been approximately Rs. 3,350, thus leaving a margin over and above her ordinary expenditure of over Rs. 1,300 per annum."

It was argued on behalf of the appellants that the above-mentioned "estimate" did not show the widow's income to be Rs. 1,921, as stated by the learned Judges, but that it appeared from the statement that the income available to the widow, *Musammat Malan*, in respect of the lands referred to therein was Rs. 420-5-2 only, and that her expenses amounted to about Rs. 396.

It was admitted by the learned Counsel, who appeared for the plaintiff-respondent, that in this respect the learned Judges of the High Court had made a slip, and that he could not support the finding of the High Court on this point on the grounds stated in the judgment.

The hearing was adjourned in order that the learned Counsel should consider whether the finding of the High Court on the issue of necessity could be supported on other materials in the record.

Having heard the learned Counsel further their Lordships are of opinion that no sufficient ground has been shown for interfering with the finding of the learned Subordinate Judge on this question, viz., that the income from the lands at the material time was hardly sufficient to meet the ordinary expenses of the family, that *Musammat Malan* had no alternative and was compelled to resort to borrowing in order to meet the extraordinary expenses of the marriages of her daughters, and that the mortgage-deed was executed for consideration and valid necessity.

It was, however, further argued by the learned Counsel for the plaintiff-respondent that, even assuming the finding of the learned Subordinate Judge on the question of necessity to be correct, that did not dispose of the case, and that the plaintiff was entitled to hold the decree, which he obtained in the High Court on other grounds.

It appears that Hira Singh died in 1875, leaving two widows, viz., *Musammat Rajindar Kuar* and *Musammat Malan*; two sons by the first-named wife, viz., *Bhagwan*

Singh and Gurbaksh Singh; and two daughters by *Musammatt Malan*.

On the 17th December, 1887, an agreement was entered into by Gurbaksh Singh, *Musammatt Malan*, *Musammatt Rajindar Kuar*, and Raiman Singh, as guardian for Bhagwan Singh, who was then a minor.

It was recited that Hira Singh, deceased, owned the lands therein described, that they were then entered in the names of Gurbaksh Singh and Bhagwan Singh in the official papers, that for settlement of mutual disputes and to make arrangements for maintenance and expenses the parties had agreed to divide the entire estate into the following shares, *viz.*—

Gurbaksh Singh one-fourth share, Bhagwan Singh (minor) one-fourth share, *Musammatt Malan* with her daughter till death, without power of alienation one-fourth share, and *Musammatt Rajindar Kuar* till her death, without the power of alienation one-fourth share.

It was agreed that the lands in dispute were part of the one fourth share allotted by the agreement to *Musammatt Malan*.

The agreement further stated as follows:—

"As for the marriage of the daughter of *Musammatt Malan*, which is yet to be celebrated, a mutual settlement in regard to the expenses thereof shall at the time of the marriage be made through a *panchayat*."

The agreement was executed "by way of a deed of mutual partition," so that no dispute might arise.

It was argued on behalf of the plaintiff-respondent that *Musammatt Malan* had not the estate of a Hindu widow, that no question of necessity for alienation arose, but that she had merely a one-fourth share in the estate for her life, with no power of alienation whatever, and that, therefore, the mortgage which she executed in favour of Bishen Singh was invalid and of no effect.

One answer set up on behalf of Bishen Singh to this case was that, after the death of Hira Singh, entry as to ownership was made in the Revenue Papers according to the aforementioned shares, that he had no knowledge of the agreement, and that such agreement was never acted upon.

The defendant further alleged that the plaintiff's father and the defendants Nos. 2 and 3 admitted by their acts and conduct that no such agreement existed, and that, if there was one, it was cancelled.

Issues were raised at the trial in respect of this point, *viz.*:

4 (a) Did the plaintiff's father attest the deed (i. e., the mortgage-deed), and by so doing, was he estopped from challenging its validity, and was the plaintiff for this reason estopped from contesting it?

4 (b) Did the plaintiff's father and defendants Nos. 2 and 3 acquiesce in the alienation in favour of defendant No. 1 by their conduct?

The learned Subordinate Judge decided these issues against the plaintiff, and held that the plaintiff was debarred from contesting the validity of the mortgage.

The High Court held that the evidence given on behalf of the defendant was not sufficient to establish the genuineness of the signature of the plaintiff's father on the mortgage-deed.

Evidence on this point was given by Bishen Singh, the defendant, who said that Bhagwan Singh (the father of the plaintiff) asked him to get the deed written and that he would attest it and get it registered, and that the mortgage-deed was executed with the consent of the plaintiff's father, and that it was attested by him.

Amir Shah, a *patwari* confirmed this evidence, and said that Bhagwan Singh signed the mortgage-deed in his presence, that *Musammatt Malan* and Bhagwan Singh consulted together, and that in order to pay off debt they mortgaged the lands.

The learned Subordinate Judge had the opportunity of seeing these witnesses give their evidence, and he accepted it.

The learned Judges of the High Court, who did not see the witnesses, rejected their evidence as insufficient to establish the genuineness of Bhagwan's signature on the mortgage-deed, for the reasons stated in this judgment.

Their Lordships are unable to agree that the reasons given by the High Court are sufficient to justify the overruling of the finding of fact arrived at by the learned Subordinate Judge on this point, and they are of opinion that the signature of Bhagwan Singh as a witness to the mortgage-deed must be taken to be a

genuine signature for the purposes of this case!

This does not conclude the matter, for attestation of a deed by itself estops a man from denying nothing whatever except that he witnessed the execution of the deed, and by itself it does not show that he consented to the transaction which the document effects.

In this case, however, in their Lordships' opinion, there is abundant evidence, in addition to the fact that Bhagwan Singh attested the deed, to show that he consented to and acquiesced in the execution of the mortgage by *Musammam Malan*. There is the evidence, to which reference has already been made, which goes to show that Bhagwan Singh not only consented to the transaction, but took an active part in the consultations which resulted in the mortgage of the lands by *Musammam Malan*.

Further, there is the significant fact that in June, 1896, *i. e.*, a month after the mortgage was executed, Bhagwan Singh entered into an agreement with Bishen Singh, whereby in effect he obtained an option to have the mortgage transferred to him.

On the consideration of all the evidence their Lordships are of opinion that Bhagwan Singh not only witnessed the execution of the mortgage by *Musammam Malan*, but also that he, in his capacity of managing member of the joint family, consented to and acquiesced in the mortgage being given, and that this appeal must be decided upon the basis of that finding.

The learned Counsel for the plaintiff-respondent further contended that, even if Bhagwan Singh would have been estopped from denying the validity of *Musammam Malan's* mortgage, the plaintiff is not so estopped, because the plaintiff does not claim through his father, but as a member of a joint Hindu family to which the Mitakshara Law applies, and he cited the cases of *Wasantrao v. Anandrao* (2), *Anandrao v. Vasantrao* (3) and *Baboo Beer Kishore Suhye Singh v. Baboo Hur Bullub Narain Singh* (4).

These decisions are not applicable to the facts of this case. It appears from the plaint that the plaintiff was only five months old at the time when Bhagwan Singh died, *viz.*, in 1899. The mortgage was executed

in May, 1896; it is, therefore, clear that the plaintiff was not born at the time when the mortgage was executed; so that even if the Mitakshara Law applies without any qualification, the plaintiff is not entitled to contest the validity of the mortgage, for at the time when it was executed the plaintiff had no interest in the family property, and Bhagwan Singh acquiesced in the execution thereof; and in the circumstances of this case it is clear that he was acting not only on behalf of himself, but also on behalf of all the members of the family who were alive at that time.

The result is that the plaintiff's claim fails and that the appellants are entitled to possession under the mortgage, and such consequential relief as can be given under s. 144 of the Code of Civil Procedure.

Their Lordships, therefore, will humbly advise His Majesty that this appeal should be allowed, that the judgment and decree of the High Court, dated the 22nd July, 1923, should be set aside, that the plaintiff's suit should be dismissed, and that the plaintiff should pay the costs of the appellants in this appeal and the costs of the defendant Bishen Singh and his legal representatives in both the Courts in India.

K. J. R.

Appeal allowed.

Solicitor for the Appellants:—Mr. H. S. L. Polak.

Solicitors for the Respondent:—Messrs. Ranken, Ford & Chester.

[Note.—The plaintiff's family in the above case were *Jat zemindars* (*Sudras*) and were governed, in matters of alienation, not by the orthodox Hindu Law, but by the Customary Law of the Punjab applicable to agricultural classes. As Sir John Edge observed, in delivering the judgment of the Board in *Ramkishore v. Jainarayan*, 64 Ind. Cas. 782; 49 C. 120; 17 N. L. R. 163; 15 L. W. 144; (1922) M. W. N. 125; 30 M. L. T. 144; 42 M. L. J. 80; A. I. R. 1922 P. C. 2; 26 C. W. N. 881; 20 A. L. J. 857; 48 I. A. 405 (P. C.), "in some parts of Northern India customs which are at variance with the law of the Mitakshara, as recognized by the School of Benares, have been for long consistently followed and acted upon." The distinction here pointed out is not adverted to in their Lordships' judgment, now reported, but apparently nothing material turned upon it—K. J. R.]

(2) 6 Bom. L. R. 925.

(3) 9 Bom. L. R. 595; 11 C. W. N. 478; 5 C. L. J. 338; 2 M. L. T. 151; 17 M. L. J. 184 (P. C.).

(4) 7 W. R. 502.

PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

November 24, 1927.

Present.—Viscount Sumner, Lord Sinha, Sir John Wallis, and Sir Lancelot Sanderson.

SIR BISSESSAR DAS DAGA AND OTHERS

—DECREE-HOLDERS—APPELLANTS

versus

EMMANUEL VAS AND OTHERS—JUDGMENT-

DEBTORS—RESPONDENTS.

Compromise decree—Construction—Provision for payment of damages no bar to specific enforcement—Specific Relief Act (I of 1877), s. 20.

A compromise decree provided (by cl. 2) that the judgment-debtors would be restrained from selling or otherwise alienating manganese ore from their mines to any third party until they had delivered certain quantities of the ore to the decree-holders, the deliveries being spread over a period of 8 years. Clause 10 of the compromise made provision for non-delivery in any particular year and imposed a liability on the judgment-debtors to pay damages to the decree-holders at a rate therein specified.

Held, reading the contract (*i. e.*, the compromise decree) as a whole and taking all its terms together, that the judgment-debtors could not repudiate their obligations under the contract by merely paying to the decree-holders the penalty calculated in accordance with cl. 10 aforesaid, that the compromise agreement was one for the non-performance of which mere payment of the specified sum of money would not be an adequate relief and, that in spite of cl. 10, the contract could be specifically enforced. [p. 28, col. 1.]

Appeal from a judgment of the Court of the Nagpur Judicial Commissioner (Baker, J. C., and Kotval, A. J. C.), dated the 24th March, 1924, dismissing an appeal from an order of the District Judge, Nagpur, dated the 5th November, 1923, rejecting the appellants' application for execution of a decree of the District Judge, Nagpur, made on the compromise of a suit between the parties and dated the 28th February, 1922.

FACTS.—As the appeal to His Majesty in Council turned on the construction of the said compromise decree, the relevant passages are quoted here in full:—

By cl. 2 the defendants "are restrained from selling the ore from their mines mentioned in the agreement, dated 1st March, 1916, or mortgaging, or otherwise alienating their mines or any interest therein, or the ore thereof, except the excess quantity specifically allowed to be sold under cl. (8) of this decree, until they have delivered the whole of the balance of 31,234 tons of ore containing 48 per cent. of metallic manganese, which has remained to

be delivered to the plaintiffs and which they agree and are hereby ordered to deliver in the following manner and subject to the following conditions".

Clause (3) deals with the delivery of 4,000 tons of ore per annum during the years beginning on the 15th February, 1922, and ending on the 14th February, 1929, and of 3,234 tons during the year 15th February, 1929, to 14th February, 1930.

Clause (4) provides that the ore should not contain less than 46 per cent. metallic manganese.

Clauses (5), (6) and (7) refer to the manner in which the ore has to be tendered, analysed, weighed and paid for, and lays down that disputes regarding the analysis shall not excuse the defendants from delivering the full quantity of ore of stipulated grade in the course of the year.

Clause (8) allows the defendants to sell any surplus quantity of ore in any year after delivery of the full quantity of 4,000 tons to the plaintiffs.

Clause (9) refers to payments, the price being Rs. 8 per ton of 48 per cent. of metallic manganese ore with a reduction of 8 annas per unit in the event of falling below that standard.

Clause (10) is the most important clause for the purpose of the present appeal and must be given in full: It recites: "That in the event of the defendants failing to deliver the full quantity of 4,000 tons of ore of the stipulated grade in any particular year, or violating any of the conditions of this compromise, the defendants shall pay to the plaintiffs damages at the rate of Re. 1 (rupee one) per ton on the whole of the quantity which may then have remained undelivered out of the total quantity of 31,234 tons and the same shall be recovered by execution of this decree."

Mr. Lowndes, K. C. (with him Mr. Pritt, K. C.), for the Appellants.—Refers to *National Provincial Bank v. Marshall* (1).

[LORD SUMNER.—Can we import all the doctrines of Equity in India?]

(1) (1889) 40 Ch. D. 112; 58 L. J. Ch. 229; 60 L. T. 311; 37 W. R. 183; 53 J. P. 356.

Mr. Lowndes reads from the judgment in *National Provincial Bank v. Marshall* (1), and argues that the doctrines of the English Courts of Equity are applicable to India. The Courts there are Courts of Equity and are directed to act according to equity, justice and good conscience.

[LORD SINHA.—It is purely a question of construction of the compromise decree in the present case.]

Mr. Lowndes cites s. 20, Specific Relief Act: "A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same." The principle underlying that section is also applicable here.

[LORD SINHA.—After all, it is a question of construing cl. 10 of the compromise.]

Mr. Raikes, for the Respondents.

JUDGMENT.

Viscount Sumner.—On the 5th November, 1923, two applications came on for hearing before the Additional District Judge of Nagpur in execution proceedings taken in Suit No. 4 of 1921. The first in date was that of the present respondents, defendants and judgment-debtors in the suit, for leave to deposit Rs. 28,649-2-9 to be paid over to the decree-holders, and for an order declaring the decree to have been thus fully satisfied. The other was that of the decree-holders for execution of their decree by seizure and delivery to them of certain manganese ore, alleged to be lying at several mines and railway sidings and by the appointment of a receiver and other relief. The respondents, having got wind of the appellants' intention to apply to the Court, lodged their application first, but nothing turns on this. The learned Judge, holding that under the decree the judgment-debtors were entitled to take the course proposed, granted their application and held that the decree-holders were not entitled to the relief prayed but must take in satisfaction the amount deposited by the judgment-debtors, and his determination was affirmed on appeal by the Court of the Judicial Commissioner of the Central Provinces. The case now comes to their Lordships' Board on the construction of the decree in question and particularly of cl. 10, which is as follows:—

"10. That in the event of the defendant failing to deliver the full quantity of 4,000 tons of ore of the stipulated grade in any particular year or violating any of the conditions of this compromise, the defendants shall pay to plaintiffs damages at the rate of Re. 1 (rupee one) per ton on the whole of the quantity which may then have remained undelivered out of the total quantity of 31,234 tons and the same shall be recovered by execution of this decree."

On the 1st March, 1916, the respondents, a syndicate possessed of and working manganese mines and dealing in the ore produced there, had contracted with K. Ettlinger & Co., of London, for the purchase of 38,000 tons of their manganese ore by instalments over an extended period. The contract contained provisions to secure to the buyers the exclusive supply of the sellers' ore till the contract quantity had been worked out. At the end of the year the benefit of this contract was assigned to the present appellants by the Official Liquidator under the war legislation applicable, and deliveries of ore under it and payments for purposes connected with it were made for some time. In 1921 the buyers commenced the suit, No. 4 of 1921, above mentioned, alleging deliveries of ore by the defendants to third parties in breach of the contract to the extent of over 1,000 tons and claiming a mandatory injunction and other relief. The defendants in their written statement alleged that the contract was all along wholly void as constituting a trading with the enemy; that the assignment of it was invalid; that their deliveries of ore to third parties were justifiable on various grounds; and that the appellants on their side were guilty of numerous breaches of contract.

The suit proceeded as far as the formulation of the issues, but they were never tried. The parties arrived at an agreement of compromise, and the terms, with one variation, which their Lordships agree with the Judicial Commissioner's Court in thinking immaterial for present purposes, were embodied in the compromise decree of the 28th February, 1922, out of which the execution proceedings now in question arose. It is entitled in the suit; it recites that "this suit coming on this day for final disposal.....it is hereby ordered and decreed in terms of the compromise arrived at between the parties and sanctioned by the Court," and it then sets out the agreed clauses. The second of these restrains the defendants

from selling ore from the mines mentioned in the agreement of the 1st March, 1916, or alienating the mines themselves (except as provided in cl. 8), till they have delivered the whole remaining balance of 31,234 tons. The third provides for deliveries at the rate of 4,000 tons per year for seven successive years ending in February, 1929, with a balance delivery of 3,234 tons in the next and final year. Then follow provisions for the quality of the ore to be delivered and for determination of that quality by analysis; for tender of each lot in writing, with particulars of the mine of origin and the place of delivery, each lot not being less than 500 tons, with liberty to the defendants in case they raise more than 4,000 tons in one year to sell the surplus to third parties, giving notice of the same with full particulars to the plaintiffs. Clause 9 fixes the price payable by the plaintiffs at Rs. 8 per ton. Then follows cl. 10 quoted above. The general tenor of this agreed decree shows that, like the original agreement on which it is founded, the parties had in contemplation the execution and completion of this contract by actual deliveries in annual instalments, the performance being secured by the present grant of an injunction preventing the defendants from finding any alternative market for their ore.

Seventeen months later the decree-holders filed their application for execution, alleging that the first 4,000 tons had been short-delivered by about 1,240 tons, and that only 60 tons more had been delivered in the first half of the second year. In the judgment-debtors' statement in reply to the application the substantial correctness of these figures is admitted with the additional allegation that their best efforts had not enabled them to deliver any more. It also mentions, what was no doubt a material factor in the dispute, that "price of the manganese has at present gone very high," and in their judgment of the 24th March, 1924, the Judicial Commissioner's Court mention that the price was then, as they were informed, about Rs. 25. It may accordingly be taken that the business object of the compromise was to get the supply of ore at Rs. 8 continued for years to come, and the business object of the breach was to put an early stop to so ruinous a loss by bringing the contract to an end. The question is whether cl. 10 permitted this to be done,

The appellants point out that this clause provides for liquidated damages and that without it the decree would only be capable of execution by enforcing the injunction. In order to ascertain the sum, for which execution should go, it would be necessary to bring a suit or suits to have the damages ascertained. Clause 10 is, therefore, a clause in the decree-holders' favour in the first instance. Though by saving time and costs it may really benefit the debtor as well in the long run, it is not framed as a clause mainly intended for the debtor's convenience. In a sense it is an option to the buyer, for, if he does not choose to seek an order for delivery of specific ore, he is able to ask for execution as of a judgment for a calculable sum of money, but in no sense can it be construed as an option to the seller, when it no longer suits him to go on with the contract, to buy back at an advance of only Re. 1 per ton the whole of the undelivered portion of the contract. Why restrain the judgment-debtors from delivering their ore to third parties, if in effect they can do so at will on merely paying the agreed forfeit? This virtually makes cl. 2 inoperative. It would be a strange result of a compromise, aiming at the continuance of deliveries, to authorise the seller to repudiate his obligations and, taking advantage of his own wrong, to end the matter at his own selected moment by a pre arranged payment, which might not be an adequate compensation at all.

The argument for the respondents and the reasoning, on which both Courts below proceeded, is the same. All the clauses of the decree are indeed to be read together, but cl. 10 controls cl. 2. Payment of sums calculated in accordance with cl. 10, if the seller chooses to make it, will be a sufficient compliance with the whole decree and, in spite of non-delivery, of by far the greater part of the deliverable quantity, no further relief will be available to the decree-holders. The clause contains no words limiting the case provided for to failures arising from causes beyond the sellers' control; but it does say that the provision as regards the damages "shall" operate on the defendants' violating any of the conditions of the compromise and it must be enforced as it stands. Among the principal conditions are the sellers' obligation not to deliver

to third parties, an act from which they consented to be restrained, but, if they delivered to others in violation of this restriction as the Court plainly understood that they had done, it was also in violation of the conditions of the contract, and would only result in bringing into play the penalty named in cl. 10. The learned Judges recognised that this construction rendered nugatory the stipulated restraint upon selling elsewhere, and enabled the defendants to escape the consequences of a wilful breach of contract, consisting in the withholding from the decree-holders of ore actually in their possession and capable of being delivered to the plaintiffs, by simply paying Re. 1 per ton as liquidated damages. Why the decree should begin by forbidding delivery to third parties except in a named case under cl. 8, and then end by giving permission to do so to any extent in case a different event happened under cl. 10, is not explained or explicable.

It must be borne in mind that there are two distinct breaches, for which the decree provides. There is delivery of ore to third parties, except as authorised by cl. 8, for which an appropriate relief is an injunction, and there is failure to deliver the agreed quantities to the decree-holders, for which damages, liquidated or not, will be the proper remedy. Their Lordships do not think that they are constrained to a construction of cl. 10, which will enable the judgment-debtors to render nugatory all their obligations under the prior part of the contract, whenever it suits their pockets to do so. Clause 10 provides that they shall pay at the specified rate, if they fail to perform the contract in any respect, but it does not say that such payment is to be [a full and exclusive satisfaction of all obligations under the contract. The payment into Court does not make the decree a satisfied decree. It provides a mode of enforcing such payment—"the same shall be recovered by execution of this decree"—but it does not say that the other terms shall not be enforced by execution of the decree, namely, by applying to the Court to enforce the injunction. The sellers have to show some cause in argument why they should not obey the injunction to which they have consented. They cannot do so merely by pointing to a clause, which provides an alternative remedy, under which they "shall"

pay so much by way of liquidated damages, if a money payment is sought at all. Reading the contract as a whole and taking all its terms together is a very different thing from reading it so that its final clause defeats the whole object of the agreement. Such a meaning even the debtors never could have intended unless they deliberately proposed to lay a trap for the decree-holders. As the clause stands it provides a remedy for the decree-holders without stipulating for the debtors any corresponding discharge of the injunction. It does not even cover all the possible events, in which the contract might be broken, for, if before the time had arrived for any performance at all, the judgment-debtors had announced that they would never perform it in any respect, this would have been an anticipatory breach, for which unliquidated damages would be recoverable if the decree-holders chose so to treat it, but, not being a breach of any of the conditions, that is the expressed conditions, it would be outside of cl. 10. On the other hand, an unintentional failure to satisfy all the requirements of cl. 5 would be as much a violation of a condition as a deliberate diversion of the ore to other buyers and failure to deliver the full or any quantity to the decree-holders, and, on the respondents' contention, would equally imperatively require payment of the expressed forfeit, cl. 2 notwithstanding. The chapter of accidents equally with the deliberate pursuit of gain might thus bring the whole scheme to an end at the outset before any ore had been delivered, or again, by a combination of luck and care the sellers might keep the contract going till it became profitable to them to break it, and then bring it to an end whenever they pleased. This is not giving to a business contract a construction that will give it the efficacy which the parties must have intended at the outset. The compromise agreement is one for the non-performance of which mere payment of this sum of money would not be an adequate relief and, in spite of cl. 10, the contract is otherwise proper to be specifically enforced. Accordingly their Lordships think that this appeal succeeds.

In the view which they took of the construction the Courts below rightly refrained from expressing any opinion as to the relief, which might be proper, if the

contrary construction were adopted or as to the extent to which a remedy under cl. 10 would be available to the decree-holders concurrently with other appropriate remedies in the circumstances. These and similar questions remain to be determined by the Court, which will dispose of the decree-holders' application. The proper course will be to declare, that cl. 10 of the compromise decree of 28th February, 1922, does not, on a true construction, afford to the judgment-debtors any answer to the petition for execution of it, presented by the decree-holders; to allow the appeal of the decree-holders with costs here and below; to set aside the decisions of both Courts in favour of the judgment-debtors, and to remit the application of the decree-holders to the Court of the District Judge of Nagpur to be dealt with, in accordance with the above declaration and otherwise as may be right, and their Lordships will humbly advise His Majesty accordingly.

K. J. B.

Appeal allowed.

Solicitors for the Appellants:—Messrs. Lattey & Dave.

Solicitors for the Respondents:—Messrs. Watkins & Hunter.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 17, 1927.

Present:—Lord Chancellor, Lord Carson and Lord Darling.

SUKDEVDOSS RAMPRASAD—

PLAINTIFF—APPELLANT

versus

Diwan Bahadur GOVINDOSS

CHATHURBHUJADOSS AND COMPANY—

—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 30—Wagering contract—Contract for sale and purchase of goods—Speculation not equivalent to wagering—Contract contemplating payment of differences only—“Patta patti.”

The mere fact that a contract for sale and purchase of goods is of a highly speculative character, cannot alone vitiate the transaction as a wagering contract within the meaning of s. 30 of the Contract Act, 1872. To produce that result there must be proof that the contract was entered into upon the terms that performance of the contract should not be demanded, but that differences only should become payable. [p. 32, col. 1.]

[Where no such definite agreement or understanding was proved, and it appeared that delivery of the goods might always have been insisted on, the Judicial Committee held (differing from the Court of Appeal in India) that the contract was not bad on the ground of wagering, notwithstanding that it would have been considered bad form, among the parties (merchants of Madras), to have made such a demand for delivery].

[The incidents of *patta patti* considered.]

Appeal from an appellate decree of the High Court, Madras (Justice Sir Kumaraswami Sastri and Krishnan, J.), dated the 29th April, 1925, and reported as 93 Ind. Cas. 169, varying a decree of the same Court on the Original Side made by Mr. Justice Coutts Trotter, dated the 4th October, 1923.

FACTS.—The material facts are given in their Lordships' judgment, and also in the judgments of Sastri and Krishnan, J.J., in the Court of Appeal (reported as 93 Ind. Cas. 169), where all the relevant authorities are cited and elaborately discussed.

As the Privy Council approve of the reasoning of the learned trial Judge, and the question is one of far-reaching importance, Coutts-Trotter, J.'s judgment is reproduced below *verbatim*:—

“The plaintiffs' case on the face of their plaint is simply a claim for the price of goods sold and delivered. It is not contended that the actual goods were delivered. It is admitted that documents purporting to be delivery orders on which delivery of the goods could be demanded passed between the parties. The defence is a somewhat unusual one, namely, that the transactions were not really sales of goods at all, but were in the nature of gaming and wagering. The only thing that I find in the evidence in support of that contention is the fact that the goods after passing from the plaintiffs to the defendants and going through other hands ultimately reverted by purchase to the plaintiffs. That is obviously not con-

clusive. A buyer may sell with the knowledge that the person to whom he sells will pass on the goods, and if the market is rapid and transfers take place quickly he may very well contemplate that the person who ultimately claims the goods may be the last of a long chain of buyers, and if the market were against him when he is called upon to deliver he might well think it to be the wisest course to buy back the goods at the end of the circle and wait for an advance in the market price. Thus it may happen that a perfectly legitimate series of transactions take place without the goods having physically left his possession and it may well be that the state of the market was such that the documents of title to the goods, in this case called *patta pattis*, changed hands so rapidly that the seller in each particular case may have thought it extremely improbable that he would ever be called upon to give delivery to his immediate buyer. As I understand the law as laid down in the leading English cases and it is obvious that the defence in this case is based upon those cases—that is not enough; you must not only have a state of things in which both parties contemplate that delivery would not in fact be likely to be demanded, but you must have a definite agreement that delivery could not in any event be demanded without a breach of the understanding between the parties. The defendants' own witnesses negate the supposition that such an understanding existed here. They all agree that they would have been compelled to take, or entitled to ask for delivery, as the case may be, unless and until they had passed a *patta patti*, which is in fact a document of title to the goods, to their sub-purchaser. That being the defendants' evidence, I think their case fails on their own showing, and that, however much one may suspect that the speculative element entered into these transactions, as no doubt it did, that suspicion cannot translate itself into a determination that these were gaming transactions. If the merchants of Madras desire to enter upon the dangerous and slippery path of gambling in differences and at the same time reserve to themselves the right of setting up that not over honest defence, they must learn its technique a little better than they have done in this case. My judgment is that the goods were sold,

that the transfer of *patta pattis* was in fact a delivery, and that the plaintiffs must have a decree for the amount claimed with costs and interest at 6 per cent. till payment. The defendants, of course, will have their remedy over against the persons who bought on the same terms from them."

Messrs. Stuart Bevan, K. C., and K. Brown, for the Appellant.

Messrs. A. T. Miller, K. C., and Narasimham, for the Respondents.

JUDGMENT.

Lord Darling.—This is an appeal against a decree of the High Court of Judicature at Madras, dated the 29th April, 1925, varying a decree of the same Court on the Original Side made by Mr. Justice Coutts-Trotter on the 4th October, 1923.

In the original suit the plaintiffs (the present appellants) claimed the sum of Rs. 65,255, the price of goods sold and delivered by the appellants to the respondents.

In answer to this claim, the respondents pleaded as follows:—

"The plaintiffs, defendants and certain other merchants formed a group, and it was agreed by and between the merchants of the group that the transactions had among them should take place on the footing that no deliveries should be intended or asked for, that *patta pattis* or delivery orders should be issued to the respective purchasers, that after the delivery orders were sent round and the same ultimately reached the hands of the original vendors; the *patta pattis* should be exchanged and *hawala chits* issued, that accounts should be taken thereafter on the footing of the exchange of *patta pattis* or delivery orders, and that the respective vendors should be entitled to the difference in prices from the respective purchasers."

The respondents also pleaded that there was no actual delivery of the goods of which the price was sued for, that appellants never were in a position to deliver them, and that it never was intended that delivery should take place. The respondents further pleaded that the contracts were void as being wagering contracts for the payment of differences only.

It was proved or conceded that as regards the goods in question no delivery took place, but that documents purporting to be delivery orders were made which passed through several hands, and that within one week all the goods—so far as any ever existed—were in the hands of the appellants, which, indeed, they had never left.

This resulted from the fact that in respect to each re-sale what is described as *patta patti* was made—a process which resulted in differences merely, according to the fluctuations of the market, being recoverable, instead of the goods or their price.

The trial Judge held that the documents which purported to be orders for delivery were so in fact, and were equivalent to delivery of the goods themselves. He rejected the contention that these dealings were wagering contracts merely, and he gave judgment in favour of the appellants for Rs. 65,255 and interest. This judgment was set aside by the Court of Appeal, the Judges holding that the contracts were entirely wagering ones incapable of giving any right of action. Judgment in regard to them was, therefore, entered for respondents.

To succeed in this action for the price of goods it is necessary for appellants to prove that the goods were actually delivered—and this was never contended—otherwise that some document of title was given to the respondents which would oblige the custodian of the goods to hand them over to the holder of it.

On the Madras market were several merchants who bought and sold amongst themselves such goods as those to which this suit relates—and it was proved that the very goods here in question had first been sold by the appellants to the respondents. No delivery of the goods was then made, but they were sold by the respondents, and re-sold by the purchasers again and again—no delivery of goods ever being made—until at last the goods were re-purchased by the appellants themselves, who now claim against the respondents the full price, as for goods sold and delivered.

It was proved that whenever one of these

particular sales was made a document was given to the purchaser. Many of these documents were exhibited in this case, notably the one now to be set out.

EXHIBIT III.

Delivery order given to Govindoss Chathurbujadoss.

Dated 27-11-1922.

No. 784.

Delivery order.

Sukdevadoss Ramprasad,

Bankers, Importers, Yarn Merchants
and Commission Agents,

101, Mint Street, Georgetown, Madras.

To

Govindoss Chathurbujadoss.

Description.	Bales.	Bundles.
No. 40s Japan.	25	1,000

November *vaida*.

Received 25 bales of 40s Japan *patta patti*
with M. Amritlal

(Signed) Trimbaklal,
for B. G. C. & Co.
27-11-1922.

It will be observed that this document is headed "delivery order"—and for the appellants it was contended that this entitled the holder of it to demand the actual delivery of the goods.

But it was replied that, however, that might have been originally, the words "received 25 bales of 40s Japan *patta patti* with M. Amritlal" showed that it is not now a document of title giving its holder a right to demand delivery of the goods, but simply a link in a chain or series of notes showing that no actual transfer of goods was contemplated, but merely a final payment of differences resulting from the making—and non-performance—of a number of contracts of sale.

A good deal of evidence was given as to the meaning of the words "*patta patti* with," and it appears certain that when once *patta patti* is made the buyer has no longer a right to demand the goods themselves, nor is the seller obliged to deliver

them, but the matter should be settled by the payment and acceptance of the difference resulting from the sale and re-sale of the goods.

This being so, it was contended on behalf of the respondents that the contract in question was a wagering contract. There can be no doubt that these various contracts were in character highly speculative; but, as was pointed out by the trial Judge and by the Judges on appeal, that is insufficient in itself to render them void as wagering contracts. The authorities cited show that to produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded, but that differences only should become payable.

Now, in the present case no such definite agreement or understanding was proved; in some instances of other sales between these parties there was no *patta patti* and delivery was given and taken, and so here, unless and until *patta patti* was made, delivery might always have been insisted on. There can be little doubt, however, that to have made such a demand would, among these merchants, have been considered bad form. Gamblers have their own code of honour, and expect its observance, although they cannot ensure it; and we know that "even the wild outlaw in his forest walk keeps yet some touch of civil government." But the law does not affect to enforce mere courtesies.

The trial Judge held that notwithstanding the fact that *patta patti* had been made or agreed in the contracts relating to these goods, the appellants were still entitled to recover the price of them, since the documents which passed between the parties were valid delivery orders on presentation of which the goods might be demanded. This was evidently not the view taken by the Judges in the Court of Appeal; but they did not go at length into this matter, because they held that the contracts represented nothing but wagering transactions—and, therefore, gave the appellants no rights whatever.

In the opinion of their Lordships the contracts relied on were not bad on the ground of wagering, and that for the

reasons given by the trial Judge. They, therefore, do not concur in the judgments appealed from in so far as wagering is concerned. But from those judgments it appears that the Judges of the Court of Appeal were prepared to hold that the appellants were not in a position to deliver the goods they had sold, and also that the respondents had not agreed to accept what are called delivery orders, directed to third persons, as something equivalent to delivery so as to exonerate the appellants from liability to deliver the goods, and to entitle them to sue for the price.

In the opinion of their Lordships this view is correct. The making of *patta patti* resulted in an agreement that the obligation to deliver the goods should not remain effective, that the price of them should neither be demanded nor paid, but merely the resulting differences. These differences have been paid or tendered and nothing is due in regard to them. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed, with costs, including those of the petition by the appellants for the admission of further documents which is also dismissed.

K. J. R.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. Pugh & Co.

Solicitor for the Respondents:—Mr. H. S. L. Polak.

Note—[As regards *teji mandi* transactions, see 68 Ind. Cas. 481; 47 Bom. 263; 24 Bom. L. R. 812 and 85 Ind. Cas. 613; 26 Bom. L. R. 1097, the decision in the latter case being upheld by the Privy Council in 98 Ind. Cas. 338; 28 Bom. L. R. 1376; 51 M. L. J. 809, where analogous cases are considered.—K. J. R.]

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL No. 18 OF 1927.

June 7, 1927.

Present:—Sir Grimwood Mears, Kt.,
Chief Justice, and Mr. Justice Lindsay.

MATHURA KURMI—DEFENDANT—

APPLICANT

versus

JAGDEO SINGH AND OTHERS—PLAINTIFFS
—OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), s. 110—
Appeal to Privy Council—‘Substantial question of law,’
meaning of—Construction of documents—Sale or con-
ditional mortgage—Test—Intention—Question of fact.*

The application of well-defined legal principles to a particular set of facts does not raise a question of law which can fairly be described as ‘substantial’ within the meaning of s. 110 of the Code of Civil Procedure. [p. 34, col. 1]

The test to be applied in determining whether a transaction is a sale subject to an option of re-purchase or a mortgage by conditional sale, is the intention of the parties at the date of the transaction, and such intention is a matter of fact and not of law. [p. 33, col. 2.]

Application for leave to appeal to His Majesty in Council.

Mr. Kamla Kant Verma, for the Applicant.

Mr. Rama Kant Malaviya, for the Opposite Parties.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council against the decree of a Bench of this Court in First Appeal No. 459 of 1923, decided on the 21st December, 1926*. The appeal was dismissed and the decree of the trial Court was affirmed. The value of the subject-matter in the first Court was over Rs. 10,000 and the value of the subject-matter of the proposed appeal to His Majesty is also above that sum. But we are asked to certify that the case fulfils the conditions of s. 110 of the Code of Civil Procedure on the ground that the appeal involves a substantial question of law, or, in the alternative, to certify that it is otherwise a fit case for appeal.

The question which arose for decision in the Court below and in this Court was with regard to the legal relation of the parties arising out of the execution of three documents executed on the 22nd May, 1915. The case for the plaintiffs was that they were mortgagors and that the defendant, Mathura Kurmi, was their mortgagee. The defendant's case was that he was the purchaser of the property in dispute subject to an option of re-purchase of which the plaintiffs had failed to take advantage.

*See 104 Ind. Cas. 504—[*Id.*]

The decision of the trial Court, affirmed in this Court, was that the three documents were evidence of a single transaction, namely, a mortgage by conditional sale, and that the plaintiffs were entitled to recover the property by redemption. As is pointed out in the judgments delivered in this Court, cases of this nature are frequently brought before the Courts in India, and many of them have been taken in appeal to His Majesty in Council. We may refer in particular to the following three cases:—*Balkishen Das v. Legge* (1), *Jhanda Singh v. Wahid-ud-din* (2) and *Narasingerji Gyanagerji v. Panuganti Parthasradhi Rayanagar Garu* (3). It has been settled definitely that the test to be applied in such cases is the intention of the parties at the date of the transaction which has to be construed and the decisions lay down the various matters which may legitimately be considered by the Courts in order to determine what the intention of the parties was. Intention is a matter of fact and not of law and where, as in the case now before us, both Courts find that the parties stand in the relation of mortgagor and mortgagee, the finding is one of fact, namely, that on the date on which the parties entered into the transaction their intention was to constitute that relation between themselves.

If it be admitted, however, that the question is not one of pure fact because the decision involves the construction of legal documents, the point remains whether any question of law is raised which can be deemed to be a substantial question. Obviously any question of law arising upon the interpretation of the documents considered in this case is not substantial in the sense of being a question of general interest: it is of importance only to the present parties. But in view of a recent decision of their Lordships, it is contended that a question of law, in order to be

(1) 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. s.) 1130 (P. C.).

(2) 36 Ind. Cas. 38; 38 A. 570; 31 M. L. J. 750; 21 C. W. N. 66; 20 M. L. T. 529; 14 A. L. J. 1189; (1916) 2 M. W. N. 570; 19 Bom. L. R. 1; 5 L. W. 189; 25 C. L. J. 524; 10 Bur. L. T. 131; 43 I. A. 284 (P. C.).

(3) 82 Ind. Cas. 993; 47 M. 729; A. I. R. 1924 P. C. 226; 20 L. W. 701; 10 O. & A. L. R. 1172; 47 M. L. J. 809; (1924) M. W. N. 915; 40 C. L. J. 481; 27 Bom. L. R. 4; 29 C. W. N. 246; 51 I. A. 305; 26 P. L. R. 18; 23 A. L. J. 161; L. R. 6 A. (P. C.) 41; 1 O. W. N. 684 (P. C.).

substantial, need not be a question of general interest: it may still be substantial although it concerns only the parties to the litigation. And so it is sought to be argued that we have here a question of substance because, it is suggested, that the tests and principles of interpretation prescribed by the Privy Council have not been correctly applied to the facts.

We are not prepared to hold that for this reason the question of law between the parties here, assuming it to arise at all, is a substantial question. It is not made to appear that the appeal, if allowed to proceed, could furnish an occasion for the discussion or enunciation of any fresh legal principle. The matter has been agitated time and again before their Lordships who have repeatedly laid down the law in the sense indicated above. In these circumstances we do not think that the application of well-defined legal principles to a particular set of facts raises any question of law which can fairly be described as substantial.

The case does not, in our opinion, fulfil the requirements of s. 110 of the Code of Civil Procedure. Nor is it a case which we could certify as being otherwise fit for appeal to His Majesty.

We dismiss the application with costs.
A. N. A. *Application dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 479 OF 1921.

June 9, 1927.

Present:—Mr. Justice Sulaiman and
Mr. Justice Banerji.

Bohra KANHAIYA LAL AND OTHERS—]

OBJECTORS—APPELLANTS

versus

GENDO—PETITIONER—RESPONDENT.

*Allahabad High Court Rule, Chap. XVI, r. 2—
General Rules (Civil), Chap. XXI, rr. 22, 26—Appli-
cation for Probate—Taxation of costs.*

An application for Probate, though contested, is not a 'suit', and for purposes of taxation of costs falls

within the purview of r. 26 of Chap. XXI of the General Rules (Civil) of the Allahabad High Court and not within r. 22. [p. 35, col. 1.]

Rule 2 of Chap. XVI of the Allahabad High Court Rules refers to suits and applications tried by the High Court itself on the Original Side and does not apply to suits and applications tried by subordinate Courts. [p. 34, col. 2.]

First appeal from a decree of the District Judge, Agra.

Mr. Shiam Krishna Dar, for the Appellants.

Mr. Narain Prasad Asthana, for the Respondent.

JUDGMENT.—This appeal arises out of a Probate proceeding and relates to the costs which have been taxed in the decree of the Court below. It raises a question of principle affecting the practice in subordinate Courts. An application for Probate was made on the 18th January, 1924, and on the 1st of March a caveat was entered. On the 30th of August evidence was recorded and Probate was ordered to be granted to the applicant. The office of the District Judge taxed the costs on the scale fixed for original suits. An objection was raised by the caveator to the amount taxed, but the learned Judge, relying upon Chap. XVI, r. 2 of the High Court Rules dismissed the objection.

In our opinion Chap. XVI, r. 2 of the High Court Rules had no direct application to the case at all. The suits and applications spoken of there refer to suits and applications which are tried on the Original Side by the High Court itself and do not refer to suits tried by subordinate Courts. The case had to be decided in accordance with Chap. XXI of the General Rules (Civil) for subordinate Civil Courts. A graduated scale is prescribed for calculating fees in "suits, or appeals from original and appellate decrees in suits for money, effects or other personal property, or for land or other immoveable property of any description, when such suits or appeals are decided on the merits after a contest." On the other hand, r. 26 prescribes a different scale for miscellaneous judicial cases. It is conceded that if r. 22 is not applicable then the only other rule which would apply would be r. 26.

Rule 22 refers to suits and to appeals. It does not refer to applications. If, therefore, the Probate proceedings are a suit, r. 22 would apply.

Under the Probate and Administration Act of 1881, which was in force when this

case was decided by the Court below, applications for Probate are throughout the Act called 'petitions' and the applicant is called 'petitioner'. Section 33 of the Act provides that in any case in which there is contention, the proceeding shall take, as nearly as may be, the form of a suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for Probate shall be the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant. In our opinion this section, instead of helping the respondent, is really against him, for it clearly implies that the proceeding is not itself a suit but is to take, as nearly as may be, the form of a suit. If the proceeding were itself a suit, there would be no necessity to say that it should take the form of a suit when there is a contention. In the case of *Sundrabai Saheb v. Collector of Belgaum* (1) a Bench of the Bombay High Court held that the proceedings in an administration case were not a suit. A similar view was expressed in the case of *Bajinath Prosad Singh v. Sham Sundar Kuar* (2).

This view is further strengthened by the circumstance that in the corresponding High Court Rules, Chap XVI, r. 2, the language is "in a suit and in an appeal from the original decree in a suit, effects or other personal property, or for land and other immoveable property, or for specific performance, or for an injunction, or for damages in a suit under s. 42 of Act I of 1877, and in a contested application for Probate or Letters of Administration." It is obvious that a contested application for Probate is mentioned separately and is not considered to be included in the expression "in a suit." It was apparently considered that in a contested Probate proceeding in the High Court the scale of Counsel's fee should be the same as that of original suits, and it is on that account that such an application was expressly mentioned in r. 2.

We are, therefore, of opinion that the rule applicable to the case was r. 26 of Chap. XXI, General Rules (Civil) for Civil Courts and not r. 22, and that the taxation of the costs was not correct.

The last ground of appeal is based on the circumstance that the applicant engaged a Vakil on the 26th January, 1924, who filed a certificate of fees on the 1st March, 1924 on which date caveat was entered. Later on, on the 30th August, 1924, he wished to offer himself as a witness and asked the permission of the Court to do so. The permission having been granted, he was examined as a witness. He did not, however, subsequently take any part in the conduct of the proceedings. The contention on behalf of the appellant is that his certificate of fee should not be taken into account.

It is likely that the Pleader did not expect that the application would be contested, and he would have to appear as a witness because he had been consulted in the preparation of the draft. Had he expected that his evidence would be required, we assume that he would have considered it undesirable to agree to be engaged in the case. Under the circumstances we are of opinion that the certificate filed by him before he was examined as a witness cannot be ignored, especially when permission was granted to him by the Judge to give evidence in the case. The appeal is accordingly allowed and the amount of costs entered in the decree of the Court below varied, so as to bring it in harmony with the scale prescribed in r. 26. The appellant will have the costs of this appeal. The costs of this appeal, however, will have to be calculated in accordance with the High Court Rules.

A. N. A.

Appeal allowed.

(1) 2 Ind. Cas. 283; 33 B. 256; 10 Bom. L. R. 1197.

(2) 22 Ind. Cas. 402; 41 C. 637; 18 C. L. J. 643.

ALLAHABAD HIGH COURT.SECOND CIVIL APPEALS NOS. 1312 AND 1315
OF 1925.

June 28, 1927.

*Present:—*Mr. Justice Mukerji and Mr.
Justice Ashworth.**LACHMI PRASAD—PLAINTIFF—****APPELLANT***versus***LACHMI NARAIN AND ANOTHER—****DEPENDANTS—RESPONDENTS.***Transfer of Property Act (IV of 1882), s. 51—
Transfer by manager of joint Hindu family—Suit to
set aside transfer—Transferee's right to compensation
for improvements—Failure to enquire as to necessity,
effect of—'Good faith,' meaning of.**Per Ashworth, J.—*A transfer by a Hindu father
and manager of a joint family is a valid transfer until
it is avoided by the son, and a transferee who has
made improvements on the property before the trans-
fer is avoided must be held to have believed himself
in good faith to be the absolute owner thereof within
the meaning of s. 51 of the Transfer of Property Act
even if he has failed to satisfy himself at the time
of the sale that it was necessary. [p. 37, col. 1.]*Per Mukerji, J.—*It is always a question of fact
whether a transferee believes or not that he is
absolutely entitled to a property. It is not possible
to hold in every case of a transfer by a qualified
owner, alleging circumstances which would enable
him to give absolute title, that the transferee should
be treated as believing that he holds the property in
good faith. [p. 38, col. 2.]*The definition of the term 'good faith' in s. 3 (20)
of the General Clauses Act, 1897, as meaning merely
'honestly' is not applicable to the Transfer of Property
Act. [p. 39, col. 1.]*Second appeal from a decree of the Dis-
trict Judge, Ghazipur.*Messrs. Kashi Narain Malaviya, Mushtaq
Ahmad and Benod Behari Lal, for the Ap-
pellant.**Sir. Tej Bahadur Sapru and Mr. Uma
Sankar Bajpai, for the Respondents.***JUDGMENT.****Ashworth, J.—**These two second ap-
peals arise out of a suit brought by Lachmi
Narain, minor, against his father, Munni
Lal, defendant No. 2, and Ganpat Rai, a pur-
chaser of house property from the father,
by a sale deed, dated the 29th April, 1927,
for possession (by which must be meant
joint possession with the father) of the pro-
perty. The plaintiff alleged that the sale
by his father was not binding on him on
the ground that the father was insane at the
time of execution of the deed. Alternat-
ively he pleaded that the property being
ancestral joint property, his father could
only sell it if the sale was necessary, and
that the sale was unnecessary. The defence
was that the father was never insane butcompetent to execute the deed, and that the
sale was necessary. It is to be noted that
the sale purported to be executed by the
father both on his own account and also as
guardian of the plaintiff.Both the lower Courts have decided that
the father was not incompetent on the score
of his mental condition to make the trans-
fer, and in second appeal we are bound by
this finding of fact which is not impugned.
The first Court found that the sale was
necessary and for adequate consideration.
It, therefore, dismissed the suit. In appeal
the District Judge of Ghazipur set aside
this finding of the first Court. It held that
the sale of the house by the father was not
necessary, and that of the total sale price
Rs. 1,350, the only consideration binding on
the plaintiff was Rs. 425 due for principal
and interest on a bond, dated the 24th Oc-
tober, 1916, due by the family to one Ma-
kund Lal. He held, however, that the de-
fendant No. 1 had spent Rs. 25,000 in re-
building the house or houses and was entitl-
ed to this sum for improvements under s. 51
of the Transfer of Property Act. Without
giving the option to the plaintiff to recover
the property by payment of the present in-
crease in the value of the property by reason
of these improvements, he assumed that the
plaintiff would not or could not pay this com-
pensation, and accordingly he, in effect, re-
quired the plaintiff to sell his interest in the
property to the transferee. He held that the
plaintiff's interest was the total purchase-
money Rs. 1,350 minus the Rs. 425 required
to pay the joint family debt existing at the
time of the sale.Against this decision there are cross-ap-
peals. The plaintiff in Appeal No. 1312
maintains that he should have been given a
decree for possession of the property on a
payment of the Rs. 425 found to be valid
consideration, and that no account should
have been taken of the improvements. I
will deal with this appeal first. I consider
that in second appeal this Court is bound
by the finding of the lower Appellate Court
that of the whole Rs. 1,350 only Rs. 425
was a debt binding on the family. The lower
Appellate Court has found that the circum-
stances were as follows:—The defendant
No. 1 was anxious to acquire this property
as it was situated between other properties
which belonged to him. He, in vain, dur-
ing the minority of the defendant No.
attempted to get a transfer from the defen-
ant No. 2's mother. As soon as the defen-

ant No. 2 came of age the sale was effected. The consideration of Rs. 425 for a debt due by the family to Makund Lal he found to be good consideration. The rest of the money was paid to Munnu Lal and used by him for his own purposes. The recital in the deed that Rs. 700 was paid to one Bawan Das on an I. O. U. (*sarkhat*) was false. This finding had no doubt some evidence to support it. In particular Bawan Dass' accounts failed to support the fact of any money being owed to him at the time by the family. As regards the liability of the plaintiff to reimburse defendant No. 1 for the money spent on improvements, the lower Appellate Court invoked the doctrine of equitable estoppel. This plea was never set up by the defendants and was clearly unsupported by any evidence sufficient to establish equitable estoppel. The lower Appellate Court, therefore, was not justified in taking the improvements into consideration on the grounds stated by it. On the other hand, I consider that s. 51 of the Transfer of Property Act justified the plaintiff being required to credit the defendant No. 1 with the present value of the improvements. Section 51 applies to a transferee who makes any improvement on the property believing in good faith that he is absolutely entitled thereto. Now a transfer by a father and manager of a joint Hindu family is a valid transfer until it is avoided by the son. A defeasible title is not the same thing as a defective title, and s. 51 of the Transfer of Property Act applies only to defective and not to defeasible transfers. At the date when the improvement was made this transfer had not been avoided. The defendant No. 1 was, therefore, the absolute owner and must be held to have believed himself in good faith to be the owner. It makes no difference that he failed to satisfy himself at the time of the sale that it was necessary. Section 65 of the Contract Act is a guide as to the principle to be invoked. When a contract becomes void, as it did in this case by the plaintiff repudiating the sale by his father, the plaintiff, as a person who has received advantage, is bound to restore that advantage or make compensation for it. The transfer only became voidable at the instance of the plaintiff. Consequently the lower Court was right in taking into consideration the plea of the defendant No. 2 under s. 51 of the Transfer of Property Act. The method in which the lower Appellate Court has applied that section is not impugned by the

plaintiff in his appeal. We are not, therefore, concerned with examining that method to see if it is correct. The plaintiff's appeal must, in my opinion, fail.

The defendant No. 1 also appeals. So far as his appeal calls in question the finding of the lower Appellate Court that the sale by the father was not necessary, and that only Rs. 425 of the purchase price was good consideration, I hold that we are bound by the findings of fact of the lower Appellate Court. In this appeal also the way in which the lower Appellate Court has applied s. 51 of the Transfer of Property Act is not called in question. This appellant merely says that he should not have been called on to pay anything to the plaintiff. Consequently I would dismiss his cross-appeal also.

Inasmuch as I have held above that the purchaser of property from a guardian or from a manager or from a Hindu widow in possession of her husband's property is absolute owner until the sale is repudiated by the minor, the co-parcener or the reversionary heir, as the case may be, the question as to the meaning of the words "in good faith" in s. 51 of the Transfer of Property Act does not arise. If it did, I should hold that a finding that the impugned sale could not be sustained because the purchaser had not made sufficient inquiry as to its necessity would amount to a finding that the transferee did not in good faith believe himself to be the absolute owner. It appears to me impossible to say that a transfer which is bad for want of proper inquiry by the purchaser may still be a transfer which the purchaser may believe in good faith to make him owner, unless we invoke the reasoning adopted by me above that the transferee is absolute owner until repudiation of the transfer. I would point out that the definition of "in good faith" contained in the General Clauses Act, s. 3 (20) as meaning merely "honestly" does not apply to Acts passed before 1897 (see s. 4). When s. 51 of the Transfer of Property Act was passed the only definition of "good faith" on the Indian Statute book was that in the Indian Penal Code (s. 52), namely, "not done or believed without due care and attention." In my opinion the Legislature had this meaning of "good faith" in mind when they enacted s. 51 of the Transfer of Property Act. It has been contended that the expression "in good faith" in the said s. 51 would cover failure to make proper inquiry provided that the necessity for further

inquiry did not occur to the transferee. Assuming this, it is clear that the necessity did occur to the transferee in this case, because, on the finding of the lower Appellate Court, he was party to a false recital in the sale-deed.

For the above reasons I would dismiss both the appeals with costs.

Mukerji, J.—I entirely agree with my learned brother that these two appeals should be dismissed. My reasons are, however, slightly different.

A father sold for himself and as the guardian of his minor son a house to defendant No. 1, Ganpat Rai, who has since died and is represented by his minor son. The sale was made on 24th April, 1917, and the present suit was instituted by the son, on 27th of June, 1923. The plaintiff was only six years old, and apparently was just born when the sale was effected.

The plaintiff's case was that the property sold was ancestral, and it was sold without any legal necessity and for inadequate consideration. His case further was that his father was insane when he conveyed the property. The defence was that the father was capable of contracting, and sale was effected for full consideration and for legal necessity. The defence further said that the defendant had built on the site and had repaired a portion of the building sold all told at a cost of about Rs. 25,000.

The Court of first instance dismissed the suit, holding that the sale was made for legal necessity. It framed an issue as to whether the defendant was entitled to be compensated for any expenditure made by him over the property in dispute. It was of opinion that if the question of legal necessity and the question of the sanity of the vendor had not been decided in defendant's favour, the defendant would not have been entitled to any compensation whatsoever. The plaintiff appealed, and the learned District Judge affirmed the decision of the Court of first instance on the question of the father's sanity and on the question whether the property had been sold for its full value. The learned Judge, however, held that there was no legal necessity for the sale except as to the sum of Rs. 425. The lower Appellate Court framed no issue whatsoever as to the question of compensa-

tion unless we consider that it is included in the 5th issue which ran:—"Whether the defendant No. 1 built any house on any portion of the houses in dispute? If so, at what costs, and how does it affect the case?"

After having arrived at the conclusion that the sale was for legal necessity to the amount of Rs. 425 out of Rs. 1,350, the entire consideration, the learned Judge decreed the suit for a sum of Rs. 925 being the difference between the sale price of Rs. 1,350 and the sum of Rs. 425, the amount to the extent of which the legal necessity had been established.

As my learned brother has pointed out, no question of equitable estoppel was raised in the case, and if the learned Judge purported to decide the case on that basis he was wrong.

The question of compensation has, however, been definitely raised in this Court and we have to see how far it is applicable.

The law on the point is contained in s. 51 of the Transfer of Property Act, which runs (omitting less important words) as follows:—

"When the transferee..... makes any improvement on the property, *believing in good faith* that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction....."

The question is whether in this particular case the transferee Ganpat Rai, when he made the improvement, *believed in good faith* that he was absolutely entitled to the property. In my opinion it is always a question of fact whether a transferee believes or not that he is absolutely entitled to a property. As at present advised I am not prepared to hold that in every case of a transfer by a qualified owner, alleging circumstances which would enable him to give absolute title, the transferee should be treated as believing that he holds absolutely the property in good faith. I need not discuss the point, because, as I said, I consider that it is always a question of fact whether a particular man holds a particular belief. The difficulty in this interpretation may be this. A man loses his property because of a defect in it and yet he is supposed to believe that he is an absolute owner of it. But *ex hypothesi*, the rule of law enacted under s. 51 applies to such a case. There should be two persons,

one the transferee who has a defective title and a claimant who succeeds in establishing a better title. This state of things being accepted, we have to find out whether the man with the defective title is really a man described in s. 51.

The words "in good faith" were not defined in the General Clauses Act of 1868, They are defined in the General Clauses Act of 1897, and the definition is as follows:—

"A thing shall be deemed to be done in 'good faith, where it is in fact done honestly, whether it is done negligently or not."

This definition does not apply to the Transfer of Property Act. "Good faith" is defined in the Indian Penal Code; but in my opinion that definition too is not applicable. When a person is supposed to be guilty of an act, which would be an offence except for certain belief held by him; the law would require, and should require, that that belief should be held on substantial grounds. It was for this reason that "good faith" in the Indian Penal Code was defined as follows:—

"Nothing shall be deemed to have been done in good faith which is not done without due care and attention."

If we import this definition into s. 51 of the Transfer of Property Act, we shall find that we shall make the section entirely unworkable. If a transferee, as in this case, from a Mitakshara father has taken a transfer with due care and attention, he is not at all liable to be evicted at the instance of his son. The son would be bound simply because the transferee had taken "due care and given attention." I, therefore, think that the words "good faith" have a meaning which is somewhat between the two definitions quoted above. I would not be prepared to hold that a man who has been quite negligent as to investigation of title of the vendors, and has acquired the property recklessly should have the advantage given to him of the rule in s. 51 of the Transfer of Property Act. This, however, is only an *obiter dictum*. It is always dangerous to lay down a general rule in discussing a particular case.

I think I have indicated sufficiently what is in my mind as to the interpretation of s. 51 of the Transfer of Property Act.

The Court below has held that the transfer was made without legal necessity except as to the sum of Rs. 425. From this it does

not follow that the defendant No. 1 had no grounds for believing that he was not holding absolutely the property purchased by him. No doubt there are certain remarks of the learned Judge, which if taken literally, would imply that the defendant No. 1 was a party to a fraud on the infant son and was a party to concoction of evidence for the purposes of the sale. The learned Judge was not trying the question of 'belief in good faith,' and I am not prepared to accept his statements as a finding of a Court of first appeal on facts relating to "belief in good faith."

I find that the defendant No. 1 got the entire consideration money in cash before the Sub-Registrar. It was found that the father (the vendor) was a same person. It was found that to the extent of Rs. 425 there was a legal necessity. The Judge is prepared to believe that some money was received by the father for his own purposes. Then there was at least a *sarkhat* in favour of Bawan Das. If all this be true, I do not see what justification the Court below had in saying, at one place of its judgment, that the consideration money that was paid before the Sub-Registrar was returned. This finding is absolutely inconsistent with its other findings. In the absence of any finding of fact on the question of 'belief in good faith' I would take it upon myself to decide on the question of fact in second appeal, and would unhesitatingly come to the conclusion that the defendant No. 1 had sufficient justification for holding the belief (good faith) that he was absolutely entitled to the property he had purchased. I need not point out that the lower Court has found that he spent the solid and large sum of Rs. 25,000 over additional buildings and improvements.

Such being my finding, the question would be whether the plaintiff should be allowed to pay for the improvement and take the entire property, or whether he should be called upon to accept the price of such interest as he possessed in the property. The plaintiff's circumstances are too poor to permit of any purchase by him of the improved property. In the circumstances the lower Court's decision was the only one possible.

The result is that I would dismiss the plaintiff's appeal with costs.

There is no substance in the defendant's appeal. It is concluded, as pointed out by my learned brother, by the finding that

the sale was supported by legal necessity only to the extent of Rs. 425.

I would, therefore, dismiss these appeals with costs.

By the Court.—The appeals are dismissed with costs.

A. N. A.

Appeals dismissed.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1321 OF 1926.

June 22, 1927.

Present :—Mr. Justice Mukerji and Mr. Justice Ashworth.

PEARE MOHAN PRASAD—DECREE-HOLDER—APPELLANT

versus

RAGHUNATH LAL AND ANOTHER

—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Application for execution—Limitation—Payment of decree debt—Time, whether runs from date of payment or date of certification—Contemporaneous certification, effect of.

In applying the provisions of s. 20 of the Limitation Act to an application for execution of a decree, the Executing Court must compute limitation not from the date of payment but from the date of certification of the payment under O. XXI, r. 2 of the Civil Procedure Code. [p. 42, col. 1.]

The certificate under O. XXI, r. 2 (3) of the Code in such a case has always to precede the application for execution and cannot follow it. [p. 41, col. 2; p. 42, col. 1.]

Baij Nath v. Panna Lal (1), followed.

Execution second appeal from a decree of the District Judge, Ghazipur, confirming that of the Munsif, Ballia.

Mr. A. P. Pandey, for the Appellant.

Mr. Shiv Dihal Sinha, for the Respondents.

JUDGMENT.

Mukerji, J.—This is a decree-holder's second appeal against a judgment by which the execution application has been declared as time-barred.

The facts briefly are these :—The decree-holder obtained the decree in question on the 29th of October, 1919. The first application for execution was made on the 18th of March, 1922. The second application was made on the 12th of October, 1925, that is to say, more than three years after the date of the first application. On the face of it, the application would be time-barred. The decree-holder, however, alleg-

ed in the application for execution that between the 14th of May, 1923, and the 22nd of September, 1925, he received several payments towards interest, and his case is that these payments save limitation. The Court refused to execute the decree for want of a certificate of payment on behalf of the decree-holder. Thereupon, on the 14th of October, 1925, the decree-holder made an application certifying the payments. The judgment-debtor appeared (it appears without any notice) and contended that the application for execution was time-barred. As already stated, the Courts below have held that the application was time-barred. In this Court the learned Counsel for the appellant, who has argued the case extremely well, has put forward before us two contentions in support of his appeal. His first contention is that the statement contained in the application for execution, that certain payments towards interest had been received prior to the execution application and on certain specified dates, would serve the purpose of certification, as contemplated by O. XXI, r. 2 (3). His second contention is that, at any rate, his certificate of the 14th of October, 1925, that payments had been received, would be good enough for the purpose of removing the bar imposed by O. XXI, r. 2 (3).

As regards the first point, the learned Counsel has frankly admitted that the trend of rulings in this Court is against him. He has quoted the rulings that are against him and these rulings are all mentioned in the latest ruling on the point, *viz.*, *Baij Nath v. Panna Lal* (1). He has argued that the first case in this Court, *viz.*, *Gokal Chand v. Bhika* (2) does not go entirely against him inasmuch as Knox, J., mentioned it as an important matter, that the factum of payment was not mentioned in the proper column in the execution application. In the cases *Chatter Singh v. Amir Singh* (3) and *Baij Nath v. Panna Lal* (1) the learned Counsel pointed out, the expressions "certified" and "recorded" have been mixed up by the addition of the word "and" in the judgments, while there is the word "or" in the Code itself—Order XXI, r. 2 (3). He has also pointed out that almost all other High Courts have held that a contemporaneous statement as to payment with the

(1) 83 Ind. Cas. 737; 22 A. L. J. 581; 46 A. 635; A. I. B. 1924 All. 706; L. R. 5 A. 348 Civ.

(2) 23 Ind. Cas. 753; 12 A. L. J. 387.

(3) 32 Ind. Cas. 590; 38 A. 204; 14 A. L. J. 132.

application for execution itself is good enough to satisfy the provision of sub-r. (3), r. 2, O. XXI. Civil Procedure Code. He has quoted for his authority the cases of *Eusuffzeman Sarkar v. Sanchia Lal Nahata* (4), *Pandurang Balkrishna Golvankar v. Jagya Bhai Shagat* (5), *Masilamani Mudaliar v. Sethuswami Aiyar* (6) and *Elahi Bux v. Nawab Lall* (7).

Speaking for myself, I am of opinion that the contention of the learned Counsel for the appellant ought to prevail. I would state my reasons very briefly, for I do not propose to decide the point according to the opinion held by me individually. The reason is this that my learned brother is against the view I am just going to propound; and the view I am taking is against the trend of authorities in this Court. In the circumstances, it would not be of much use for me to raise my voice in favour of a new interpretation, although that interpretation has found favour with other Courts. The reasons for my opinion are these. There is a clear distinction between a decree-holder certifying payment and a judgment-debtor alleging payment. Order XXI, r. 2 does not, in itself, deal with any rule of limitation. It says that where a decree-holder has received payment, or a decree has been adjusted, *it is the duty* of the decree-holder to inform the Court of the fact. Then it goes on to say that where a judgment-debtor has made a payment, or there has been an adjustment of a decree, the judgment-debtor is *at liberty* to bring the matter to the notice of the Court and ask the Court to call upon the decree-holder to show cause why such alleged payment or adjustment should not be recorded as certified; that is to say, as certified by the decree-holder. In the first case a certificate by the decree-holder would be a statement against the decree-holder himself; and *prima facie*, there would be some truth in the statement. In the second case a payment alleged by the judgment-debtor is always a statement in his favour, and it would be necessary before making a record of that statement to verify it. The rule, therefore, provided for a notice to

the decree-holder and a decision, if necessary. We need not suppose that the Legislature was blind to the fact that the statement by the decree-holder that he had received payment might, in some cases, be to his own advantage and to the disadvantage of the judgment-debtor. The Legislature did not provide any rule of limitation for the decree-holder to certify, although it did provide for a short period of limitation where the judgment-debtor's application is concerned. It follows that the decree-holder is at liberty to certify the payment at any time he likes. In any case he is at liberty to certify the payment within three years of the payment if Art. 181 of the First Schedule of the Limitation Act applies. That being so, it would be open to the decree-holder to notify to the Court, at any time before he makes his application for execution, that he has received a payment. Now, the question is whether he cannot notify the factum of the payment to the Court simultaneously with his application for execution. Sub-rule (3) of r. 2, O. XXI, says: "A payment..... which has not been certified..... shall not be recognised by any Court executing the decree." The meaning of this would be that when the Court has to consider whether it should recognise an alleged payment, it will have to see whether that payment is certified or not. Where the payment has been alleged in the execution application itself, it would be doing no violence to the language of the law if it be said that the Court, at the time of considering the question, would find that the decree-holder has already certified the payment. I need not point out that in every case of a certificate, how long so ever made before the execution application, if the judgment-debtor contests the allegation of payment, the decree-holder has always to prove it.

For the foregoing reasons I was inclined to accept the appellant's appeal and to allow the appellant an opportunity to prove whether he has actually received the alleged payments towards interest or not; but, as already stated, my voice would be too feeble to be effective and I do not propose to record a dissentient judgment for pure academic purposes.

The second contention of the learned Counsel for the appellant is, in my opinion, untenable. The certificate under the language of sub-r. (3), r. 2, O. XXI has

(4) 34 Ind. Cas. 606; 43 C. 207; 20 O. W. N. 272; 23 I. L. J. 390.

(5) 59 Ind. Cas. 399; 45 B. 91; 22 Bom. L. R. 1120.

(6) 41 Ind. Cas. 701; 41 M. 251; (1917) M. W. N. 502; 3 M. L. J. 219; 22 M. L. T. 115.

(7) 50 Ind. Cas. 364; 4 P. L. J. 159; (1919) Pat. 50.

always to precede the application for execution and cannot follow it.

In the result I would dismiss the appeal with costs.

Ashworth, J.—I concur in the dismissal of the appeals but for different reasons. Section 20 of the Limitation Act enacts that a fresh period of limitation shall be computed from the time when payment of interest on a debt is made. Order XXI, r. 2 (3), Civil Procedure Code, enacts that an uncertified payment shall not be recognised by any Court executing the decree. Reading these two provisions together I hold that an Execution Court must compute limitation from the date not of payment but of certification. To do otherwise would be recognising, to some extent, an uncertified payment. When, then, a decree-holder applies for execution he can only invoke a payment certified before execution became time-barred.

This is the view which has been taken by this High Court in several decisions, though it was not based on the precise reason that I have set forth. As that view accords with reasons commending themselves to me, I see no reasons for departing from the position taken up hitherto by this High Court.

I would, however, point out that this view does not involve the extension of the period of limitation beyond the period prescribed from the date of actual payment. The view contracts the period of limitation by exclusion (at the beginning of such period) of the period between payment and certification but does not lengthen it at the other end.

I would hold, therefore, that both the applications now in question are time-barred.

By the Court.—The appeal is dismissed with costs.

A. N. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No 463 of 1924.

June 7, 1927.

Present.—Mr. Justice Sulaiman and Mr. Justice Banerji.

SALIG RAM MISIR—PLAINTIFF—

APPELLANT

versus

LACHHMAN DAS—DEFENDANT—

RESPONDENT.

Contract Act (IX of 1872), s. 134—Suretyship—

Allowing remedy against principal debtor to become time-barred—Discharge of surety—Execution of decree—Sale set aside—Application for fresh execution—Limitation—Cause of action—Appeal, effect of.

A surety will be discharged where the remedy against the principal debtor is allowed to become barred by time. [p. 45, col. 1.]

Hazari v. Chuni Lal (9), *Radha v. Kinlock* (10), and *Ranjit Singh v. Naubat* (11), followed.

Once it is declared by a Court that a judgment-debtor had no interest in the properties sold, the cause of action for making a fresh application for execution arises in favour of the decree-holder-purchaser and the mere fact that an appeal has been preferred from the decree would not prevent time from running against the decree-holder. [p. 45, col. 2.]

Under the Indian Law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted when the decree is one of dismissal. [*ibid.*]

Hukum Chand Boid v. Pirthichand Lal Chowdhury (12), applied.

Obiter.—Where no application has been made by an auction-purchaser, under O. XXI, r. 91, Civil Procedure Code, for setting aside an auction sale on the ground that the judgment-debtor had no saleable interest, he has no further remedy to claim a refund of the amount by a separate suit. [p. 44, col. 1.]

First appeal from a decree of the Subordinate Judge, Benares.

Dr. K. N. Katju and *Mr. Harmandan Prasad*, for the Appellant.

Messrs. Peary Lal Banerji and *Gopi Nath Kunzru*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit brought by Salig Ram Misir, creditor, to recover the amount due from his principal debtor, the suit being brought against Lachhman Das surety. It appears that on the 28th March, 1912, a mortgage-deed was executed by *Musammatt Tulsa Kunwar* and *Lachhmanji*, respondent, acting for himself and guardian of his minor son *Dauji*, for a sum of Rs. 2,000 under which a house in Benares was mortgaged. The deed stood in the name of *Musammatt Sumitra*, wife of *Saling Ram*, but it is the case of both parties that she was a mere *benamidar*. On the same date a security bond was executed by *Lachhman Das*, the present defendant in the suit, as a surety undertaking that if the amount of the mortgage money was not recovered from the property mortgaged under the deed or from the mortgagors, the mortgagee would be entitled to recover the whole of the amount together with the costs and the damages from the personal property of the surety. Under this bond the surety hypothecated certain immoveable property.

Salig Ram brought a suit on the basis of his mortgage for sale of the house against *Lachhmanji*, *Musammatt Tulsa*

Kunwar and the minor Dauji. A defence was put forward on behalf of the minor son that there was no legal necessity for the mortgage of the house which was ancestral joint property. On the 22nd January, 1916, the Court held in favour of the minor that no legal necessity for the transfer had been established and accordingly declined to enforce the mortgage against the property. As, however, the suit was brought within six years of the mortgage, a simple money decree was passed against the executants *Musammatt Tulsa Kunwar* and *Lachhmanji*. The decree-holder then proceeded to execute the decree by attaching the very house which had been released from the charge. Objections were raised to the attachment by one *Chaturbhuj* to the effect that the house did not belong to *Lachhmanji* at all but belonged to the objector. In support of his claim *Chaturbhuj* produced a sale-deed of the year 1867 standing in his ancestor's name. The objections were summarily dismissed under O. XXI, r. 58. The house was in due course put up for sale and purchased at auction in two lots for Rs. 900 and Rs. 1,250, aggregating Rs. 2,150, by the decree-holder himself. On the 23rd April, 1917, the auction-sale was confirmed and soon after that *Salig Ram* obtained possession of the house. *Chaturbhuj*, on the 1st September, 1917, instituted a suit for declaration of his title and for possession of the house. This claim was contested by *Salig Ram*, but was ultimately decreed on the 31st July, 1918, by the trial Court. *Salig Ram* in the meantime had made certain new constructions and additions to the house and pleaded that he was entitled to some compensation for the improvements. The Court granted a decree conditional on the payment of an amount to represent the cost of the improvements. Two appeals were preferred from this decree. One by *Salig Ram* challenging the finding that the property belonged to *Chaturbhuj* and not *Lachhmanji*, and the other by *Chaturbhuj* challenging the amount of the compensation awarded to *Salig Ram*. These appeals were disposed of on the 4th May, 1921, on which date *Salig Ram's* appeal was dismissed, and the decree of the trial Court declaring *Chaturbhuj's* title and granting him possession was affirmed. The appeal preferred by *Chaturbhuj*, however, was allowed in part and the amount of compensation

was reduced slightly. The result of the first Court's decree was that during the pendency of the appeal, *Salig Ram* was dispossessed from the house on the 26th December, 1918.

We may mention another proceeding which took place in the meantime. *Salig Ram* had executed his decree against *Musammatt Tulsa Kunwar* also and had got attached certain ornaments in the house occupied by her. Objections were raised by *Musammatt Jasoda Kunwar* that the articles attached belonged to her exclusively. The Court ordered that the ornaments should be released on condition that security was furnished of their full value. One *Gopal Mukhia* stood surety and deposited Rs. 1,200 which sum was considered to be the value of the ornaments. The ornaments were allowed to be taken out of Court by *Musammatt Jasoda Kunwar* and Rs. 1,200 deposited as security remained. Ultimately the objection by *Musammatt Jasoda Kunwar* was dismissed summarily and she brought a suit for a declaration that the ornaments actually belonged to her. While this suit was pending, the house was sold in March, 1917, in execution of the simple money decree, in favour of *Salig Ram*. After the execution case had been struck off and the decree satisfied on full payment, *Musammatt Jasoda Kunwar* applied to the Court for permission to withdraw the suit on the ground that it was not necessary to proceed with it. The Court allowed her to withdraw the suit. Later on the surety *Gopal Mukhia* was allowed to take away the amount of Rs. 1,200 lying in deposit with the Court apparently on the ground that the decree in favour of *Salig Ram* had been fully satisfied.

After having been dispossessed from the house in execution of the decree in favour of *Chaturbhuj*, *Salig Ram* took no further steps against his principal debtors *Lachhmanji* and *Musammatt Tulsa Kunwar*. He did not for instance try to revive the execution proceedings or to execute the decree by arrest of the person of the judgment-debtors or by attachment of their properties. He also does not appear to have requested the Court not to allow the sum of Rs. 1,200 to be taken away until the period of one year allowed to *Chaturbhuj* to bring the suit had expired. He also did not file any application under s. 47 of the Civil Procedure Code.

What he did was that he instituted the

present suit which was filed on the 29th January, 1924, against the surety Lachhman Das only. The principal judgment-debtors are not even parties to the present suit.

The claim was contested by Lachhman Das who pleaded that the remedy against the principal debtors had been exhausted and no claim lay against him. There was a further plea that in consequence of several acts and omissions committed by Salig Ram the surety has been discharged. The learned Subordinate Judge has acceded to the contention of the defendants and has dismissed the suit. Hence this appeal. The first point for consideration is whether the plaintiff, Salig Ram, having got his decree satisfied by purchase of the house is entitled to re-open the matter and to assert that there has in fact been no satisfaction because the property purchased by him has ultimately gone out of his possession. It is clear on the authorities that if the purchase had been made by a stranger and no application by him had been preferred for setting aside the sale under O. XXI, r. 91 on the ground that the judgment-debtor had no saleable interest, he would have no further remedy by a separate suit to claim a refund of the amount paid by him as purchase-money from the decree-holder. This was the view expressed by this Court in two cases, namely, *Nannu Lal v. Bhagwan Das* (1) and *Ram Sarup v. Dalpat Rai* (2) the last case having been decided by a Bench of which one of us was a member. After some conflict of opinion in the other High Courts, all the High Courts in India have now come to the conclusion that no such separate remedy is available to an auction-purchaser. We may only refer to the following cases, namely, *Habib-ud-din v. Hatim Mirza* (3), *Jurani Mohammad v. Jathi Mohammad* (4), *Balwant Rangnath v. Bala Malu* (5), *Tirumalaisami Naidu v. Subramanian Ghattiar* (6) and *Ram Dayal v. Rampal Singh* (7). The basis of the decision is that at an auction the purchaser acquires the rights and interests of the judgment-debtor there being no warranty of title at all at

(1) 37 Ind. Cas. 9; 39 A. 114; 14 A. L. J. 1216.

(2) 58 Ind. Cas. 105; 43 A. 60; 18 A. L. J. 905; 2 U. P. L. R. (A.) 318.

(3) 86 Ind. Cas. 622; 6 Lah. 283; 1 Lah. Cas. 552; A. L. R. 1925 Lah. 467.

(4) 46 Ind. Cas. 783; 22 C. W. N. 760.

(5) 67 Ind. Cas. 360; 46 B. 833; 24 Bom. L. R. 808; A. I. R. 1922 Bom. 205.

(6) 45 Ind. Cas. 109; 40 M. 1009.

(7) 51 Ind. Cas. 95; 22 O. C. 42; 6 O. L. J. 160.

a compulsory sale. Thus if the house had been purchased by a third party he would not have been entitled to get back the purchase-money on the ground that Chaturbhuj in a subsequent suit had been dispossessed. Of course in such a case the purchase-money would have been retained by the decree-holder himself.

The question before us is whether the decree-holder who purchased the property himself is in a better position than an innocent third party. It is the decree-holder himself who took the mortgage of the house and when the charge failed attached the property and put it for sale. It was he himself who purchased it in spite of the fact that objections were raised by Chaturbhuj that the property had belonged to him and had been acquired by him under the sale-deed of 1867. The question is whether Salig Ram can even after the confirmation of the sale apply under s. 47 of the Code and claim that the decree has nevertheless not been satisfied. The only case on this point which has been cited by Counsel before us is the case of *U Paw v. N. R. M. A. Chetty* (8), which strongly supports the contention of the respondent that even the decree-holder purchaser is debarred from going behind the confirmation of the sale. In this case, however, we do not feel that we are called upon to decide this point finally, as we are of opinion that the suit must fail on a different ground.

Under s. 134 of the Indian Contract Act, a surety is discharged by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. So far as this High Court is concerned, it is now well settled that if the remedy of the creditor against the principal debtor is allowed to become barred by time, the surety is deemed to have been discharged. No doubt the other High Courts have taken a contrary view but we are bound to follow our own rulings unless overruled by their Lordships of the Privy Council. We may further note that the words in s. 134 are not that by any act or omission by the creditor the debt became extinguished. The words are that the "legal consequence of which is a discharge of the principal debtor". The view taken by this Court is that when the remedy against the principal debtor is barred by time and ceases to be enforceable, the legal consequence of this circumstance is that

(8) 61 Ind. Cas. 805; 13 Bur. L. T. 152.

the principal debtor is discharged. If the surety were still liable to pay the amount, he would in his turn be entitled to proceed against the debtor and recover the amount from him even after limitation has set in. We may only refer to the cases of this Court *Hazari v. Chunni Lal* (9), *Radha v. Kinlock* (10), and *Ranjit Singh v. Naubat* (11). The point has been discussed at considerable length in these cases and it is not necessary for us to go into it in any detail. It must be taken that if Salig Ram allowed his remedies to become barred as against Lachhmanji and Musammal Tulsa, it is no longer open to him to proceed against the surety.

The point that now remains to be considered is whether Salig Ram's remedies against Musammal Tulsa were barred on the 29th January, 1924, when the plaintiff's suit was instituted. The learned Advocate for the appellant has contended that after dispossession the remedy open to Salig Ram was to revive the execution proceedings inasmuch as the auction-sale had been automatically set aside and that under s. 47, Civil Procedure Code, he was entitled to proceed against the judgment-debtors, and on the ground that the decree had not been in fact satisfied. If an application of this nature could be maintained, it would, however, be an application for execution of the decree which would be governed by Art. 182 of the Limitation Act, or by an application for revival of execution proceedings which would be governed by the general Art. 181 of the Act. In either case, the right to apply would accrue on the 31st July, 1918 when the suit was decreed by the Court of first instance and in any case on 26th December, 1918, when Salig Ram was actually dispossessed. The mere fact that an appeal from the first Court's decree preferred by Salig Ram himself was pending in the High Court and was ultimately dismissed, would not prevent the first Court's decree from being operative. Once it had been declared by the first Court that his judgment-debtor had no saleable interest, the cause of action for making the application certainly arose in favour of Salig Ram. Once time began to run it could not be suspended. As authority for this proposition we may refer to the case of *Hukum Chand Boid v. Pirthichand Lal* (9) 8 A. 259; A. W. N. (1886) 75; 5 Ind. Dec. (N. S.) 51. (10) 11 A. 310; A. W. N. (1889) 94; 6 Ind. Dec. (N. S.) 625.

(11) 21 A. 504; A. W. N. (1902) 166.

Chowdhury (12), decided by their Lordships of the Privy Council. At page 514* their Lordships observed that "under the Indian Law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal" and that the cause of action arises on the passing of the first Court's decree and is not suspended till that decree is finally affirmed on appeal. It has been urged on behalf of the appellant that inasmuch as the appeal preferred by Chaturbhuj was allowed in part, the decree of the first Court was modified and the case, decided by their Lordships of the Privy Council is distinguishable. We, however, think that the two appeals stood on a different footing. In Bhaturbhuj's appeal no question of the validity of the decree as regards title was at all raised. He was only challenging the amount of the compensation awarded. The question of title was raised in the appeal preferred by Salig Ram and the case is, therefore, very much similar to the present case. The present suit was not filed till more than three years after the first Court's decree and even after the delivery of possession to Chaturbhuj. We must, therefore, hold that the remedies of the creditors, if any, had become barred by time when the present suit was filed. In view of the authorities of this Court the plaintiff has disqualified himself from seeking any relief against Lachhman Das. The result, therefore, is that this appeal must be dismissed with costs.

A. N. A.

Appeal dismissed.

(12) 50 Ind. Cas. 444; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 46 O. 670; 26 M. L. J. 131; 10 L. W. 416; 46 I. A. 52 (P. O.).

*Page of 17 A. L. J.—[Ed.]

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 206 OF 1924.

May 23, 1927.

Present:—Mr. Justice Sulaiman and
Mr. Justice Banerji.

RUP KISHOR—PLAINTIFF—APPELLANT
versus

PATRANI AND OTHERS—DEFENDANTS—
RESPONDENTS.

Evidence Act (I of 1872), s. 32 (5)—Statement post litem motam, admissibility of—Question in issue raised in previous litigation, whether admissible—Limitation Act (IX of 1908), Sch. I, Art. 141—Starting point of limitation—Subsequent disability, effect of.

The words 'before the question in issue was raised' in s. 32 (5) of the Evidence Act do not necessarily mean before it was raised in the particular litigation

in which such statement is sought to be adduced in evidence. A statement which was made after the question had been raised in a previous litigation is inadmissible in evidence in a subsequent suit even though it was made before the question was raised in the latter suit. [p. 47, col. 1.]

Kalka Prasad v. Mathura Prasad (3) and *Bahadur Singh v. Mohar Singh* (4), followed.

The cause of action for a suit by a Hindu reversioner for possession of an estate on the death of a Hindu female arises under Art. 141 of the Limitation Act on the death of the widow and once limitation has begun to run under the section no subsequent disability can stop it. [p. 48, cols. 1 & 2.]

First appeal from a decree of the Subordinate Judge, Shahjahanpur.

Mr. N. P. Asthana, for the Appellant.

Mr. Peary Lal Banerji, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for recovery of possession of a share in villages Lilhar and Karanpur Pindri, by avoidance of a deed of relinquishment and a deed of transfer, dated the 7th of May, 1911, executed on behalf of the plaintiff, when he was a minor, by his natural father, Damodar Das.

The plaintiff's case briefly put is as follows:—Brij Kishor was the original owner of this property and had no child. Shortly before his death he gave an oral permission to his wife, *Musammatt Durga Dei*, to adopt a son, and then died in 1878. In 1905 *Musammatt Durga Dei*, acting on this permission, adopted the plaintiff, and a deed of adoption was duly executed by her on the 11th March, 1905. The plaintiff alleged that in a suit brought by Jivan Das and others, claiming to be the collaterals of Brij Kishor against the present plaintiff Rup Kishor, a compromise was arrived at under which the estate was divided in the ratio of 6 annas and 10 annas between the claimants and the present plaintiff, and a *tamliknama*, dated the 10th August, 1906, was duly executed by the parties concerned. He then goes on to allege that a suit was brought by Kishan Chand claiming to be the *bandhu* of the deceased son against the collaterals of the present plaintiff, which was ultimately struck off on a compromise having been arrived at by the parties to that suit. In that suit the plaintiff was represented by his natural father, Damodar Das, who signed a deed of relinquishment and a deed of transfer, acting as the plaintiff's guardian. Under this deed the plaintiff relinquished all rights so far as the villages Lilhar and Karanpur Pindri were concerned. We may note in this connec-

tion that these villages had been recovered by Kishan Chand from the transferee of *Musammatt Durga Dei* by a separate suit in 1908 to which the present plaintiff was not a party. Kishan Chand had then succeeded as against the transferee in proving that he was the next heir of the last male owner. These villages were not in dispute in the suit brought by Kishan Chand in 1910 against the present plaintiff but were dealt with by the deeds of relinquishment and transfer mentioned above. The plaintiff's case is that these deeds are in no way binding upon him, inasmuch as they were executed without the sanction of the Court, and his natural guardian had no authority to bind him.

The contesting defendants are Kishan Chand's widow and her transferees. They deny that there was any permission given by Brij Kishor to adopt. The factum of adoption, however, is not disputed before us and is proved by overwhelming evidence. They further plead that the present claim is barred by limitation.

The learned Subordinate Judge has dismissed the suit; hence this appeal.

It may perhaps be difficult to support the finding that the plaintiff is bound by the compromise effected by his natural father Damodar Das. We however do not think it necessary to go into this question in detail because the appeal must fail on other grounds.

We take up first the question of the oral permission to adopt. This is said to have been given in 1878, and was certainly not acted upon for nearly 27 years. The burden, therefore, lies heavily on the plaintiff to establish that such an oral permission had actually been given.

There is now no oral evidence available of witnesses who could testify to the permission having been given in their presence. The plaintiff relies on certain documentary evidence in support of his case.

Reliance is placed on the deposition of *Musammatt Durga Dei*, dated the 20th May, 1905, in Suit No. 2 of 1905 brought by Jivan Das and others to contest the adoption. It is obvious that the dispute had then clearly arisen between the alleged reversioners and the widow and her alleged adopted son, and any statement made by *Musammatt Durga Dei* in the course of that litigation cannot be used in evidence against Kishan Chand and his representatives, who were no parties to that suit.

Section 32, sub-cl. (5) would be inapplicable as the statement was made after the dispute had arisen. Section 33 cannot apply inasmuch as the present defendants had no opportunity to cross-examine *Musammât Durga Dei*.

Reliance is next placed on the statement of two witnesses, Kewal Kishan and Kundan, who were examined in another Suit No. 202 of 1906, brought by the plaintiff Rup Kishor against a third party Batuk Nath Sircar. To this suit also the present defendants were no parties. Batuk Nath Sircar denied the adoption of Rup Kishor and some evidence was led on the question. The case, however, was ultimately compromised. In our opinion the depositions of these witnesses are not admissible against Kishan and his representatives. Section 32, sub-cl. (5) cannot apply because the dispute had arisen previously and also arose in that particular case. Section 33 is not applicable because the present defendants had no opportunity to cross-examine these witnesses.

There is a third ground on which also these depositions are not admissible. In their statements the witnesses, Kewal Kishan and Kundan, merely tried to prove the oral permission given by Brij Kishor to his wife and did not say a word as to the adoption of Rup Kishor. Their statements, therefore, did not relate to the existence of any relationship by adoption inasmuch as they did not state that Rup Kishor was the adopted son of *Musammât Durga Dei*.

A question of law has been raised by the learned Advocate for the appellant in respect of these three depositions. His contention is that s. 32, sub-cl. (5) becomes applicable when the statement was made before the question in issue was raised which according to his contention means before the commencement of the present litigation. For this view he relies on the head-note* in the case of *Mauladad Khan v. Abdul Sattar* (1), which says that the statement to be admissible must be before the litigation in the present case arose. That head-note*, in our opinion, is misleading. The learned Judges in their judgment at page 358† had used a different language, namely, that the plaintiff contained a statement made before the question in dispute in the present suit was raised.

(1) 39 Ind. Cas. 666; 15 A. L. J. 349 at p. 350; 39 A. 426.

*Head-note of 15 A. L. J.—[Ed.]

†Page of 15 A. L. J.—[Ed.]

The plaintiff which was referred to in that case had been filed before any dispute had arisen. The head-note of the same case, as reported in *Ram Charan Sahu v. Goga* (2), does not contain any such passage. The point, in our opinion, is concluded by the case decided by their Lordships of the Privy Council, viz., *Kalka Prasad v. Mathura Prasad* (3). In this case a dispute arose in 1896 on the death of *Musammât Parbati*. In 1898 in a suit brought by one Sheo Sahai a pedigree was filed. After this the suit, which went up in appeal to their Lordships of the Privy Council, was filed in 1901. At page 522* their Lordships held that the pedigree filed in 1898 was inadmissible having been made *post litem motam*. We may also refer to another case decided by their Lordships of the Privy Council, *Bahadur Singh v. Mohar Singh* (4), where statements made in 1847 were held to be admissible on the ground that it did not appear that the heirship of the then claimants was really in dispute at that time. No such point could have arisen for consideration if the statements made prior to the suit before their Lordships were automatically admissible. We must, therefore, exclude from consideration the depositions of *Musammât Durga Dei*, Kewal Kishan and Kundan.

The last piece of evidence relied upon is the deed of adoption executed by *Musammât Durga Dei*. It does undoubtedly contain a recital that she had the permission from her deceased husband. In ordinary circumstances a recital of this kind made by the widow may be of some weight. There are, however, circumstances which, in our opinion, destroy its value. In the first place, as soon as this deed was executed, the reversioners challenged the statements and actually brought a Suit No. 2 of 1905, followed by another Suit No. 14 of 1906. In the second place, the recital in the document is not consistent with the statement of *Musammât Durga Dei* when made in the reversioners' suit. In the deed she had alleged that the permission was given to her four days before Brij Kishor's death. In her deposition, on the other hand, she alleged that

(2) 102 Ind. Cas. 96; 25 A. L. J. 425; A. I. R. 1927 All. 446; 49 A. 565.

(3) 1 Ind. Cas. 175; 30 A. 510; 13 C. W. N. 1; 18 M. L. J. 42; 4 M. L. T. 380; 10 Bom. L. R. 1088; 8 C. L. J. 447; 5 A. L. J. 701; 11 O. C. 362; 35 I. A. 166 (P. C.).

(4) 24 A. 94; 29 I. A. 1; 6 C. W. N. 169; 12 M. L. J. 56; 4 Bom. L. R. 233; 8 Sar. P. O. J. 152 (P. C.).

*Page of 30 A.—[Ed.]

the direction to adopt was given at the time of his death—in fact when the husband was at the point of death and had been brought downstairs and that he died an hour and a half after giving this direction. It is, therefore, apparent that *Musammatt Durga Dei* herself was not consistent in her statements. We, therefore, decline to accept the recital in the deed of adoption as any satisfactory evidence of the truth of the statement.

There is no other evidence in support of this alleged permission, and in the absence of any satisfactory evidence we must uphold the finding of the Court below that no such permission has been proved. The result, therefore, is that the plaintiff's claim as the adopted son of Brij Kishor falls to the ground.

In para. 4 of the plaint the plaintiff had set forth the particulars of the compromise and the *tamliknāma* between himself and the reversioners, Jivan Das and others. Although he did not expressly base his claim on a title derived from these reversioners, he claimed only a $\frac{10}{16}$ share which was given to him under that compromise. The learned Advocate for the plaintiff, therefore, contends that even independently of his claim as the adopted son, the plaintiff is entitled to recover this property as a representative of the reversioners Jivan Das and others, and that if Kishan Chand is not an heir, the plaintiff can succeed against Kishan Chand's representatives on the strength of an assignment from the reversioners Jivan Das and others.

But before succeeding on this second ground the plaintiff will have to show that his claim on such a new case is within time, and that Jivan Das and others were in fact the next heirs of the deceased.

Musammatt Durga Dei died on the 8th of June, 1905. The present suit was instituted more than 12 years from her death. The claim by the plaintiff, as a representative of the reversioners Jivan Das and others, would fall under Art. 141 of the Indian Limitation Act, being a suit by a Hindu entitled to the possession of an immoveable property on the death of a Hindu female. *Prima facie* the suit was filed beyond time. Under O. VII, r. 6 the plaintiff ought to have shown the ground upon which exemption from the Law of Limitation was claimed. Time began to run against Jivan Das and

others as soon as *Musammatt Durga Dei* died in 1905. Once time began to run there could be no suspension. Section 9 of the Indian Limitation Act prescribes that once time has begun to run, no subsequent disability or inability to sue stops it. The present plaintiffs, therefore, cannot take advantage of his minority so far as this question of limitation is concerned. It was the duty of the plaintiff or his predecessors Jivan Das and others to have instituted the suit within 12 years of the death of the widow. We have already remarked that in the previous litigation, to which the present plaintiff was a party, the villages Lilhar and Karanpur Pindri were not the subject-matter of dispute at all. Kishan Chand only brought a suit to recover these from the transferee of *Musammatt Durga Dei*, and Kishan Chand and his representatives have been in possession all along. Even when the compromise of the 7th of May, 1911, was arrived at, Kishan Chand's right to retain possession of these villages was not challenged. There was in fact no acknowledgment by Kishan Chand of any title of the plaintiff with regard to these properties. The present claim for recovery of these villages, therefore, must be held to be barred by time.

The learned Advocate for the plaintiff contends that in view of the compromise effected in 1911 the running of limitation must be deemed to have remained suspended till the plaintiff was able to institute the present suit to set aside that compromise. In our opinion it is impossible to hold that there was any such suspension at any time or that the Court ever recognised the right of Rup Kishor or his predecessor to get these villages as against Kishan Chand. It cannot, therefore, be suggested that Rup Kishor having got what he wanted, it was not incumbent upon him to bring a suit. This question has been considered at some length in the case of *Ram Charan Sahu v. Goga* (2), and it is, therefore, not necessary for us to discuss the point at any length. We hold that the present claim is barred by limitation.

In view of our finding that the claim is barred by limitation it is not necessary to go into the question of Jivan Das' pedigree, which the Court below has found not proved.

The appeal is accordingly dismissed with costs.

A. N. A.

Appeal dismissed.

BOMBAY HIGH COURT.CIVIL REVISION APPLICATION No. 293
OF 1926 AND

FIRST APPEAL No. 311 OF 1926.

August 12, 1927.

Present:—Sir Amberson Marten, Kt.,
Chief Justice, and Mr. Justice Crump.
NATHABHAI DEVIDAS AND OTHERS—
TRUSTEES—OPPONENTS—APPELLANTS IN
F. A. No. 311 OF 1926.

versus

VAGHJIBHAI JHAVERBHAI AND
OTHERS—APPLICANTS—RESPONDENTS.

Trusts Act (II of 1882), ss. 73, 74—Application for removal of trustee—Proper procedure—Guardians and Wards Act (VIII of 1890), ss. 7 (3), 39, 41—Testamentary guardian, removal of.

A person who is not the beneficiary has no right to apply for removal of a trustee under s. 74 of the Trusts Act. [p. 49, col. 2.]

An application for removal of a trustee should be brought by a suit, and where it is alleged that the trustees have committed a breach of trust, the suit should pray that the delinquent trustees should make good their breach of trust. Such a suit should further normally ask for the administration of the trust estate by the Court. [*ibid.*]

A Court should not appoint a fresh guardian in place of a testamentary guardian under s. 7 of the Guardians and Wards Act until the powers of the latter have ceased under the provisions of the Act. [p. 50, col. 1.]

Application against an order of the District Judge, Kaira, in Miscellaneous Application No. 25 of 1926.

First Appeal against an order of the District Judge, Kaira, in Miscellaneous Application No. 7 of 1926.

Messrs. G. N. Thakor (with him Mr. U. L. Shah), for the Applicants.

JUDGMENT.—In this matter the learned District Judge on a petition under the Indian Trusts Act, 1882, has purported to remove from their office the trustees appointed by the Will of the father of the minor. This he has done on a petition presented not by the next friend of the minor but by his uncle Vaghjibhai. As the learned Judge in his judgment puts it, although the application refers to other sections of the Indian Trusts Act, *viz.*, 72 and 74, yet it is really founded on s. 73 on the ground that the trustees have become unfit to act in the trust.

The view generally adopted in the English Courts is that those words imply something in the nature of personal incapacity like, for instance, paralysis or personal unfitness which in many cases has been held to apply to insolvency. In this particular section insolvency has been provided for,

But whatever the true construction of the words "unfit or personally incapable" in s. 73 may be, one has also to see who are the new trustees to be appointed by. This section provides that the appointment may be made (a) by the person nominated for that purpose by the trust instrument. There is no such person in the present case. Then (b), if there be no such person, the author of the trust, if alive, may appoint. But the author of this trust is dead. Then we come to the "surviving or continuing trustees for the time being." But the present appointment has not been made by them. So stopping there s. 73 could not apply. The old trustees obviously have not removed themselves.

Next, if one turns to s. 74: "Whenever any such vacancy or disqualification occurs and it is found impracticable to appoint a new trustee under s. 73, the beneficiary may, without instituting a suit, apply by petition." But the present petition is not by any beneficiary, but by the uncle Vaghjibhai on his own account. He is not, however, even mentioned in the Will of the minor's father. Under these circumstances the Court had no jurisdiction to grant the relief asked for on the petition of the present petitioner. And so on that ground alone this order of the learned Judge must be set aside.

But I wish to put the matter on rather broader grounds by way of warning. Speaking generally, applications for the removal of a trustee should undoubtedly be brought by a suit. And where, as here, it is alleged that the trustees have committed a breach of trust, that suit should ask for the delinquent trustees to make good the breach of trust. Further, the suit should normally ask for the administration of the trust estate by the Court. Nothing of that has been done here. All that has been done is to appoint the Deputy Nazir the sole trustee, because the Court finds that the petitioner himself is not to be trusted as he is a man who has his own axe to grind, so the Court says.

I may refer to Lewin on Trusts, 9th Edition, page 1166: "If there be ground for removing a trustee for misconduct or other cause, the application to the Court should be by suit." Similarly if one looks at Seton, Vol. II, 6th Edition, page 1224, it is stated: "There is no jurisdiction under the Trustees Act to remove a trustee for misconduct." Reference is there made to certain authorities.

If, on the other hand, a suit was brought

here to remove the trustees, that could be brought by the uncle acting as the next friend of the infant. And if it was alleged that specific breaches of trust had been committed, then those could be inquired into in the ordinary way on oral evidence and not on affidavit evidence without any cross-examination—the course that has been adopted by the learned Judge in the present case.

Next turning to First Appeal No. 311 of 1926, the learned Judge there has, under the Guardians and Wards Act, appointed the mother to be the guardian of the person, and the Deputy Nazir to be the guardian of the property of the infant. Now s. 7 is the ordinary section giving the Court power to make an order as to the appointment of a guardian of the person or property of a minor, if it is satisfied that it is for the welfare of the minor that an order should be made. But sub-s. (3) provides: "Where a guardian has been appointed by Will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act." Then if one turns to s. 39 or s. 41, the Court has power on the application of any person interested, or of its own motion, to remove a guardian.

Here the guardianship must not be muddled up with the trust. Under the Will the trustees were given definite powers of management, and to apply the property for the education, amongst other things, of the minor, and to hand it over to him when he attained his majority. Therefore, in one sense if the trustees are not removed from their office, there is little for the guardian of the property to do and no adequate reason for his appointment. Technically the guardian of the property on being appointed could only receive such income as the trustees under the Will allotted for the education and maintenance of the minor, and could then personally apply it for such purposes.

But the ground on which the learned Judge has made his order is that he has removed the trustees from their office as trustees under the other application. We have already pointed out that that order cannot be upheld. Consequently the grounds on which the learned Judge appointed a guardian of the property cannot

be supported. The mother opposes the present application, and under the circumstances and on the materials at present before us we do not think an order should be made either appointing a guardian of the person or a guardian of the property.

This, of course, will not prevent a guardianship order being made on some other application at some future date on proper materials before the Court. We only determine the present matter on the present materials. In our opinion this order of the learned Judge must be discharged.

As regards costs, we think the uncle must bear the costs throughout of both applications. The learned Judge in the Court below seems to have doubted his *bona fides*, and under these circumstances we see no reason why the infant should be saddled with the costs of these irregular applications.

Therefore, in Civil Revision Application No. 293 of 1926, the Rule is to be absolute. Order discharged. Vaghjibhai to pay the costs throughout. In First Appeal No. 311 of 1926 appeal allowed. Order of the lower Court discharged. Vaghjibhai to pay the costs throughout. In Stay Application No. 748 of 1916 Rule made absolute. Order discharged.

A. N. A.

Rule made absolute;
Appeal allowed.

BOMBAY HIGH COURT.

APPEAL FROM ORDER NO. 55 OF 1926.

July 22, 1927.

Present:—Sir Amberson Marten, Kt.,
Chief Justice, and Mr. Justice Crump.

KUNVERSI RATANSI PATEL—

—APPELLANT

versus

PITAMBERDAS RAMDAS AND OTHERS

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XLIII, r. (1) (w); O. XLVII, r. 7—Order granting review—Appeal—Grounds for appeal—Interference in revision.

An appeal from an order granting a review is

governed in the Bombay Presidency by the provisions of O. XLVII, r. 7 of the Code of Civil Procedure and not by O. XLIII, r. (1) (w) of the Code, inasmuch as the latter provision has been deleted from the Code by the Bombay High Court in exercise of its powers under s. 122 of the Code.

Daso Keshav Panchbhavi v. Karbasappa Kariyappa Mudhol (1), dissented from.

It is inexpedient to interfere with an order which is not appealable by having recourse to the exceptional powers under s. 115 of the Civil Procedure Code.

Appeal against an order of the Joint First Class Subordinate Judge at Ahmedabad, in Suit No. 1312 of 1925.

Mr. Amin (with him Mr. N. P. Desai), for the Appellant.

Mr. P. B. Shingne, for the Respondents.

JUDGMENT.—This is an appeal against an order by the First Class Subordinate Judge at Ahmedabad granting a review of a judgment. The facts shortly are that on July 23, 1926, the Court upon the evidence came to the conclusion that the defendants in the suit were not agriculturists. There was then an application to review that decision, and the Court granted that application on the ground that there was a mistake or error apparent on the face of the record. Though other grounds were suggested in the application, it is plain that it was on that ground alone that a review was allowed. From that order an appeal is made to us, and a point arises whether any such appeal lies or not.

The appellant's Counsel bases his right of appeal on O. XLIII, r. 1 cl. (w), but it has unfortunately escaped the attention of the Bar that that clause of O. XLIII, r. 1, has been deleted by a rule made by this High Court in exercise of the powers conferred by s. 122 of the Code of Civil Procedure. That rule was published in the *Bombay Government Gazette* on March 11, 1926, and must be taken to have been in force at least from that date. Therefore, O. XLIII, r. 1, cl. (w), cannot help the appellant, and the decision of this Court in *Daso Keshav Panchbhavi v. Karbasappa Kariyappa Mudhol* (1) can no longer be supported on the grounds on which it was based.

We must fall back, therefore, on the provisions of O. XLVII and any appeal against the order granting review must be conditioned by the provisions of that Order. Rule 7 of that Order lays down three cases and three only in which an

appeal is available, and it does not appear that the present matter falls under any one of these three cases. The first deals with contravention of r. 2 which lays down to whom applications for review are to be made. Clearly that does not apply here as the review was granted by the Judge who himself made the previous order. The second case is where there has been a contravention of r. 4. That rule requires that there shall be previous notice to the opposite party and that where the application is granted on the ground of discovery of new matter or evidence there shall be strict proof that such new matter or evidence was not within the power or knowledge of the party who seeks to rely upon it. That has no application here. The third case is where the application for review has been granted after the expiry of the period of limitation, and that too clearly does not apply in the case before us. It thus appears that no appeal lies in the present matter, and whatever view we may take as to the proceedings of the learned Subordinate Judge, they cannot be challenged before us in the form of an appeal.

We have been asked to deal with this matter as coming under s. 115 of the Code of Civil Procedure. No doubt, we have a wide discretion in such cases, but it might be doubted whether this is a decided case within the meaning of that section. And apart from that we do not think that it is a matter in which we should interfere. The finding as to the status of an agriculturist is not appealable in itself, and that being so, it would be, we think, inexpedient to interfere with an order which is not appealable [see *Rupchand Ganesh Shet v. Bhogilal Ratanchand* (2)], by having recourse to our exceptional powers under s. 115. The appellant will have an opportunity to raise the question of status should he find it expedient to appeal against the final decree. For these reasons the appeal must be dismissed with costs.

A. N. A.

Appeal dismissed.

(2) 94 Ind. Cas. 72; 28 Bom. L. R. 307; A. I. R. 1926 Bom. 237.

(1) 94 Ind. Cas. 591; 27 Bom. L. R. 1446; A. I. R. 1926 Bom. 121.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 800 OF 1923.

August 23, 1927.

Present:—Sir Amberson Marten, Kt.,
Chief Justice, and Mr. Justice Crump.

BHAILAL NATHABHAI—DEFENDANT—

APPELLANT

versus

KALANSANG GULABSANG—

PLAINTIFF—RESPONDENT.

Adverse possession—Landlord and tenant—Unsuccessful plea of permanent tenancy—Possession for twelve years thereafter—Acquisition of permanent tenancy.

A person who is in fact in possession as an annual tenant cannot by the mere unsuccessful assertion of a permanent tenancy in a judicial proceeding and the lapse of twelve years without that assertion having been challenged by the landlord obtain a title to permanent tenancy by adverse possession. [p. 53, col. 2.]

Mohammad Mumtaz Ali Khan v. Mohan Singh (3), followed.

Budesab v. Hanmantha (1) and Fatehsingji v. Bamanji (2), distinguished.

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 183 of 1923, varying the decree of the Subordinate Judge at Kaira, in Civil Suit No. 203 of 1921.

Mr. G. N. Thakor (with him Mr. R. J. Thakor for Mr. M. K. Thakor), for the Appellant.

Mr. H. C. Koyajee (with him Mr. P. N. Desai), for the Respondent.

JUDGMENT.

Crump, J.—The material portion of the judgment is as follows:—I now turn to the second question which has been raised in this case, and that is that even though the defendants may have been at one time annual tenants, they have by adverse possession acquired the rights of permanent tenants. The argument proceeds thus. Before the suit in the *Mamlatdar's* Court in 1898 the defendants asserted their right to hold as permanent tenants. True those rights were not allowed in those judicial proceedings, but the assertion of those rights made it necessary for the plaintiffs to take some action to assert their title and they did not do so, the possession being adverse for twelve years, ripened into a title by prescription. Now, here again, the first answer is to be found in the judgment of the lower Appellate Court. It is significant, as I have said before, that the appellant's Counsel can point to no assertion of adverse title of this nature after the decision in the *Mamlatdar's* Court, and the Judge has held upon the facts,

though he expresses his conclusion in somewhat different language, that the inference really is that the defendants agreed to continue in possession as annual tenants after these decisions by the *Mamlatdar* for possession. If that is so, there is, of course, an end of the matter, and here again that is a conclusion which it was open to the Judge to draw upon the evidence in the case, and one, therefore, which cannot properly be challenged in second appeal.

But even supposing that was not so, though, no doubt, there are decisions of this Court in *Budesab v. Hanmantha* (1) and *Fatehsingji v. Bamanji* (2), that a limited interest can be acquired by adverse possession, it will be seen that the facts upon which at least the former of these cases proceeds are very different from the facts now before us. There the tenant successfully resisted an attempt by the landlord to oust him pleading a permanent tenancy. And it was held, that being so, adverse possession for twelve years of the limited interest thereby set up was sufficient to confer upon the defendant the character which he claimed. But we have not got here facts resembling those. Here there was no successful resistance by the tenants of a claim to recover possession. The matter was the precise contrary. The plaintiffs succeeded, and though the defendants did remain in possession it is not shown that they remained in possession in assertion of an adverse title. For no such assertion is proved after the date of the decision in that case. As for the second case, *Fatehsingji v. Bamanji* (2), the facts there were of a special and peculiar nature, and can certainly not form a precedent for the present case.

Further with reference to these cases and with reference to the general question it is important to bear in mind the remarks of their Lordships of the Privy Council in *Mohammed Mumtaz Ali Khan v. Mohan Singh* (3). Their Lordships say at page 208* of the report:—

"The Board are unable to hold that the simple assertion of a proprietary right in

(1) 21 B. 509; 11 Ind. Dec. (N. S.) 341.

(2) 27 B. 515; 5 Bom. L. R. 274.

(3) 74 Ind. Cas. 476; 50 I. A. 202; A. I. R. 1923 P. C. 118; 21 A. L. J. 757; 45 A. 419; 26 O. C. 231; 45 M. L. J. 623; 9 O. & A. L. R. 901; 10 O. L. J. 383; 19 L. W. 283; 39 C. L. J. 295; 28 C. W. N. 840; 33 M. L. T. 321 (P. C.).

*Page of 50 I. A.—[Ed.]

a judicial proceeding connected with the land in dispute which *ex hypothesi* was unfounded at the date when it was made, can, by the mere lapse of six or twelve years, convert what was an occupancy or tenant title into that of an under-proprietor. It is true that the defendant might, if he had chosen, have at once instituted proceedings for a declaratory decree that the plaintiff was not an under-proprietor, but such a course was equally open to the plaintiff. Each party had had his supposed rights judicially challenged by the other, the plaintiff by the notice of ejectment, of which he had obtained cancellation, the defendant by the assertion in the proceedings for cancellation of the notice for ejectment that he was not liable to be ejected because of his rights as under-proprietor."

That is very much the case which we have here. Then further on they say (page 209*):—

"They (the Board) are unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. Such a judgment might have very far-reaching results and would almost certainly lead to a flood of litigation."

Those remarks are pertinent to the present case, and were affirmed by their Lordships of the Privy Council in *Madhavrao Waman Saundalgekar v. Raghunath Venkatesh Deshpande* (4). In that case their Lordships say (page 264*):—

"The defence of 12 years' adverse possession as permanent tenants is set up by persons who, and their predecessors-in-title, always claimed to be and were tenants of service *watan* lands; and in the opinion of their Lordships neither the defendants nor their predecessors-in-title could have acquired any title to a permanent tenancy in the lands by adverse possession as against the *watandars* from whom they held the lands."

Comment is made upon this that it is a

case of *watan* lands and may depend in some way upon the special Statute which governs property of that kind; but in a further case in *Nainapillai Marakayar v. Ramanathan Chettiar* (5), their Lordships lay down a far broader proposition. The passage is at page 98*; and runs as follows:—

"One of the reasons for these consolidated appeals as stated in the case for the appellants is: '4. Because the appellants have acquired permanent occupancy right by prescription.' No tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands: see *Madhavrao Waman Saundalgekar v. Raghunath Venkatesh Deshpande* (4)."

Thus the proposition in the second case in *Madhavrao Waman Saundalgekar v. Raghunath Venkatesh Deshpande* (4) has been given a very wide extension in this latter case. Therefore, apart from the finding of the lower Appellate Court to which attention has been drawn, it would appear upon these authorities that no title to a permanent tenancy could have been acquired by prescription in such a case as the present.

It follows that the decree of the lower Appellate Court must be affirmed and the appeal dismissed with costs.

Marten, C. J.—I agree. We have here the advantage of a clear and concise judgment from the learned District Judge with which I quite agree. It is unnecessary, therefore, so far as the findings of fact or law are concerned, for me to add anything to what my brother Crump has just stated. But, as regards the second point about prescription in connection with a permanent tenancy, I may state that in the present case we are not called on to decide whether the statement in *Nainapillai Marakayar v. Ramanathan Chettiar* (5) would necessarily prevent a title by adverse possession being ever obtained to a permanent tenancy in our Presidency. It is sufficient in the present case to apply what their Lordships have laid down in *Mohammad Mumtaz Ali Khan v. Mohan Singh* (3) and to say that applying those principles they would clearly

(4) 74 Ind. Cas. 362; 50 I. A. 255; 25 Bom. L. R. 1005; (1923) M. W. N. 689; A. I. R. 1923 P. C. 205; 33 M. L. T. 389; 47 B. 798; 28 C. W. N. 857; 20 L. W. 248; 47 M. L. J. 248 (P. C.).

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(5) 82 Ind. Cas. 226; 51 I. A. 83; A. I. R. 1924 P. C. 65; 19 L. W. 259; 20 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 47 M. 337; 28 C. W. N. 809; L. R. 5 A. (P. C.) 33 (P. C.).

prevent the appellants from successfully establishing their right to a permanent tenancy by adverse possession after 1894 or 1898, having regard to the findings against them by the lower Appellate Court.

I respectfully agree that the landlord here established his title by judicial proceedings, and that the true inference is that the tenant accepted that position and took their *khatas* acquiescing in the view that they were annual tenants. That being so, as in my judgment they took their *khatas* as ordinary annual tenants, prescription would not run in their favour by mere assertions that they were permanent tenants notwithstanding these existing annual tenancies. Nor, indeed as my brother Crump has pointed out, is there on the evidence any real assertion of their rights as permanent tenants after 1898.

Therefore, the facts of this case are clearly distinguishable from those of the earlier Bombay authorities, such as *Budesab v. Hanmantha* (1) where it was held that a tenant successfully denying in 1862 the landlord's right to possession could claim that he was holding adversely as permanent tenant to the landlord. Further, as regards the *khatas* that were passed in the present case, I think there is a broad distinction between them and other cases where an isolated *khata* has been passed in a long series of years under circumstances pointing otherwise to a permanent tenancy, or where the evidence points to the fact that the tenant who passed the *khata* did not appreciate the precise significance of the document he was executing. I, accordingly, agree that these appeals should be dismissed with costs.

A. N. A.

Appeal dismissed.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 87 OF 1927.

November 10, 1927.

Present :—Mr. Justice Fawcett and Mr. Justice Mirza.

EMPEROR—PROSECUTOR

versus

UKHA MAHADU BARASE—

ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 195 (1) (b)—Complaint to Police—Subsequent complaint to Magistrate on same facts—Merger—Prosecution for false charge—Complaint by Magistrate, whether necessary—Committal before filing of complaint to Magistrate, validity of:

The accused made a complaint to the Police which was found to be false and he was committed for trial to the Sessions Court for an offence under s. 211 of the Penal Code. Subsequently he made a similar complaint to a Magistrate and contended that the committal proceedings should be quashed as there was no complaint in writing by the Magistrate within the meaning of s. 195 of the Criminal Procedure Code:

Held, that the principle that where a complainant makes a complaint to the Police and subsequently makes a similar complaint to the Magistrate, the complaint to the Police merges in the complaint to the Magistrate and the complainant cannot be prosecuted for having made a false accusation without a complaint by the Magistrate, was not applicable to the case inasmuch as there was no complaint to the Magistrate at the time of the committal order, and that the committal order was, therefore, perfectly valid. [p. 55, col. 2.]

Criminal reference made by the Sessions Judge, Nasik.

Mr. Rege (with him Mr. A. A. Adarkar), for the Accused.

Mr. P. B. Shingne, Government Pleader, for the Crown.

JUDGMENT.

Fawcett, J.—In this case on May 4, 1926, accused No. 1 made a complaint to the District Superintendent of Police, Nasik, that one Bai Saru had been murdered by her mother-in-law, and had been thrown into a well by two other persons. The Police investigated the petition, and coming to the conclusion that it was false, obtained a summary in form B from the First Class Magistrate, Malegaon. The papers were then laid before the Assistant Superintendent of Police, Malegaon, who sanctioned the prosecution of Ukha and his witnesses. The First Class Magistrate, Nandgaon, on April 30, 1927, committed these persons for trial before the Sessions Court of Nasik under s. 211 of the Indian Penal Code. After the committal order had been passed, and on the same day, Ukha made a complaint to the same First Class Magistrate under s. 302, Indian

Penal Code, accusing the mother-in-law and three other persons of murder. The Magistrate eventually committed these four persons for trial in the Sessions Court on a charge of murder. That case was tried first by the Sessions Court and resulted in an acquittal. Then the Sessions Judge took up the earlier case, but at the outset the Assistant Public Prosecutor conducting the prosecution submitted that further proceedings would be improper in view of the terms of s. 195, Criminal Procedure Code. He contended that, although the original application of Ukha was made to the Police and a Police Officer is not a "Court," yet the complaint to the Police in effect merged in the subsequent complaint to the Magistrate, and, therefore, no proceedings in regard to the alleged falsity of the first complaint could be taken without the sanction of the First Class Magistrate under sub-s. (1) (b) of s. 195, Criminal Procedure Code. The learned Sessions Judge has adopted this view and has submitted the case to this Court with a recommendation that the committal order should be quashed, and adds that "upon return of the papers they will be sent to the First Class Magistrate, Nandgaon, for such action as he may deem necessary." This recommendation is supported by Counsel for the persons charged and by the Government Pleader.

As pointed out in the letter of the Sessions Judge, there is, no doubt, authority for the view of merger that I have referred to. The rulings in *Tayabullar v. Emperor* (1), *Brown v. Ananda Lal Mullick* (2) and *Muhammad Yassin v. Emperor* (3) have ruled that, where a complainant has made a complaint to the Police and subsequently makes a similar complaint to the Magistrate, he has shown that he wants to insist upon a judicial investigation, and he must be deemed to have made his complaint to the Magistrate, so that under the present Code he cannot be prosecuted for having made a false accusation without a complaint by the Magistrate. The Sessions Judge mentions in his letter that in this case the committal order was passed before any complaint was made to a

Magistrate, but he thinks this immaterial. "The point is," he says, "that by making his complaint to the Court the informant has withdrawn the information from the category of mere Police proceedings and has raised it to the category of a proceeding in Court. This necessitates a complaint by the Court if any proceedings are to be taken against Ukha and his witnesses. The matter is no longer in the hands of the Police but within the cognizance of the Court, that is, the First Class Magistrate or the Sessions Court of Nasik."

We do not, however, agree with this contention, which has also been put before us by Counsel for the accused. The committal order, when it was passed, was perfectly valid, because (even adopting the view taken by the Calcutta and Patna High Courts) there had been no complaint made to a Magistrate, which could supersede the complaint to the Police. Section 195, at the time of that committal order, would not require any complaint in writing by a Court, because the offence under s. 211, Indian Penal Code, was not "alleged to have been committed in, or in relation to, any proceeding in any Court" within the meaning of cl. (b) of sub-s. (1) of s. 195. In our opinion it was not open to the accused in this case to make the committal order invalid by merely making a subsequent complaint to the Magistrate. There is nothing in the Code which would justify the principle adopted by the Calcutta and Patna High Courts being applied to a case of the present kind; and in the absence of some specific provision such as s. 195, Criminal Procedure Code, to prevent the Sessions Judge exercising jurisdiction, he clearly has power to try the case. If, for any reason, the authorities think that the case ought not to be tried, then the proper course, in our opinion, is the withdrawal of the case under s. 494, Criminal Procedure Code. But as it at present stands, in our opinion, there is no legal ground for quashing the committal order under s. 215, Criminal Procedure Code. The papers to be returned to the Sessions Judge with this intimation.

Mirza, J.—I agree.

A. N. A.

Answer accordingly.

(1) 36 Ind. Cas. 845; 43 C. 1152; 24 C. L. J. 134; 20 C. W. N. 1265; 18 Or. L. J. 13.

(2) 36 Ind. Cas. 857; 44 C. 650; 20 C. W. N. 1347; 18 C. L. J. 25; 25 C. L. J. 59.

(3) 86 Ind. Cas. 825; 4 Pat. 323; 6 P. L. T. 457; A. I. R. 1925 Pat. 483; 26 Or. L. J. 889.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No.

268 of 1927.

October 19, 1927.

Present :—Mr. Justice Patkar and Mr.
Justice Baker.In re BAJIRAO ABAJI KULKARNI—
APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 4 (1) (r), 435, 439—Mukhtyar—Right to appear in Criminal Courts—General order prohibiting Mukhtyars from practising, legality of—Pleader, meaning of—Revision—Interference.

A District Magistrate has no power, in view of s. 4 (1) (r) of the Criminal Procedure Code, to pass a general order prohibiting Mukhtyars from practising in the Criminal Courts. [p. 57, col. 1.]

There is no reason why a Mukhtyar, though he has no general power to appear in any Court, should be debarred from appearing in any proceeding in a Criminal Court with the permission of the Court. [ibid.]

An order prohibiting Mukhtyars from practising can be revised by the High Court under ss. 435 and 439 of the Criminal Procedure Code. [p. 56, col. 2.]

Reg. v. Ramchandra (1), In the matter of the petition of Anant Ram. (2) and Ishan Chandra Bhat v. Emperor (3), relied on.

Criminal application against an order of the District Magistrate, Nasik.

Mr. G. N. Thakor (with him Mr. A. A. Adarkar), for the Applicant.

Mr. P. B. Shingne, Government Pleader, for the Crown.

JUDGMENT.—This is an application filed by one Bajirao Abaji Kulkarni who has been practising as a Mukhtyar for the last six years since 1921 in the Sinnar Taluka in the Nasik District. It appears that the Bar Association of Sinnar made a representation to the District Magistrate of Nasik who passed an order that in future the services of Mukhtyars should not be employed in criminal or other cases at Sinnar unless the Magistrate certifies under his own hand that the party is too poor to engage the services of a qualified Pleader.

The first question which arises for consideration in this case is whether this is an order of a Criminal Court which falls within ss. 435 and 439 of the Criminal Procedure Code. Our attention has been invited to the precedents of this Court in the cases of *Tamannacharya alias Narsinh Guracharya Shiggaon*, [(1924) Criminal Revision No. 407 of 1924] and *Reg. v. Ramchandra (1)* and to the decision of the Allahabad High Court in the case of *In the matter of the*

petition of Anant Ram (2) in which similar applications were entertained by the High Court. We have decided to hear the application on the merits.

Under s. 340 of the Criminal Procedure Code, an accused person has a right to be defended by a Pleader. "Pleader" is defined in the Criminal Procedure Code, s. 4 (1) (r). Under the old Code of 1882, "Pleader" included any Mukhtyar or other person appointed with the permission of the Court to act in such proceeding. Sections 6, 7 and 10 of the Legal Practitioners Act XVIII of 1879, make provision for the issue of a certificate to Mukhtyars. But the Legal Practitioners Act does not apply to Bombay, and even in the Provinces to which the Act applied, it was held that the Mukhtyars could not be given general permission to practise, but the Court must decide in each particular case whether a Mukhtyar should be allowed to appear. See *Ishan Chandra Bhat v. Emperor (3)* and *In the matter of the petition of Anant Ram (2)*. But these decisions are no longer law having regard to the change in the definition of "Pleader" by Act XXXV of 1923 which may now render it unnecessary that Mukhtyars should have special permission in each case in the Provinces to which the Legal Practitioners Act applies. But ss. 6, 7 and 10 of the Legal Practitioners Act do not apply to Bombay and the Bombay Pleaders Act, XVII of 1920, does not make any provision for issuing any certificate to Mukhtyars. There are in the Bombay Presidency no Mukhtyars authorized under any law for the time being in force to practise in any Court within the Presidency. The question, therefore, has to be decided on the wording of s. 4 (r) of the Criminal Procedure Code. It is conceded by Mr. Thakor that the applicant does not fall under the first clause of s. 4 (r), that is "a Pleader or a Mukhtyar authorized under any law for the time being in force to practise in such Court," but he contends that he falls within the words "any other person appointed with the permission of the Court to act in such proceeding." Having regard to the ruling of this Court in *Dorabsha Bomanji Dubash v. Emperor (4)* in which an Estate Manager was allowed

(2) 30 A. 66; 5 A. L. J. 40; A. W. N. (1908) 11; 7 Cr. L. J. 21.

(3) 9 Ind. Cas. 664; 38 O. 488; 15 C. W. N. 409; 13 O. L. J. 635; 12 Cr. L. J. 111.

(4) 93 Ind. Cas. 232; 50 B. 250; 28 Bom. L. R. 102; 27 Cr. L. J. 440; A. I. R. 1926 Bom. 218.

to appear for an accused in his stead and plead and do other acts on his behalf in the case against him, we think that a Mukhtyar would fall within s. 4, cl. (r) of the Criminal Procedure Code, and represent an accused as a Pleader with the permission of the Court in any proceeding. If an Estate Manager can be allowed to appear on behalf of an accused with the permission of the Court there is no reason why a Mukhtyar, though he has no general power, to appear in any Court, should be debarred from appearing in any proceeding in a Criminal Court with the permission of the Court.

The matter was considered recently in Chambers, and the Circular No. 5216 of 1927 dated October 17, 1927, is to this effect:—

"It has been represented to the High Court that in certain Districts non-qualified persons have been allowed generally to practise in all Criminal Courts as Mukhtyars. Under s. 4 (1) (r) of the Code of Criminal Procedure a criminal Court can grant permission to an individual to act in a particular proceeding pending before it. But the law in this Presidency does not allow Mukhtyars to be given general permission to practise in all cases or in all Courts. The Honourable the Chief Justice and Judges are, therefore, pleased to direct that general permission to appear in Criminal Courts should not be given to any Mukhtyar and that no Mukhtyar should be allowed to appear in any case in any Court before he obtains the special permission of the Magistrate before whom the case is to be heard to appear in that case only."

The order passed by the District Magistrate in this case is a very general order, and he has imposed a condition which is not recognised by the Criminal Procedure Code.

We would, therefore, set aside the order of the District Magistrate of Nasik, and direct that the District Magistrate and the Magistrates subordinate to him should follow the circular mentioned above.

A. N. A.

*Rule made absolute.***BOMBAY HIGH COURT.**

CRIMINAL APPLICATION FOR REVISION No. 155 OF 1927.

October 19, 1927.

Present:—Mr. Justice Patkar and Mr. Justice Baker.

EMPEROR—PROSECUTOR

versus

SHAIKH USMAN SHAIKH UMAR—

ACCUSED.

Criminal Procedure Code (Act V of 1898) as amended by Act XVIII of 1923, s. 162—Application for copy of statement of prosecution witness—Proper time for making such application—Proof of statement, mode of.

An accused is not entitled under s. 162 of the Criminal Procedure Code to a copy of the statement made by a prosecution witness before the witness on behalf of the prosecution, who is sought to be cross-examined by such statement is in the witness-box. The request has to be made to the Court when the witness on behalf of the prosecution is under cross-examination. [p. 59, col. 1.]

Dadan Gazi v. Emperor (1), In re Peramasami Ragudu (2) and Madari Sikdar v. Emperor (3), relied on.

The statement by which it is sought to contradict the prosecution witness under s. 162, Criminal Procedure Code, must be either proved by the investigating officer, or must be admitted by the witness in his cross-examination, or must be proved in some other way before it is put to the witness under s. 145 of the Evidence Act, 1872. [p. 58, col. 2; p. 59, col. 1.]

Criminal application against conviction and sentence passed by the Second Class Magistrate at Nandurbar, confirmed in appeal by the District Magistrate, West Khandesh.

Mr. D. G. Dalvi, for the Accused.

Mr. P. B. Shingne, Government Pleader, for the Crown.

JUDGMENT.

Patkar, J.—In this case, the accused, Shaikh Usman Shaikh Umar was tried on charges under ss. 277 and 295 of the Indian Penal Code. He was convicted by the Second Class Magistrate, Nandurbar, and the convictions and sentences have been upheld by the District Magistrate, West Khandesh.

It appears that on December 14, 1926, the prosecution case was finished, the charge was framed, and after the examination of the accused the case was adjourned to December 22, 1926. On December 15, 1926, an application was made on behalf of the accused, requesting that he should be furnished with the copies of the statements of the witnesses on behalf of the prosecution under s. 162 of the Criminal Procedure Code as he had to cross-examine the witnesses on December 22, 1926, and stating that he would not be in a position

to cross-examine the witnesses unless the copies were given to him. The Police Prosecutor made an endorsement on the application that he objected to the copies being granted as there was nothing on the record to show that the statements of any of the witnesses were recorded by the Police. The learned Magistrate on December 22, 1926, made an order that under the circumstances no copies could be granted.

It is urged on behalf of the accused that he was entitled to get copies of the statements of the witnesses on behalf of the prosecution under s. 162 of the amended Criminal Procedure Code. Under s. 162, no statement made by any person to a Police Officer in the course of an investigation or any record thereof in the Police diary or otherwise or any part of such statement or record shall be used for any purpose at any inquiry or trial. The first proviso deals with the case where witnesses are called for the prosecution whose statements have been taken down in writing as aforesaid. Under the proviso, the accused has to make a request to the Court and the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by s. 145 of the Indian Evidence Act, 1872. Under the old Criminal Procedure Code, the accused was not entitled to obtain a copy of such statement, and it was left to the discretion of the Court, if the Court thought it expedient in the interest of justice, to direct that the accused be furnished with copies of the statements. Under the second proviso to s. 162, if the Court is of opinion that any part of such statement is not relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interest of justice and is inexpedient in the public interests, the Court shall record such an opinion and exclude such part from the copy of the statement furnished to the accused. Under the new Criminal Procedure Code, subject to proviso 2, the accused is entitled to a copy of the statement under s. 162 for the purpose of contradicting the prosecution witness in the manner provided by s. 145.

The important question is as to the point of time when the accused is entitled to make his request under the first proviso to s. 162. I think that the application to get a copy of

the statement must be made at the time when the prosecution witness, whom it is desired to cross-examine by reference to his previously recorded statement, appears in the witness box. That view was taken, before the amendment, in the case of *Dadan Gazi v. Emperor* (1), and there is nothing in the amended Code to show that the accused is entitled to a copy of the statement at any time before the witness appears in the box. The reference in the first proviso to s. 145 points to the time when the request is to be made. The time when such request is to be made is when the witness is sought to be cross-examined and the statement, if duly proved, is to be used to contradict such witness under s. 145 of the Indian Evidence Act. This view was taken by the Madras High Court in *In re Peramasami Ragudu* (2), where it was held that the accused is not entitled to copies of the statements made by prosecution witnesses at the Police investigation before their cross-examination is opened. The same view is accepted by the Calcutta High Court in the case of *Madari Sikdar v. Emperor* (3), where it was held that under the first proviso to s. 162 the accused was entitled to be furnished with a copy of such statement only after the witness had been examined by the prosecution and his cross-examination had laid a foundation for the suggestion that this evidence in Court was contradicted by the previous statement recorded under s. 161 of the Code and not at any antecedent stage of the inquiry or trial. The words "if duly proved" indicate that the record of the statement cannot be admitted in evidence straightway, but the officer before whom the statement was made should ordinarily be examined as to any alleged statement that is relied upon by the accused for the purpose of contradicting the witness: *Vithu Balu Kharat v. Emperor* (4). The statement by which it is sought to contradict the prosecution witness under s. 162 must, therefore, be either proved by the investigating officer, or must be admitted by the witness in his cross examination, or must be proved in some other way before it

(1) 33 O. 1023; 10 O. W. N. 890; 4 Cr. L. J. 79.

(2) 91 Ind. Cas. 532; 27 Cr. L. J. 100; 22 L. W. 784; A. I. R. 1926 Mad. 183.

(3) 102 Ind. Cas. 550; 54 C. 307; A. I. R. 1927 Cal. 514; 28 Cr. L. J. 582; 8 A. I. Cr. R. 112.

(4) 83 Ind. Cas. 1007; 26 Bom. L. R. 965 at p. 967; A. I. R. 1924 Bom. 510; 26 Cr. L. J. 223.

is put to the witness under s. 145 of the Indian Evidence Act, 1872.

Though I am not prepared to hold that the cross-examination must lay a foundation for the suggestion that the evidence given by the witness before the Court is contradicted by the statement recorded under s. 162 of the Criminal Procedure Code before the accused is entitled to request the Judge to refer to the writing and grant him a copy, I think that the accused is not entitled to a copy of the statement before the witness on behalf of the prosecution, who is sought to be cross-examined by such statement, is in the witness-box, and that the request has to be made to the Court when the witness on behalf of the prosecution is under cross-examination. In this case, some of the witnesses on behalf of the prosecution have not at all been cross-examined, and the request was not made when the witnesses were in the witness-box for cross-examination, but the application was made some time before the case was fixed for hearing and cross-examination of the witnesses. I think the application made on behalf of the accused on December 15, 1926, was misconceived, and that the accused was not entitled to copies of the statements under s. 162 on the application made on December 15, 1926. I cannot, therefore, say that the learned Magistrate committed any error in declining to furnish the accused with the copies at that stage.

It appears from the remark made by the learned District Magistrate on appeal that he was not aware that the application of the accused to get copies of the depositions of witnesses was on the record. But, as I have said above, the application was premature.

I think, therefore, that the refusal of the Magistrate to give copies of the statements before the prosecution witnesses were in the box for the purpose of cross-examination is not, in my opinion, illegal.

We have sent for the statements of witnesses recorded during the Police investigation under s. 161 of the Criminal Procedure Code, and on perusing them we are satisfied that they do not contain anything favourable to the accused, and that the accused is not in any way prejudiced in this case.

We would, therefore, discharge the Rule.

Baker, J.—The applicant, in this case, was convicted by the Second Class Magistrate, Nandurbar, of offences under s. 277 of

the Indian Penal Code, for fouling the water of a public reservoir and s. 295 of the Indian Penal Code, for injury to or defiling a place of worship with intent to insult the religion of any class, and was sentenced to a fine of Rs. 25, in default to undergo fifteen days' rigorous imprisonment under s. 277 and a fine of Rs. 60 in default to undergo rigorous imprisonment for one month under s. 295. The conviction and sentence were confirmed in appeal by the District Magistrate, West Khandesh.

The applicant applies in revision on the ground that he was not furnished with a copy of the statements of witnesses before the Police under s. 162 of the Criminal Procedure Code. After the charge, the accused was asked if he wished to cross-examine the prosecution witnesses, and he stated, on December 15, 1926, that he wanted to do so. The case was adjourned to December 22, and on December 15 he presented an application asking for copies of statements to the Police. The Police Prosecutor objected to the statements being given on the ground that there was so far nothing on the record to show that any statements had been made. The Magistrate refused copies of the statements, and the prosecution witnesses were not cross-examined with the exception of (Ex. 1), the complainant, and (Ex. 7). This point was raised in appeal and overruled. The statement in the Appellate Court's judgment that there is nothing on the record to show that such an application was made appears to be incorrect. The case raises an important point of law, viz., the right of the accused to get a copy of the statements under s. 162 of the Criminal Procedure Code as amended by Act XVIII of 1923. There does not appear to be any direct ruling on the point since the amendment. It is to be noted that while the amendment of s. 162 is in favour of the accused, the section lays down certain formalities which must be observed, and it is not the case, as appears to be generally supposed, that the amended section gives the right to the accused to demand copies of the statements made by the prosecution witnesses to the Police until the formalities laid down by the section have been complied with. The section says:—

"When any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused, refer to such writing and

direct that the accused be furnished with a copy thereof in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by s. 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

"Provided, further, that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial, or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused."

This latter proviso appears frequently to be overlooked, and reading the section as a whole it is clear that the grant of copies as a matter of course without the Court first referring to the statements with the object of excluding any portion which it considers irrelevant to the subject-matter of the trial, or any portion whose disclosure is not essential in the interests of justice and is inexpedient in the public interests, is not a compliance with the section as it stands and is in disregard of its provisions. It may, therefore, be laid down that the accused is not entitled; as a matter of course, to a copy of the statements, unless the Court has previously referred to them and has exercised its discretion in the light of the second proviso to the section. It has been held in the case of *In re Peramasami Raghudu* (2), which was followed by the Calcutta High Court in *Madari Sikdar v. Emperor* (3) that the proper time at which an application under s. 162 should be made is when the cross-examination of the prosecution witnesses commences. It must, therefore, be held that in the present case the application made on behalf of the accused before the cross-examination of the witnesses had commenced is not a compliance with s. 162, and that, strictly speaking, the Court was justified in refusing it. But, had the accused, after the cross-examination commenced, made an application asking the Court to refer to the statements and to direct that the accused be furnished with a copy thereof for the purpose of contradicting the witnesses, the

Court would have been bound to comply with the request. In the present case, it does not appear from the record whether any of the witnesses had been examined by the Police and the learned Government Pleader had had no instructions on the point and was unable to state definitely, whether the witnesses were examined or not. We have accordingly found it necessary to direct him to obtain information on the point from the Police.

The statements have now been received and do not contain anything which would affect the cross-examination, nor has the accused been prejudiced by their non-production. The Rule will, therefore, be discharged.

A. N. A.

Rule discharged.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 841 OF 1923.

August 17, 1927.

Present:—Sir Amberson Marten, Kt.,
Chief Justice, and Mr. Justice Crump.

NARAYAN BALAJI BANDIVDEKAR—

PLAINTIFF—APPELLANT

versus

GOVIND SAKHARAM NIMKAR

AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (XIV of 1859), s. 1, cl. 15—*Limitation Act* (IX of 1871), s. 29—*Limitation Acts* (XV of 1877 and IX of 1908), s. 19—*Acknowledgment by manager of joint family, validity of—Right to sue for redemption barred under Act of 1859—Revival by later Acts.*

The plaintiff's great-grandfather mortgaged to the defendant's predecessor-in-interest certain property in 1807. In 1860, the mortgagee's son who was the manager of the joint family at that time acknowledged this mortgage in a sub-mortgage executed by him. The plaintiff sued for redemption in 1920:

Held, (1) that the acknowledgment of 1860 was not a valid one inasmuch as the manager of a joint family could not bind the family by an acknowledgment under the *Limitation Act* of 1859; [p. 62, col. 2.]

Bhogilal v. Amritlal (1), followed.

(2) that the suit for redemption became barred in 1868 and the mortgagor's rights were extinguished under the provisions of s. 29 of the *Limitation Act* of 1871; [*ibid.*]

Fatimatunnissa Begum v. Sundar Das (4), followed.

(3) that the rights were not in any way revived by the *Limitation Acts* of 1877 and 1908 and that the plaintiff's suit for redemption could not be maintained. [p. 63, col. 2.]

Second appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 97 of 1922, reversing the decree of the First Class Subordinate Judge at Ratnagiri, in Civil Suit No. 84 of 1920.

Messrs. Y. N. Nadkarni (with him Mr. D. S. Varde), for the Appellant.

Messrs. V. B. Virkar and G. B. Chitale, for the Respondent.

JUDGMENT.

Crump, J.—The plaintiff in this action sued to redeem a mortgage of the year 1807. The first Court held that the suit was within time. The suit was filed on June 18, 1920, that is to say, 113 years after the date of the mortgage. But the trial Court held that, by reason of a certain acknowledgment of June 27, 1860, the suit, being within sixty years from the date of that acknowledgment, was not time-barred. The lower Appellate Court took a different view, and held that the acknowledgment in question was ineffectual to give a fresh starting point of limitation inasmuch as it was not signed by a person who could give an effectual acknowledgment having regard to cl. 15 of s. 1 of Act XIV of 1859 which was in force at that date.

The question which we have to determine is which of these two views is correct. The mortgagee under the mortgage of 1807 was one Bachaji, and though the facts are not very clearly ascertained, it appears that in 1860 the family consisted of Sakharām, the son of Bachaji, and possibly his eldest son the 1st defendant, and also Moreshwar, the son of Bachaji's brother. The acknowledgment on which reliance is placed is signed by Sakharām. It is contained in a sub-mortgage to a third party, and in the course of the document, the following passage occurs: "We mortgage to you the same fourth *takshim* of the whole village of Mouje Karade which we hold under mortgage." It has been found from other documents that the mortgage alluded to in these words is the mortgage of 1807. Therefore, we must consider the effect of this acknowledgment by Sakharām in the year 1860. It appears to have been found that Sakharām was the manager of the joint family, and though it is rather difficult to feel entirely satisfied with the finding upon that point which rests on grounds which are somewhat conjectural, still we take that to be so for the purposes of the present appeal.

Turning then to the Act of 1859, which was in force at this date, there will be found in cl. 15 a reference to acknowledgments in the following words "if in the meantime an acknowledgment of the title of the...mortgagor, or of his right of re-

demption, shall have been given in writing signed by the...mortgagee or some person claiming under him, (a period of 60 years) from the date of such acknowledgment in writing." Therefore, we have to decide whether Sakharām was such a person as would come within these words. Now that very point came before this Court in *Bhogilal v. Amritlal* (1), with reference to Art. 148 of the Indian Limitation Act of 1871, where practically the same form of words are used. The facts there were that one Jagjivandas was the manager of a joint Hindu firm, and also the manager of the joint family estate, and the question before the High Court was whether an acknowledgment by Jagjivandas satisfied the requirements of cl. 15 of s. 1 of Act XIV of 1859, or Art. 148 of Act IX of 1871. It was held that it did not. The decision was based upon the view that Jagjivandas in that case might have been regarded as an agent, but that an acknowledgment by an agent was not sufficient for the purposes of the law in force at that date.

In the same volume, is another decision of this High Court, *Bhasker Tatya Shet v. Vijalal Nathu* (2), in which the validity of an acknowledgment by the manager of a joint Hindu family was considered with reference to s. 19 of the Indian Limitation Act XV of 1877. It may be remarked here that it was in s. 19 of the Act of 1877 that an agent was introduced for the first time as a person competent to give an acknowledgment for the purpose of giving rise to a fresh starting point for limitation. Upon that point, the High Court held that the manager of a joint Hindu family could, for the purposes of s. 19 of the Indian Limitation Act of 1877, give a valid acknowledgment, and they base their decision upon this that the manager must ordinarily be held to be an agent duly authorised in this behalf within the meaning of s. 19.

Those two decisions bring out very clearly the views of this High Court as to the provisions of the law in the Act of 1859 and the Act of 1871 as compared with the provisions of the law in the Act of 1877. The effect of the two decisions together is plainly this: that the manager of a joint Hindu family should be regarded as an agent, and, therefore, a person who could

(1) 17 B. 173; 9 Ind. Dec. (N. S.) 113.

(2) 17 B. 512; 9 Ind. Dec. (N. S.) 333.

give an acknowledgment for the purposes of the latter Act, but though he is an agent, he cannot give an acknowledgment for the purposes of the former Act, because the former Act does not provide for an acknowledgment by an agent. It has been conceded before us that the earlier of these two decisions has never been overruled, and the only criticism offered upon it is that it is in some way inconsistent with the decision of their Lordships of the Privy Council in *Annamalai Chetty v. Murugasa Chetty* (3). The point before the Privy Council there was not whether there was a good acknowledgment for the purposes of limitation, but whether the manager of a joint family was a person on whom proper service could be effected for the purposes of s. 17 of the Code of Civil Procedure of 1882. Their Lordships say with reference to the relation between the manager of joint family property and the agent of the members of the family (page 228*):

"The relation of such persons is not that of principal or agent, or of partners; it is much more like that of trustee and *cestui que trust*."

But how that decision on an entirely different point can be invoked as casting any serious doubt upon the decision in *Bhogilal v. Amritlal* (1) is, in my opinion, difficult to understand. It was further suggested that in *Bhogilal's case* (1) the Court had to deal with the manager of a Hindu family firm, and that in some respects for the present purpose the manager of a joint family firm stands upon a different footing from the manager of a joint Hindu family. We are, however, unable to see any substantial difference so far as the present purpose is concerned. No doubt the manager of a joint family firm is not in all respects identical with the manager of a joint Hindu family. But in *Bhogilal v. Amritlal* (1), it is relevant to observe that Jagjivan held both capacities, and the Courtsays (page 176†):—

"Jagjivan was then manager of the mortgagee firm for and on behalf of the Hindu family to which the firm belonged, and was not sole owner thereof, but like the present defendant only one of several co-parceners."

(3) 30 I. A. 220; 5 Bom. L. R. 494; 26 M. 544; 7 O. W. N. 754; 13 M. L. J. 287; 8 Sar. P. C. J. 523 (P. C.).

*Page of 30 I. A.—[Ed.]

†Page of 17 B.—[Ed.]

Nothing really turned upon the distinction now sought to be made, nor are we able to see that that distinction in any way detracts from the value of the authority in question for the purpose of the present case. It follows then that the acknowledgment of 1860 was not such an acknowledgment as was required by Act XIV of 1859 which was then in force. It is, therefore, further clear that had a suit for redemption been brought in the year 1868, that suit would have been barred. In other words, the mortgagors allowed the time within which they could sue for redemption to expire.

We have next to consider the effect of that inaction on their part upon their right to redeem. Upon this point a reference may be made to the judgment of their Lordships of the Privy Council in *Fatimatunnissa Begum v. Sundar Das* (4). Their Lordships were there dealing with a mortgage and a suit to redeem. That mortgage was in the year 1788, and, therefore, the suit to redeem became barred in 1848 unless in the meantime the required acknowledgment was given. Their Lordships say at page 1010* of the report:—

"The Act of 1871 provided the same limits of time for suits of this kind, and it added the provision (s. 29) that at the expiration of the period thereby limited to any person for instituting a suit for the possession of any land his right to such land shall be extinguished. The period thereby limited in the case of this mortgage was the 17th October, 1848, and the title of the mortgagors was extinguished on that day unless they can show a previous acknowledgment in writing."

Now an acknowledgment which is infelicitous for the purpose of the law is no acknowledgment at all, and, therefore, precisely, as in the case before their Lordships of the Privy Council, the effect of s. 29 of the Act of 1871, in the present case would be to extinguish the rights of the mortgagors. That would appear to put an end to the present action, unless it can be shown that in some way or other those rights have been revived by something that has taken place after the year 1868. Clearly the Act of 1871 did not revive those rights but rather extinguished them. The Act of 1877 specifically provides in

(4) 27 O. 1004; 27 I. A. 103; 4 C. W. N. 565; 7 Sar. P. C. J. 718; 14 Ind. Dec. (N. s.) 657 (P. C.).

*Page of 27 O.—[Ed.]

s. 2 that "all references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed."

This is not merely a case of reviving a right to sue barred under the provisions of the Act. It is a case of reviving a right which has become extinguished by the operation of law. The word "extinguished" is a very strong word—almost as strong a word as could be used, and nothing has been shown to us which can be invoked as an authority for holding that the right extinguished has been in any way revived. Much reliance was placed upon the decision of the Privy Council in *Soni Ram v. Kanhaiya Lal* (5). It is argued that here, as in that case, we must apply to this suit the Indian Limitation Act of 1908. That may be conceded, and the Article applicable is, no doubt, Art. 148 of that Act. But that does not touch the real point which, as I have said, is whether the extinguished right can be revived. Now in that case their Lordships of the Privy Council were considering a mortgage of 1842, the period of limitation for that mortgage expired in 1902, and it was not barred when the Act of 1877 came into force, and, therefore, it was not touched by s. 2 of that Act. Their Lordships say that the case must be approached from the stand-point of the Act of 1908. There were certain acknowledgments round about the year 1866, and with reference to those acknowledgments their Lordships say that (page 236*) "an acknowledgment of liability only extends the period of limitation within which a suit must be brought and does not confer title, and is not a 'thing done' within the meaning of s. 6 of the General Clauses Act." The case was heard *ex parte*, and though their Lordships took that view they held in effect that the acknowledgment on which reliance was placed was not an effectual acknowledgment, and that, therefore, the suit was time-barred. They did not consider, nor was it necessary for them to consider, whether the right had been extinguished by

the failure of the mortgagees to sue within sixty years from the date of the mortgage or sixty years from the date of the acknowledgment. The grounds on which they base their judgment were sufficient for the decision of the appeal before them, and, therefore, that case cannot be cited as an authority with reference to the operation of s. 29 of the Act of 1871 on the rights of these mortgagors.

It is not necessary in this view of the case to consider the decision in *Mahomed Mehdi Faya Tharia v. Sakinabai* (6), which lays down that a right to sue once lost cannot be revived by the enactment of subsequent Act of Limitation—a principle which is also expressed in the judgment of the Privy Council in *Mohesh Narain Munshi v. Taruck Nath Moitra* (7). The precise point which we have here did not come up for consideration in those cases. The real point here is that the acknowledgment of 1860 was not a valid acknowledgment for the purposes of the Act of 1859, and, therefore, must be regarded as no acknowledgment at all, and the rights of the mortgagors were, therefore, extinguished in 1868 or thereabouts and nothing has occurred which can be held to revive them.

Therefore, the decision of the Court below appears to be correct and the appeal must be dismissed with costs.

Marten, C. J.—I agree. On the points of law I would hold that the effect of s. 29 of the Act of 1871 was to extinguish the plaintiff's right to possession of the land, because sixty years had expired from the date of the mortgage, and under the law then in force there had been no valid acknowledgment, and that in particular the alleged acknowledgment, Ex. 77, in 1860 was insufficient for that purpose. The fact that there was a subsequent Act in 1877 which altered the clauses dealing with acknowledgment by an agent, is to my mind immaterial, because there are words in the later Act, either the general Act or otherwise, which prevent rights which have been once extinguished from being revived.

The right to sue then having been barred by the Act of 1859, and the right to the land itself having been extinguished, in my

(5) 19 Ind. Cas. 291; 35 A. 227; 15 Bom. L. R. 489; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 25 M. L. J. 131; 40 I. A. 74 (P. C.).

*Page of 35 A.—[Ed.]

(6) 17 Ind. Cas. 629; 37 B. 393; 14 Bom. L. R. 908.

(7) 20 I. A. 30 at p. 38; 29 C. 487; 6 Sar. P. O. J. 261; 17 Ind. Jur. 164; 10 Ind. Dec. (N. S.) 330 (P. C.).

judgment the plaintiff is not entitled to sue for redemption and possession of the land in the year 1920. A somewhat similar provision as to extinguishment will be found in the English Limitation Acts. There too a title once extinguished by limitation cannot be revived by a subsequent acknowledgment. (See Halsbury's Laws of England, Vol. XIX, page 155.)

Then on the second point of law as to whether this acknowledgment of 1826 was given by the mortgagee or some person claiming under him, in my judgment, the decision in *Bhogilal v. Amritlal* (1) of Mr. Justice Jardine and Mr. Justice Telang is binding on us. That decision decided that on the construction of that particular Act, viz., the Act of 1859, the manager of a joint Hindu family firm was not a person claiming under a mortgagee within the meaning of that Act. That decision has not been dissented from or questioned in this Court, and, therefore, I do not think it is for us, sitting as a Division Bench, to question it now.

I have only some general observations to make. This case is an apt illustration of the possibilities of litigation in India that are caused by this excessive period of sixty years being allowed for limitation in the case of mortgages. I doubt whether in any civilised country in the world a law suit of the present nature would be possible. It would be quite impossible in England. The parties begin first of all with a long discussion as to whether the plaintiff is an agriculturist. Then there is another issue as to whether the old mortgage of 1807 is proved. Then there is another long discussion whether the family was joint or separate in 1860. Then there is a further point—and an important point—whether Sakharam was then the manager or not. That was at one time is some doubt. There is another point, viz., Does this acknowledgment of 1860 clearly refer to the mortgage of 1807. The acknowledgment only says that the sub-mortgagor holds the land under a mortgage. No express reference is made to the mortgage of 1807. Once more we go on presumption or inference. Then, when the learned trial Judge has given judgment on all these disputed points, including the two main points of law which my brother Crump has just dealt with, there is even yet a question left as to whether all the lands in suit are covered by the mortgage in

question. So an inquiry has been ordered as to the identity of some of the lands.

Then to complete the story, my brother Crump at the end of Counsel's arguments said: "Are you quite satisfied that even now the suit is within time?" In fact the plaintiff has left it almost to the last possible date. The plaint itself was presented on June 18, 1920. I have had that date checked by the translator and the *sheristadar*, and I understand Counsel agree on that date. But when we come to check the date of the acknowledgment, which was stated in the judgments of the lower Courts to be June 27, 1860, our interpreter now tells us the real date is May 24, 1860. If that latter date is correct, then the suit is in any event out of time. We have accordingly thought it right to send for the Chief Translator, to see whether the date given by the Court Translator is correct. I will only add that all these things show the difficulties and ambiguities that arise in certain classes of Hindu litigation, more especially where there is a joint Hindu family. They also show partly why some of these suits drag on for years and years, and why a law suit of this type is a curse to the people of India. If the Legislature would cut down the period of sixty years to something like twenty years I have no doubt, speaking for myself, that benefits would result from it.

We have now called on the Chief Translator, and he confirms what the original interpreter told us, viz., that the true date of Ex. 77 is May 24, 1860, and not June 27, 1860. Counsel for the appellant is not able to dispute that.

Under these circumstances on that finding the suit must in any event fail. But our prior judgments nevertheless stand. It might possibly be contended that sitting here in second appeal, we are bound by the findings of fact, and that both Courts below have given the date as being June 27, 1860, and that no point as to a different date has arisen in the Courts below. My brother Crump also mentions that it is conceivable that if the date expired in the vacation, the plaintiff might have had some few extra days to file his plaint, viz., at the beginning of term. But to ascertain that we should have to enquire of the lower Courts.

A. N. A.

Appeal dismissed.

CALCUTTA HIGH COURT.APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 82 OF 1927.

August 25, 1927.

Present :—Sir George Claus Rankin, Kt.,
Chief Justice, and Mr. Justice Mitter.

SALAM CHAND KANAYRAM—

PLAINTIFF—APPELLANT

versus

JOOGUL KISHORE RAMDEO—

DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 36, 136, O. XXXIX, r. 2—Appointment of Receiver by Original Side of High Court—Refusal to hand over books to Receiver—Contempt of Court—Jurisdiction of Judge of Original Side to send warrant of arrest for execution to District Judge—Proper procedure—Application for injunction—Appointment of Receiver, whether operates as injunction.

An application was made to a Judge on the Original Side of the High Court of Calcutta for an order directing the District Judge of Nadia to execute a warrant of arrest of a person who was guilty of contempt of Court in not having handed over certain articles to a Receiver appointed by the Court. The application was refused and the petitioner appealed:

Held, (dismissing the appeal), that although the High Court in its Appellate Side could make such an order as was asked for, it was extremely doubtful whether it could do so on its Original Side, and that it was eminently desirable that the petitioner should proceed regularly under the Code so far as possible by asking for an injunction in express terms, in which case s. 136 of the Civil Procedure Code could be applied and the High Court would have statutory power to make the kind of order sought for. [p. 66, col. 2.]

The appointment of a Receiver so far as regards parties bound by the order operates against them as an injunction. It is an injunction necessarily against interference with the Court's Receiver whether by withholding possession of property or otherwise. [p. 66, col. 1.]

Appeal against an order of Mr. Justice Gregory, dated the 15th of June, 1927, passed in the exercise of Original Civil Jurisdiction.

Mr. S. N. Banerji, for the Appellant.

JUDGMENT.

Rankin, C. J.—In this case an order was made on the 26th of August, 1925, appointing a Receiver and directing that the defendant firm do make over to the Receiver the books of account of their firm for a certain year and the *hatchittas* standing in the *benami* name of one Ramdeo's brother Baijnath Motilal and those executed by various debtors of the defendant firm in acknowledgment of their debts. It was further ordered that the defendant firm do make over to the Receiver or to this Court to be placed to the credit of the suit all moneys

realised by them in contravention of a certain order. By another order made on the 5th of July, 1926, it was ordered that the Official Receiver be appointed Receiver in the suit under the order already mentioned and that the said Receiver do stand committed to the custody of the Superintendent of the Presidency Jail for contempt of Court for having failed to make over to the said Receiver the *hatchittas* mentioned in para. 22 of the said petition and that a warrant do issue directed to the Sheriff of Calcutta and to the Superintendent of the Presidency Jail commanding the Sheriff to arrest the said Ramdeo wherever he may be found within the local limits of the jurisdiction of this Court and to convey him to the said Jail.

It appears that Ramdeo was not within the limits of the Ordinary Civil Jurisdiction of the Court but was residing and staying within the District of Nadia in this Province. Accordingly the warrant directed to the Sheriff failed to take effect. In consequence of this the application which is now before us was launched on the 31st of March, 1927, and it asks the learned Judge on the Original Side for an order directing the District Judge of Nadia to execute the said warrant, seize the person of the defendant wherever found within the said District and convey it to the Sheriff of Calcutta to be by him conveyed over to the Superintendent of the Presidency Jail. The learned Judge, Mr. Justice Gregory, dismissed this application not being satisfied that he had any jurisdiction to make such an order. It would appear from the minutes of the proceedings before him that s. 136 of the Civil Procedure Code was relied upon by the applicants and that the applicants also claimed to be entitled to the exercise of the inherent powers of the Court and also to powers under s. 151 of the Code. Section 36 of the Civil Procedure Code was also referred to.

Mr. S. N. Banerji has argued upon this appeal that ss. 36 and 136 must between them cover this case. It is necessary, therefore, to observe that any order for arrest for contempt of Court committed by breach of an injunction or by defiance of the Court's Receiver may be regarded in the High Court in different ways. In so far as the order is made

under a provision of the Code that is another thing. Viewed merely as an order in the exercise of the Court's inherent jurisdiction to punish for contempt, I am not of opinion that it is made out that any such order as is here asked for can be made by this Court. There can be no doubt as it seems to me that for the purposes of execution of decrees and orders the Ordinary Original Jurisdiction is confined within the local limits of Calcutta. The question of the Court's power derived from the old Supreme Court to arrest for contempt of Court a person in the Mofussil has not been argued before us and I make no pronouncement with regard to that. There can be no doubt that this Court on its Appellate Side in a case arising in the Mofussil would have the power to make such an order as is here asked for. That on its Original Side the Judge would have any right to direct the District Judge of Nadia to execute a warrant of arrest for contempt is a proposition which I doubt extremely. That matter, however, need not be further discussed. It was to be observed that this question is one which might arise just as easily in a Mofussil Court as in the High Court. Any Mofussil Court may appoint a Receiver and if a person residing outside its jurisdiction interferes with the Receiver then the same problem arises as arises here. In my judgment it is eminently desirable to proceed regularly under the Code so far as possible. It is trite law that the appointment of a Receiver so far as regards parties bound by the order operates against them as an injunction. It is an injunction necessarily against interference with the Court's Receiver whether by withholding possession of property or otherwise. Under the Code permanent injunctions are enforced in execution but under O. XXXIX interlocutory injunctions are enforced under a special power which is given to Courts in the Mofussil as well as to the High Court notwithstanding that such Courts have no inherent right of arrest for contempt. The provision is contained in r. 2 of O. XXXIX where it says:—"In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person

to be detained in the civil prison for a term not exceeding six months." It seems to me that instead of appealing to this Court the applicants here would have been better advised to make a fresh application to the learned Judge on the Original Side asking for an injunction in express terms. In case of breach of that injunction an order could be made under O. XXXIX, r. 2 directing the arrest and detention of the offender. In that case there would be no difficulty in holding that s. 136 of the Civil Procedure Code would apply. This Court would have a statutory right to make the kind of order which is now asked for. If there be any objection to this course—and after all it is no part of the duty of this Court to give advice to these appellants—then these appellants must discover some other method of procedure for themselves. In the case of *Rajah of Ramnad v. Seetharam Chetty* (1) it was held that the High Court on its Original Side could not execute decrees by arrest outside its territorial limits, but there are observations which would appear to distinguish the case of arrest for contempt on the ground that that is in its nature a criminal matter. Accordingly the same reasoning may not apply in such a case. But apart altogether from any question of jurisdiction it has to be remembered that there is a question of machinery to be considered and as the Sheriff of Calcutta no longer functions outside the limits of the Ordinary Civil Jurisdiction of this Court grave difficulties arise if it be attempted in any way to exercise criminal jurisdiction by this summary proceeding over a person in the Mofussil. That, however, was not touched upon in the arguments before us and it is a question upon which it is not necessary now to pronounce any opinion.

In my opinion this appeal must be dismissed. We make no order as to costs.

Mitter, J.—I agree.

A. N. A.

(1) 26 M. 120.

Appeal dismissed.

CALCUTTA HIGH COURT.APPEAL FROM APPELLATE ORDER NO. 2107
OF 1924.

January 6, 1927.

Present:—Mr. Justice Duval and Mr.
Justice Mallik.

MUNSHI FUZZLUR RAHAMAN,

Mukhtear—PLAINTIFF—APPELLANT

versus

SADAR ALI AND OTHERS—DEFENDANTS—

RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 65, 66—
Benami purchase in execution sale—Sale held before
passing of new Code but confirmed after new Code—
Suit by real owner against transferee of benamidar,
whether maintainable—Difference between old and new
Codes.*

A *benami* purchase in a Court sale held before the passing of the Civil Procedure Code of 1908 but confirmed after the passing of that Code is governed by the provisions of s. 66 of the Code of 1908 and not by those of s. 317 of the Code of 1882, notwithstanding the provisions of s. 65 of the Code of 1908 under which, on confirmation of a sale, the title of the auction-purchaser vests back with retrospective effect from the date of sale. [p. 67, col. 2.]

Promotha Nath Pal v. Sourav Dasi (1) and *Makar Ali v. Sarfaddin* (2), distinguished.

The chief difference between s. 66 of the Civil Procedure Code of 1908 and s. 317 of the Code of 1882 is that whereas under the old Code a suit would lie against the heirs or assignees of a *benamidar* though not against the *benamidar*, under s. 66 of the new Code no suit would lie against anyone claiming a title under the certificated purchaser. [*ibid.*]

Appeal against the decree of the Subordinate Judge, Second Court, Chittagong, dated the 28th of June, 1924, affirming that of the Munsif, First Court at Patiya, dated the 11th of July, 1922.

Babu Narendra Cumar Das, for the Appellant.

Babu Chandra Sekhar Sen, for the Respondents.

JUDGMENT.

Duval, J.—In this case the plaintiff sued for declaration of his title to, and for possession of, a certain land. His case was that he purchased it in auction-sale in the *benami* of defendant No. 6 on the 8th August, 1908, and that subsequently he got possession in the name of his *benamidar* who was in possession for sometime, but that in 1915 his *benamidar* sold the land to defendants Nos. 1 and 2 and he was dispossessed. He brought a case under s. 9 of the Specific Relief Act and lost it and so he brought this suit. The defence set up in the written statement of the ven-

dees was that the plaintiff was never in possession and that defendant No. 6 was not a *benamidar* and that the suit was barred under s. 66 of the Code of Civil Procedure. Defendant No. 6 who purported to sell the property has put in a written statement stating that he was a *benamidar*. After issues were framed the first Court tried the issue as to whether the suit lay in view of the provisions of s. 66 of the Code of Civil Procedure and held that it did not. This finding has been upheld in appeal. The second appeal is directed on this point only.

Now the sale took place as we have stated on the 8th August, 1908. At that time the Code of 1882 was in force and under s. 316 of that Code the property purchased in execution of the decree vested on the confirmation of the sale; but the sale was not confirmed until 6th January, 1909, when the Code of 1882 had ceased to operate and had been superseded by the Code of 1908. Under s. 65 of the present Code on the confirmation of the sale, the title to the property is to vest back with retrospective effect from the date of the sale. The argument, therefore, addressed to us is that by the confirmation of the sale under s. 65 of the new Code the plaintiff's title to the property accrued on the 8th August, 1908, and, therefore, s. 66 of the Code has no application but that s. 317 of the old Code applies. The chief difference between the two sections is that whereas under the old Code a suit would lie against the heirs or assignees of a *benamidar* though not against the *benamidar*, under s. 66 of the new Code no suit would lie against anyone claiming a title under the certificated purchaser. The learned Vakil for the appellant has referred to two decisions of this Court, being the case of *Promotha Nath Pal v. Sourav Dasi* (1) and the case of *Makar Ali v. Sarfaddin* (2) to support his argument. But in both those cases the sale was confirmed before the new Code came into force, that is to say, before the 1st January, 1909, though in one of them the sale certificate did not issue until after the new Code came in force and there it was held that the real

(1) 50 Ind. Cas. 327; 47 C. 1108; 24 C. W. N. 1101;
31 C. L. J. 463.
(2) 70 Ind. Cas. 606; 50 C. 115; 27 C. W. N. 183; 36
C. L. J. 132; A. I. R. 1923 Cal. 85

purchaser could maintain a suit against the transferee as his right had already accrued under the old Code. The present case, however, is clearly different. No doubt, s. 65 of the new Code states that when the sale has become absolute the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. But the question really before us is whether on the 1st January, 1903, when the new Code came into force the plaintiff's rights had accrued as a purchaser through the *benami* of defendant No. 1. In my opinion it had not. In this connection reference must be made to s. 6 of the General Clauses Act which says that when an Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not affect any right, acquired or accrued under any enactment so repealed.

The only point, therefore, is whether, as a matter of fact, on the 1st January, the plaintiff's right had accrued. Now even if we take s. 65 as dating back the right, it is clear that on the 1st January this sale had not become absolute and so the plaintiff's right had not accrued. Now if the plaintiff's right did not accrue on the 1st January he is clearly bound by s. 66 and if he is bound by s. 66 the plaintiff cannot maintain this suit.

In this view, therefore, I would dismiss the appeal with costs.

Mallik, J.—I agree.

A. N. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

MATRIMONIAL JURISDICTION APPLICATION

No. 6 of 1927.

July 14, 1927.

Present:—Mr. Justice Costello.

PAULINE WHITE—PETITIONER.

versus

S. W. WHITE—RESPONDENT.

Divorce Act (IV of 1869), ss. 7, 55—Order for pay-

ment of alimony pendente lite—Mode of enforcement—Proceedings for contempt of Court, whether can be taken.

An order for payment of alimony *pendente lite* made in a suit under the Divorce Act has to be enforced in accordance with the provisions of the Civil Procedure Code relating to execution of decrees and cannot be enforced by sending the person against whom the order is made to Jail for contempt of Court. [p. 69, col. 2.]

Although non-compliance with an order made by a Divorce Court in England is contempt of Court, an order for payment will not be enforced by attachment. [p. 69, col. 1.]

Application by the petitioner in a suit for judicial separation.

Mr. Barwell, for the Petitioner.

Mr. Langford James, for the Respondent.

JUDGMENT.—This is an application on behalf of the petitioner in a suit for judicial separation who had obtained an order for alimony *pendente lite*. The application is made on behalf of the petitioner for an order that the respondent should carry out the terms of an order made by Mr. Justice Gregory, dated the 7th April, 1927, whereby he was ordered to pay a certain sum to the petitioner by way of alimony *pendente lite*, and the application further asks that in default of compliance with the order to pay the respondent be committed to Jail as for a contempt of Court.

On the previous occasion when the matter came up before me, by consent of Counsel for the respective parties it was agreed that the order made by Mr. Justice Gregory should be varied and that in future the respondent should pay to the petitioner's Solicitors the sum of Rs. 400 or rather the equivalent of it in English money, that is to say, £30, by delivering to them a cheque upon an English Bank on the 7th of each month. That agreement will be embodied in an order of this Court.

The question then remains as to whether or not any order should be made with regard to the costs of the proceedings.

It is said on behalf of the respondent that the procedure adopted for the enforcement of the order of Mr. Justice Gregory will not lie and in fact it is incompetent for the Court to enforce an order of this character as for contempt.

It was very ably argued by Mr. Barwell that proceedings by way of contempt will still lie in this country for the enforcement of an order of this kind, and he bases his argument upon this footing that in England until the passing of the

Debtors' Act in the year 1869 it was the practice to enforce orders for the payment of alimony *pendente lite* by means of proceedings in contempt and that it was only by reason of s. 4 of the Debtors' Act that such procedure was abolished.

That would indeed appear to be the case; and indeed Mr. Justice Hill so held in the case of *Leavis v. Leavis* (1). It also appears from that case and from other authorities that although non-compliance with an order for payment of alimony cannot be enforced by attachment by reason of s. 4 of the Debtors' Act, it nevertheless remains a contempt and has certain effects as a contempt, as for example, in preventing a contumacious respondent himself from obtaining relief. It is clear from the English authorities, which I need not go into in any detail, that other orders made by the Divorce Court in England, as for example, an order requiring a respondent to furnish security for his wife's costs, may still be enforced by proceedings for contempt of Court. From all the authorities it indeed appears that non-compliance with any order made by the Divorce Court in England is a contempt of Court, but so far as an order which directs the payment of money is concerned, although it is a contempt, it cannot be enforced by attachment.

Mr. Barwell argued that as there is no counterpart in this country of s. 4 of the Debtors' Act of 1869, the English procedure not only survives but is imported into the machinery of the Courts of India, and that—partly, if not wholly, by the operation of s. 7 of the Indian Divorce Act of 1869.

It is perhaps a little difficult to follow the reasoning of that argument, because Mr. Barwell admitted quite frankly—and indeed there are plenty of authorities to show that—that s. 7 is concerned not with adjective law, but with substantive law, and it applies to matters which are not specifically otherwise dealt with in the Divorce Act.

However be that as it may, even if it were the intent of s. 7 to bring into this country all the rules of procedure in the

Divorce Court in England, it would no avail the petitioner in the present instance not only because it is no longer the practice in England to enforce order for payment of money made by the Divorce Court by means of contempt, but because there is in the Indian Divorce Act itself an express direction as to the method by which orders of this kind are to be dealt with. Section 55 of the Divorce Act provides that all decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from in the like manner as the decrees and orders of the Court made in the exercise of its Original Civil Jurisdiction. They may be appealed from under the laws, rules and orders for the time being in force.

Therefore, in order to ascertain how orders made by the Court in any suit or proceeding under the Divorce Act should be enforced, it is necessary to turn to the provisions of the Code of Civil Procedure and to see how orders of the Court made in the exercise of its Original Civil Jurisdiction are to be enforced and upon turning to the Code we find that by s. 76 it is laid down that the provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to execution of orders; and by s. 2, cl. 14, "order" is defined as meaning a formal expression of any decision of the Civil Court which is not a decree. There can be no doubt, in my opinion, that the order made by Mr. Justice Gregory on the 7th July was an "order" within the definition of s. 2, cl. 14, and reading that in conjunction with s. 36, that order has to be enforced in accordance with the provisions of the Code relating to the execution of decrees, and there is an appropriate part of the Code dealing with the matter, into which I need not go at this moment. Suffice it to say that the provisions relating to the execution of decrees or the enforcement of orders do not contemplate the Court dealing with the matter purely as one of contempt. On the contrary, there are various specific provisions laying down how the matter should be dealt with and how the debtor in default should be brought before the Court.

In these circumstances it seems to me that it is not competent for a Court to send a defaulting respondent to Jail straight-

(1) (1921) P. 299; 90 L. J. P. 302; 125 L. T. 28; 65 S. J. 456; 37 T. L. R. 578.

way. The machinery dealing with the execution of orders must be complied with and then ultimately if there is a failure to pay the respondent may be committed to Jail.

From what I have said the consequence is that these proceedings are in a sense misconceived. In so far as they purport to be an application to commit the respondent to Jail they are not in order. I will also observe that the petition itself prays that there shall be an order directing payment, which is inconsistent with a proper application for commitment into prison as for a contempt.

Having regard to all the circumstances I think the proper method of dealing with this question of costs is to say that there shall be no order as to costs.

A. N. A.

Order accordingly.

CALCUTTA HIGH COURT.
APPEAL FROM ORIGINAL ORDER No. 347
OF 1927.

August 16, 1927.

Present :—Mr. Justice Mukerji and
Mr. Justice Mallik.

JNANENDRA NATH MUKHERJEE
AND ANOTHER—PLAINTIFFS—APPELLANTS
versus

JITENDRA NATH MUKHERJEE

AND OTHERS—DEFENDANTS—RESPONDENTS.

Executor—Acceptance of office—What constitutes acceptance—Effect of acceptance—Dispute as to construction of Will—Reference to arbitration empowering arbitrators to decide in contravention of Will—Award contrary to Will, validity of—Award dealing with rights of strangers, effect of.

It is not open to a person who has been appointed as an executor to refuse the office or renounce it after he has once elected to act as executor. [p. 72, col. 1.]

An executor may determine such election by acts which amount to an administration. The acts which amount to an administration, so that the party cannot afterwards refuse, are (1) anything done by the executor with relation to the effects of the testator

which shows an intention in him to take upon him the executorship, and (2) whatever acts will make a man not named executor in the Will, liable as executor *de son tort*. [*ibid.*]

Where certain persons who had been appointed as executors under a Will without acting in any way in defiance of its terms put forward the Will and relied on its contents, but, being unable to agree as to its construction, referred the matters in dispute between themselves and the legatees to arbitrators to settle the matters in the best way they could either in accordance with or in contravention of its terms, and the arbitrators made an award in violation of the terms of the Will :

Held, (1) that the reference amounted to acceptance of the office on the part of the executors; [*ibid.*]

(2) that the reference and the award were illegal inasmuch as the object of the agreement of reference was to attain something which the law did not permit, namely, to allow the parties to acquire title to property in contravention of the terms of a Will in a case where the title was claimed under the Will itself, to allow the executors to have the Will construed by a tribunal of their own choice without proving the Will and evading the duty fixed by law, and to allow the executors and some of the legatees to join together and make an arrangement for the distribution of the properties contrary to the testator's intention and to the prejudice and detriment of the remaining legatee or legatees under the Will. [p. 72, col. 2.]

An award is not invalid as between the parties to the reference merely because it purports to determine the rights of strangers. [p. 71, col. 2.]

Appeal against an order of the Subordinate Judge, Second Court, Hooghly, dated the 28th of April, 1924.

Babus Bibhuti Bhusan Lahiri and Surendra Nath Basu (II), for the Appellants.

Dr. Bijan Kumar Mukherji, for the Respondents.

JUDGMENT.—One Kailas Chandra Mukherji died in November, 1910, leaving a Will, dated the 28th August, 1908. He left two sons Jnanendra and Debendra by his first wife and four sons Jogendra, Jatindra, Jitendra and Jonendra by his second wife. He also left a daughter Ashalata by his second wife, who was unmarried at the time of his death. Jnanendra, Debendra and Jogendra had attained majority at the date of the Will, and Kailas Chandra Mukherji appointed all the said three sons as executors. Jogendra, however, died during the lifetime of his father and a few months before the death of the latter. No Probate was taken of the Will but on the 17th January, 1921, there was an agreement between the first party consisting of Jnanendra and Debendra and the second party consisting of Jatindra, Jitendra and Jonendra by which the disputes between them were referred to the arbitration of three gentlemen, Babu Nanda

Lal Pal, Babu Hari Charan Chatterji and Babu Kanti Chandra Ghose. The arbitrators made their award on the 25th November, 1921. On the 1st February, 1922, Jnanendra and Debendra applied to the Court against Jatindra, Jitendra and Jonendra that the award might be filed. This gave rise to the suit which was tried by the Subordinate Judge, Second Court, Hooghly. The Subordinate Judge made an order refusing to file the award and dismissed the suit. Hence this appeal.

It was stated in the agreement that a dispute had arisen between the two parties for the partition of the moveable and immoveable properties left by their father and in respect of the construction of the Will and also with regard to the accounts connected with the estate left by him. It was stipulated that—"Both the parties shall be bound by the award that may be given by the said arbitrators on making a partition or any other settlement in respect of the self-acquired moveable and immoveable properties of our father, by relying on the evidence and documents that may be put forward. None of the parties shall be competent to raise any objection or plea thereto. The parties shall all be bound by the decisions arrived at by the arbitrators, with respect to the respective assets or liabilities of the parties after examining and looking through the accounts of the income and expenditure of the estate left by our father since his death." The Will was put forward as one of the documents in the case, but the arbitrators thought, to quote their own words, that it was "unworthy of evidence." The arbitrators nevertheless referred to the Will, but only for the purpose of ascertaining the testator's intention and not with the object of giving effect to the same, and, on the other hand, the arrangement contemplated by the testator was freely departed from in the award. As regards partition the allotments were made in contravention of the terms of the Will in order to suit the desire of the parties or their mutual convenience. The unmarried daughter Ashalata who was not a party to the agreement or the suit had been given certain ornaments by the Will, but the arbitrators held that Kailas had no authority to dispose of them and they awarded the same to the plaintiffs. There were other variations made though they were of minor importance. The award

also gave credit in favour of the plaintiffs in respect of a sum of Rs. 4,500 on the ground of maintenance charges incurred by them on account of the defendants.

The Subordinate Judge has dismissed the suit upon three main grounds, and these grounds have been challenged before us.

The first ground on which the Subordinate Judge has proceeded is that in his opinion the arbitrators exceeded their authority. In his opinion the arbitrators had no power to partition the properties or award the ornaments in violation of the terms of the Will as the parties did not challenge its propriety, and any intention on their part to do away with it was not apparent. So far as this ground is concerned I am unable to agree in the view of the learned Subordinate Judge, for the terms of the agreement left it open to the arbitrators to make any award they thought fit either in accordance with or in contravention of the Will. In my opinion the arbitrators did not exceed their authority. It is true that the award purported to interfere with the rights of strangers—notably the daughter Ashalata, and the strangers would not in any event be affected by it; but as between the parties to the award its provisions must be held to be operative, if there is no other question about its validity.

The next ground on which the learned Subordinate Judge rested his decision is that one of the arbitrators Babu Nanda Lal Pal did not assent to one of the terms of the award, namely, that about the credit of Rs. 4,500 in favour of the plaintiffs on account of the maintenance of the defendants. The finding has been assailed before us and reliance in this respect has been placed upon certain passages in the deposition of the said arbitrator Babu Nanda Lal Pal as indicating a failure of memory on his part and also upon the deposition of another arbitrator Babu Kanti Chandra Ghose as establishing that there was such assent. A careful study of the evidence of these two gentlemen has convinced me that there must have been a misunderstanding in the matter, that is to say, Babu Nanda Lal Pal never assented to this particular provision, while Babu Kanti Chandra Ghose on his part honestly thought that Babu Nanda Lal Pal had given his assent. It is impossible to believe that such a positive statement as the one which Babu

Nanda Lal Pal made in answer to the Court towards the end of his deposition, was due to a failure of memory. Both the witnesses are quite respectable and their integrity is beyond reproach. On this ground alone the dismissal of the suit is amply justified.

Another ground on which the judgment of the Subordinate Judge rests is that the plaintiffs being executors could not legally make any reference to arbitration which would go against the terms of the Will. This proposition has been challenged, it being urged that it will not hold good in this case as the plaintiffs have not taken Probate of the Will and have not accepted their office as executors. Now, the office of executor being a private office of trust named by the testator and not by the law, one named executor may refuse the office or renounce it. It is, however, too late to refuse or renounce when one has once elected to act as executor; and he may determine such election by acts which amount to an administration. The acts which amount to an administration, so that the party cannot afterwards refuse, are (1) anything done by the executor with relation to the effects of the testator which shows an intention in him to take upon him the executorship, and (2) whatever acts will make a man not named executor in the Will, liable as executor *de son tort* (Williams on Executors, 11th Edition, Volume I, page 194). In the present case the plaintiffs, and for the matter of that the defendants as well, put the Will forward and relied on its contents, and were unable to agree as to its construction, but never showed any intention to act in defiance of its terms beyond leaving it to the arbitrators to settle the dispute in the best way they could and agreeing to abide by the award that they would make. The plaintiffs who are two of the executors named in the Will, have been handling the estate and effects of the testator ever since his death which took place so far back as 1910. Far from refusal or renunciation, the reference to the arbitration, one of the matters referred thereby being the construction of the Will itself, affords ample indication of the plaintiffs having accepted the office. They cannot be permitted to enter into an agreement the result of which may be, and in this particular case has been, to bring about an award nullifying the intention of the testator.

The object sought to be attained by such an agreement is something that the law does not permit, namely, to allow the parties to acquire title to property in contravention of the terms of a Will in a case where the title is claimed under the Will itself, to allow the executors to have the Will construed by a tribunal of their own choice without proving the Will and evading the duty fixed by law, and to allow the executors and some of the legatees to join together and make an arrangement for the distribution of the properties contrary to the testator's intention and to the prejudice and detriment of the remaining legatee or legatees under the Will. The Court which is asked to pass a judgment and issue a decree in accordance with such an award may very well refuse to do so treating the award as an invalid one. Under the English Law when it is too late for an executor to renounce, he having once elected to act as such, he may be cited to take Probate and his disobedience will amount to a contempt of Court.

In my opinion, therefore, the decision of the Court below is right and this appeal should be dismissed with costs—hearing-fee being assessed at three gold mohurs.

A. N. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 25
OF 1926.

May 3, 1927.

Present:—Mr. Justice B. B. Ghose and
Mr. Justice Page.

H. R. CHAMARIA AND COMPANY—
DEFENDANTS—APPELLANTS
versus

SONATON PAL AND ANOTHER—PLAINTIFFS
—RESPONDENTS.

Mortgage—Mortgagee obtaining possession with consent of mortgagor—Liability to ejectment—Person claiming under mortgagee, whether trespasser—Purchaser of equity of redemption, rights of.

The possession of a mortgagee, who though not

entitled to possession under his mortgage, enters into possession of the mortgaged property with the express or tacit consent of the mortgagor, continues to be lawful until such assent is withdrawn, and neither the mortgagee nor a person who is holding under him can be treated as a trespasser by a purchaser of the mortgagor's rights. [p. 76, col. 2.]

"Owing to the exceptional severity with which a mortgagee in possession is treated in taking the accounts, the Courts are slow to decide that such possession has been taken, and will only do so when it is proved that the mortgagee had no reasonable ground for believing himself entitled to take the rents and profits in any other capacity. The mortgagee may relieve himself of the liability to account as a mortgagee in possession by showing that he entered into possession in some other character. If he fails to establish that fact in order to exonerate himself from the liability to account as a mortgagee in possession he is held to be accountable as such." [p. 77, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Second Court, Dacca, dated the 21st December, 1925.

Sir P. C. Mitter, Mr. Charu Chandra Biswas and Babu Monindra Kumar Biswas, for the Appellants.

Babus Joges Chunder Roy, Rajendra Chandra Guha and Prokas Chandra Mazumdar, for the Respondents.

JUDGMENT.

B. B. Ghose, J.—This is an appeal on behalf of the principal defendant H. R. Chamaria and Company, who may shortly be described as Chamaria, against a judgment and decree of the Subordinate Judge, Second Court, Dacca, dated the 21st December, 1925. The suit as framed was on the ground that Chamaria was a tenant-at-will under one J. B. Sukeas who was the owner of the property in question. The plaintiff had purchased the right, title and interest of the legal representative of J. B. Sukeas in execution of a money-decree on the 2nd May, 1919. He was put into symbolical possession by virtue of his purchase on the 18th July, 1919. The purchase was made in the *benami* of his son named Bepin Behary Pal who was joined as defendant No. 2 in the suit. On the 4th August, 1919, the plaintiff served notice on Chamaria determining the tenancy under which Chamaria was alleged to have held the property in question as from the end of August, 1919. The present suit was brought on the 17th September, 1919, and the claim was for rent at the rate of Rs. 600 per month from 2nd May to 31st August, 1919, and for damages at a certain rate, which it is unnecessary to mention, from the 1st September to 17th

September, 1919. The plaint was subsequently amended by an application made on the 23rd January, 1925, asking for mesne profits or damages up to the date of delivery of possession. By this amendment the original valuation of the suit which was Rs. 10,000 odd was increased to Rs. 80,000 odd. The defendant objected to the application for amendment which was overruled by the lower Court. The defendant's main defence was that he was never a tenant of the land under the plaintiff or his predecessor-in-interest, and the plaintiff has no right to maintain the suit against him. His case was that one J. O. Galstaun held an equitable mortgage—or as it may be properly described as a mortgage by deposit of title-deeds, which was effected in the town of Calcutta under s. 59 of the Transfer of Property Act by J. B. Sukeas; and that Galstaun was in possession of the property in suit along with other properties as a mortgagee and while in such possession Galstaun let out the property at first to a brother of J. B. Sukeas and then to the defendant Chamaria at a rent of Rs. 600 per month. But sometime in April, 1918, an agreement was entered into between Galstaun and Chamaria that Chamaria would purchase the property in dispute for Rs. 85,000 and that he would have to pay no rent but would have to pay interest on the purchase-money agreed to between them. The sale could not be effected because Galstaun had no right to effect a sale of the property at the time. But the stipulation was that Galstaun would either take the permission of the Court to sell the property on behalf of the infant heir of J. B. Sukeas or he would himself effect the sale after purchasing the property in execution of the decree on his mortgage which he intended to have. On these pleadings several issues were framed in the lower Court. The main questions are covered by issues Nos. 3, 7 and 11. Issue No. 3 was "Is there any relationship of landlord and tenant between the plaintiff and the defendant?" Issue No. 7 was "Was the plaintiff aware of the equitable mortgage in favour of J. O. Galstaun at the time when he purchased the property in suit? If so, can he get *khas* possession without redeeming plaintiff's mortgage?" The 11th issue was "Whether Mr. J. O. Galstaun is mortgagee in possession in respect of the properties in

suit. If so, whether the plaintiff is entitled to recover any amount by way of damages? It should be stated here that the plaintiff did not at the commencement admit the mortgage of Galstaun. When the suit was brought by Galstaun on his mortgage the present plaintiff was joined as a defendant as he ought to have been joined as a purchaser of a portion of the equity of redemption. Galstaun's suit on his mortgage was brought on the 14th of May, 1919, four months prior to the present suit by the plaintiff. The plaintiff disputed the mortgage and in that suit he took up a plea that Galstaun having got into possession of the property and having realised the profits he was bound to account for the receipts and those must be debited against the debt if any was found due to Galstaun. That suit was decided in the trial Court on the 23rd September, 1921. There was an appeal against that decision and this Court modified the decree of the Subordinate Judge by its judgment dated the 23rd January, 1924. I shall speak later on about this judgment. The judgment and decree of the High Court were affirmed by the Judicial Committee in January, 1927.

In the present case before the Subordinate Judge the trial proceeded upon the ground that Galstaun had a mortgage on the property in question. The sole question upon which the parties seem to have been in controversy was whether Galstaun was ever in possession of the property in question as a mortgagee or in other words whether Galstaun's position was that of a mortgagee in possession. The Subordinate Judge found as it was found in the previous litigation that the purchase of the plaintiff was with notice of Galstaun's mortgage. The Subordinate Judge found in the present case in deciding issue No. 7 as stated above that Galstaun took possession of the property as guardian of the infant son of J. B. Sukeas and did not take possession as a mortgagee. That being so, he held with regard to issue No. 7 that the brother of J. B. Sukeas was a tenant of Owen Sukeas, the infant son of the original mortgagor, when Galstaun let out the property to him and that Chamaria was similarly a tenant under Owen Sukeas when Chamaria was let into possession by Galstaun in his capacity of guardian of Owen Sukeas.

In that view it was held that the plaintiff as a purchaser of the right title and interest of Owen Sukeas stepped into his shoes and thus Chamaria became a tenant under the plaintiff and that tenancy was terminated at the end of August, 1919, by notice to quit which was served by the plaintiff upon Chamaria and upon that basis the plaintiff was entitled to a decree for rent for the period of the tenancy and also for damages by way of mesne profits till the date of delivery of possession. The property, however, was sold in execution of the mortgage decree obtained by Galstaun on the 23rd October, 1925, and purchased by himself. The value fetched for the property at the execution sale was far below the amount of the mortgage decree. By reason of that sale no decree could have been made by the Subordinate Judge for ejectment of the defendant as the plaintiff's title to the property ceased to exist by virtue of that sale. But he made a decree for damages up to that date and the total amount of the decree made by the Subordinate Judge, who modified the claim for damages made by the plaintiff to a considerable extent, was Rs. 46,660. The defendant Chamaria has appealed to this Court.

The first ground taken on behalf of the appellant is that the amendment asked for by the plaintiff should not have been allowed by the lower Court. We do not think that there is any substance in this objection. If the plaintiff had not specified in his plaint that he asked for mesne profits till the date of the suit, that is to say, till the 17th of September, 1919, the Court might have been in a position to make a decree for mesne profits up to the date of delivery of possession. But if the suit is otherwise properly framed there was no harm in allowing the plaintiff to amend his plaint by striking out from his prayer for recovery of mesne profits the words "up to the date of the suit" and by substituting in their place the words "up to the date of delivery of possession."

The appellant then takes up the position that he was brought on the land by the mortgagee Galstaun who was in possession at the time and that so long as the possession of Galstaun could not be got rid of the plaintiff was not entitled to sue him as there was no privity be-

tween him and the plaintiff. As I have already stated Chamaria never acknowledged that he was on the land as tenant of Sukeas. Galstaun's possession was not admitted by the plaintiff in this suit either in the plaint or in the evidence on his side. The Subordinate Judge, however, has found that Galstaun was in possession. But he has held that as Galstaun was in possession as a guardian of Owen Sukeas the relationship of landlord and tenant existed between Owen Sukeas and the defendant. The question, therefore, is whether that position is at all maintainable. The learned Vakil on behalf of the plaintiff respondent does not seek to support the decree of the Subordinate Judge on that ground. The position that he takes up is this, that Galstaun got into possession without any right. His position was that of a mere trespasser and Chamaria who was brought on the land by Galstaun was in no better position. They were joint trespassers upon the facts as established by the evidence. That being so, the plaintiff was entitled to claim damages from any one of them, both of whom were jointly and severally liable. So long as it is not established that the plaintiff has recovered any damage from the other joint trespasser the plaintiff is entitled to recover damages from this tortfeasor that is, Chamaria, and upon that ground the decree of the Subordinate Judge is unassailable.

The appellant, on the other hand, contends that Galstaun was in possession as a mortgagee. He brought a suit on his mortgage. In that suit he admitted in his plaint, as would appear from a recital in the judgment of the Subordinate Judge in the mortgage suit (at page 42 of the second part of the paper-book), that he had obtained possession of the mortgaged properties and some moveables belonging to J. B. Sukeas, after the death of J. B. Sukeas. He had sold some of the moveables and realised the rents and profits of the mortgaged properties and credited the price and rent and profits towards the satisfaction of his debt. He took upon himself the liability to account as a mortgagee in possession. The present plaintiff was defendant No. 3 in the previous mortgage suit who practically alone contested the suit. He also referred to the fact that Galstaun had taken possession of the property left by J. B. Sukeas and that he was bound to account

for all the moneys that he had received, (which the present plaintiff described as mis-appropriation) and also to make good the amount of the loss which he had caused by his neglect to get in any part of the property of the deceased. In substance the present plaintiff as a defendant in the mortgage suit pleaded that not only Galstaun was liable to account for what he had actually received or might have received but he was also liable to account for his wilful default. Upon that an issue was framed as to how much was realised and that was the 6th issue before the Subordinate Judge in the mortgage suit. Galstaun produced his account books in the mortgage suit. What the receipts were is evident from the fact which was stated in the judgment of the Subordinate Judge (at page 53 of the same part of the paper-book) where the Judge stated "The plaintiff, it is true, credited in his accounts the moneys received from the estate of J. B. Sukeas after his death and these should be held as payments made in reduction of the plaintiff's dues." It should be stated that the decree made by the Subordinate Judge was merely a money decree as against the representative of the original debtor J. B. Sukeas and the sums which were found in the accounts to have been realised from the property by Galstaun were debited against his dues.

Against that decree Galstaun appealed to the High Court and in the High Court the decree of the Subordinate Judge was modified to this extent that a decree was made in favour of Galstaun as a mortgagee and he was held entitled to recover his dues from the mortgaged property. With regard to the accounts it appears that neither party pressed for an account being taken and a decree which in ordinary case is made to the effect that accounts should be taken of what was due to the mortgagee by taking accounts of what was due under the bond and what was received by the mortgagee from the mortgaged properties was not made. Instead of that a decree was made for the sum that was found by the lower Court with interest and costs. The reason evidently seems to have been that both the parties knew that the receipts were less than the interest and outgoings and that on taking accounts the dues of the mortgagee would be found to have been much larger than

what was found by the Subordinate Judge and the mortgaged property not being of sufficient value it would be mere waste of time and money to take further accounts which would have the effect of increasing the debt which was found to be due to the mortgagee. There was an appeal from the decision of the High Court to the Privy Council by the present plaintiff. The judgment and decree of the High Court were affirmed by the Privy Council on the 21st January, 1927*. No objection was made in that appeal to the accounts nor to the nature of the decree that was made by the High Court. The only ground upon which the present plaintiff chose to fight the case before the Privy Council was whether there was a mortgage or not. The position of the parties, therefore, stands thus, that if there was a mortgage the equity of redemption purchased by the plaintiff was worth nothing as the mortgage-debt of Galstaun would far exceed the value of the property in whichever way the accounts might have been taken.

It is contended on behalf of the appellant that it is quite clear from the facts that Galstaun was in possession as a mortgagee. That being so, Chamaria had been brought on the land by the mortgagee in possession and the plaintiff as a purchaser of the equity of redemption could not treat Chamaria as his tenant so long as the property was not redeemed by him. It is conceded on the part of the respondent that if Galstaun was a mortgagee in possession and if Chamaria was brought on the property by Galstaun as such mortgagee the plaintiff would have no case. But his contention is that Galstaun never took possession as a mortgagee and that contention is sought to be supported by the fact that the plaintiff was not drawn up in the mortgage suit in the form which is prescribed in Appendix 'A,' form No. 45 of the Code of Civil Procedure for a plaintiff by a mortgagee who had entered into possession; and the decree is not also in the form given in Appendix 'D' of the Code of Civil Procedure. I have already stated why the decree was not in that form. The plaintiff, although it is not precisely in the form prescribed in Appendix 'A,' sufficiently indicates the position of Galstaun. When he stated in his plaintiff

that he had a mortgage and that after the death of the original mortgagor he got into possession of the property and realised rents and profits which he was willing to debit against the mortgage amount, this is a sufficient statement that the mortgagee was liable to account as mortgagee in possession and I have already indicated the defence in which it was alleged that the mortgagee was not only bound to account for what he received or what he might have received but also to account for the loss to the estate by his default. Under the circumstances it seems to me difficult to hold that the position of Galstaun was anything but that of a mortgagee in possession. The Subordinate Judge has held that Galstaun went into possession as a guardian. It is undoubtedly true, as it appears from the record, that after the death of J. B. Sukeas, who had himself written a pencil note before his death to the effect that Galstaun should look after his minor son, Galstaun thought that he would act as a sort of a guardian of the minor son of J. B. Sukeas as Galstaun seems to have been very much interested in the welfare of the family. With that view he took possession of not only the mortgaged property but also some moveable properties belonging to Sukeas and tried to carry on his business. It is apparent that when he found that the debts of the estate of Sukeas were so great that it would be hopeless to try to save the estate he ceased from acting as a sort of guardian of the infant. Subsequently, a lady who was the grandmother of Owen Sukeas took out Letters of Administration of the estate of J. B. Sukeas. Galstaun was certainly not entitled to enter into possession under his mortgage. But it is quite clear that he got into possession either with the express or tacit consent of the persons who were really interested in the estate of the mortgagor, J. B. Sukeas. This question does not seem to have been properly investigated and that must have been due to the fact that the plaintiff altogether ignored the existence of Galstaun with reference to this property in the present litigation. It appears quite clear from the evidence on the record that Galstaun entered into possession peacefully and without objection on the part of the persons interested in the mortgaged property. That being so, he cannot be treated as a wrong-doer as he is sought to be treated by the respondent here and unless the

*See 101 Ind. Cas. 50—[Ed.]

plaintiff can maintain the position that Galstaun was a wrong-doer and Chamaria was equally a wrong-doer the present suit cannot, in my opinion, be maintained as against Chamaria.

It is contended on behalf of the respondent that there is nothing to show that Chamaria paid any money to Galstaun for the period of his occupation or that any sum which he might have paid was taken into account in the mortgage suit and, therefore, the plaintiff is entitled to recover the money from Chamaria for the period of his occupation. We are not concerned in this case, in my judgment, with the question whether proper accounting was made in the mortgage suit of Galstaun. That question does not arise in the present case. The short question which seems to arise here is that if Galstaun was in possession as a mortgagee and was accountable as such in his mortgage suit any person who has been brought on the mortgaged property by Galstaun has no privity between himself and the mortgagor so as to be liable to the mortgagor for his occupation of the mortgaged property. It may be conceded that the plaintiff after his purchase of the equity of redemption could by giving proper notice to Galstaun claim to recover possession of the property. In other words he might withdraw by notice to Galstaun the consent that was either actually or tacitly given by his predecessor-in-interest to the taking of possession by Galstaun; but it is unnecessary to discuss what the position would have been in that case as there is no allegation anywhere on the record that any such notice was given. The plaintiff was, therefore, bound by the consent given by or on behalf of the owner of the equity of redemption before his purchase to the taking of possession by Galstaun and he cannot on that ground maintain this suit against the defendant for damages or rent.

There is another matter with regard to which I propose to make a few observations. The discussion by the learned Subordinate Judge in his judgment as regards the question whether Galstaun was a mortgagee in possession or not, is based upon a discussion in the books as to whether the mortgagees should in certain cases be treated as having taken upon himself the onerous position of a mortgagee in possession. When a mortgagee enters into possession he is bound to account as a mortgagee in possession. But owing to the exceptional severity

with which a mortgagee in possession is treated in taking the accounts, the Courts are slow to decide that such possession has been taken, and will only do so when it is proved that the mortgagee had no reasonable ground for believing himself entitled to take the rents and profits in any other capacity. The mortgagee may relieve himself of the liability to account as a mortgagee in possession by showing that he entered into possession in some other character. If he fails to establish that fact in order to exonerate himself from the liability to account as a mortgagee in possession he is held to be accountable as such; for example, in this case if in the mortgage suit Galstaun had taken up the position that he did not enter into possession as a mortgagee but simply as guardian of Owen Sukeas, I think his plea could not have been given effect to. He was not the legal guardian of Owen Sukeas and, therefore, as there is no other legal ground, which he could maintain for being in possession of the property he would be liable to account as a mortgagee in possession. My view, therefore, is that Chamaria may shelter himself under the plea that Galstaun took possession of the property as a mortgagee after the death of J. B. Sukeas and that he was brought on the land by Galstaun.

There was no relationship of landlord and tenant between him and the plaintiff and the plaintiff, therefore, is not entitled to claim anything from him. The plaintiff purchased the equity of redemption which unquestionably was worth nothing and he is not, in my judgment, entitled to recover anything from Chamaria.

In that view this appeal must be allowed and the suit dismissed with costs in all Courts.

Page, J.—I agree. This is a suit brought to recover *khas* possession of certain immoveable property together with arrears of rent and mesne profits. The property in suit was the subject-matter of an equitable mortgage of the 22nd May, 1914, created by one J. B. Sukeas in favour of J. G. Galstaun.

It was common ground at the hearing of the appeal that even if the sums decreed for rent and mesne profits in the suit had been added to the mortgage security it would have been insufficient to meet the sum due to Galstaun under the mortgage of the 22nd May, 1914. The ground upon

which the decree was based is set out in the judgment of the learned Subordinate Judge as follows: "Defendant No. 1 (that is appellant) got into possession admittedly as tenant at a monthly rent of Rs. 600. They were let into possession by Mr. Galstaun in his capacity as a guardian of Owen Sukeas in 1917, and they paid rent as they had agreed to pay for a period of one year. In March or April, 1918, they entered into an infructuous verbal contract with Mr. Galstaun to purchase the property for Rs. 85,000, but they did not pay the money as Mr. Galstaun could not execute any valid deed of transfer and it was settled and agreed that reasonable interest upon the sum of Rs. 85,000 should be paid by H. R. Chamaria & Co. As there was no sale the interest payable as mentioned above was really the rent payable for the property and thus the tenancy created at first was practically continued. The relationship of landlord and tenant, therefore, in my opinion, existed as between Owen Sukeas and defendant No. 1 till the interest of Owen Sukeas was purchased by the plaintiff on the 2nd May, 1919, in the *benami* of his son defendant No. 2 in auction-sale. On purchase of the equity of redemption the plaintiff stepped into the shoes of Owen Sukeas and thus H. R. Chamaria & Co. became tenants under him. The tenancy terminated with the end of August 1919 as it was put an end by a notice to quit." It is quite clear that Galstaun could not legally enter into an agreement for a tenancy with H. R. Chamaria & Co. in the capacity either of guardian or of agent of the minor son of Sukeas. It follows, therefore, that the suit as framed must fail, for no privity of estate at any time existed between the plaintiff and Chamaria. At the hearing of the appeal, however, the learned Vakil for the respondent contended that, although he could not support the decree upon the ground upon which it was based by the learned Subordinate Judge, it ought to be affirmed upon an entirely different basis. He urged that Chamaria must have been in possession of the property at all material times either without any title or claiming title through the mortgagor or the mortgagee.

As the learned Vakil for the appellant admitted that he could not claim title through the mortgagor Chamaria either had no title to be in possession at all or he must rest his claim to be in possession upon

the title of Galstaun, the mortgagee. Upon that assumption the learned Vakil for the respondent further contended that Galstaun took possession without any pretence of legal right, and was liable to be ejected as a trespasser; and that Chamaria, who admittedly was put into possession by Galstaun acting in some capacity or other, was in a like predicament. Being trespassers both Galstaun and Chamaria were jointly and severally liable to pay damages for having been in wrongful possession of the property. That is a different cause of action—involving the consideration of entirely different issues—from the cause of action that was set out in the plaint and canvassed at the trial, and learned Counsel who appeared for the appellant strenuously contended that the Court ought not to permit the respondent to set up a new cause of action of this nature for the first time in appeal. It is necessary to decide that question, because, in my opinion, upon the evidence the learned Subordinate Judge ought to have held that at all material times Galstaun was in possession of the property in suit as mortgagee and not as a trespasser. The oral evidence upon this matter, in my opinion, supported the view that Galstaun took possession of this property as mortgagee with the assent of the mortgagor. That being so, his possession was lawful possession unless and until the assent of the mortgagor to Galstaun remaining in possession of the mortgaged property was withdrawn. At the hearing of the suit no allegation was made, no issue was raised, and no evidence was led by the plaintiff to prove that any time after he purchased the property the plaintiff had refused or withdrawn his assent to Galstaun remaining in possession of the property as mortgagee under the mortgage of 12th May, 1914. It may be that if such an issue had been raised at the trial the defendant might have been in a position to prove that the plaintiff in fact consented to Galstaun remaining in possession as mortgagee. But once it is found that Galstaun took possession of the property as mortgagee with the assent of the mortgagor, in my opinion, the mortgagee's possession continued to be lawful possession until the assent of the mortgagor was withdrawn; and if Galstaun's possession was lawful possession it follows that Chamaria's possession was also lawful.

The result is, therefore, that, even as

suming that the respondent ought to be allowed at this stage of the proceedings to put forward the case that Chamarra was trespasser, such a contention must fail having regard to the evidence that has been adduced. It is unnecessary to consider the legal position of the plaintiff *vis-a-vis* the mortgagee Galstaun, and I refrain from expressing any opinion with respect to the legal obligations that existed or may exist between them.

For these reasons I agree that the appeal should be allowed and the suit dismissed.

A. N. A.

Appeal allowed;

Suit dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 466
OF 1925.

July 22, 1927.

Present :—Mr. Justice Page and
Mr. Justice Graham.

MAHESH CHANDRA SADHU AND OTHERS
DECREE-HOLDERS—APPELLANTS
versus

JOGENDRA LAL SARKAR AND OTHERS—
JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 29—Order for stay of execution, operation of—“Until the pending suit has been decided”—“Suit”, whether includes “appeal”.

The words “until the pending suit has been decided” in O. XXI, r. 29 of the Civil Procedure Code mean until the claim in the pending suit has been finally decided, that is to say, after all rights of appeal have been exhausted. [p. 80, col. 2.]

Appeal against an order of the Subordinate Judge, Asansole, District Burdwan, dated the 29th of August, 1925.

Mr. Ram Chandra Majumdar and Dr. Bijan Kumar Mukherjee, for the Appellants.

Mr. Bankim Chandra Mukherji and Babu Shib Saran Sarkar, for the Respondents.

JUDGMENT.

Page, J.—The determination of this appeal depends upon the true construction of O. XXI, r. 29 of the Civil Procedure Code. The question raised is one of first impression, for in none of the High Courts in India does it appear to have been considered or decided. Order XXI, r. 29 runs as follows :—“Where a suit is pending in any

Court against the holder of a decree of such Court, on the part of the person, against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.” The question to be determined is whether the words “until the pending suit has been decided” mean until a decree has been passed by the Court in which the suit is pending, or until the claim in the pending suit has finally been determined. The material facts are not in dispute.

The present appellants or their predecessors-in-title obtained a decree in the Court of the Subordinate Judge of Asansole against the respondents for Rs. 10,939-14 and costs on the 22nd March, 1915. This decree was affirmed on appeal to the High Court on 14th January, 1918. On the 18th April, 1925, the appellants applied to the Subordinate Judge of Asansole for execution of the decree which they had obtained in the High Court on 14th January, 1918 to the extent to which it had not already been satisfied. On the 29th August, 1925, the learned Subordinate Judge of Asansole dismissed the appellants' application upon the ground that it was barred by limitation. Against this order the appellants-decree-holders have preferred the present appeal. The appeal is supported upon two grounds, (i) that the present application for execution must be treated as a continuation of a previous execution case (No. 101 of 1919); (ii) that an order under O. XXI, r. 29 staying the execution of the decree of 14th January, 1918, had been passed by the learned Subordinate Judge of Asansole on the 14th April, 1920, that the stay order remained in force until the 24th November, 1924; and that, if the time during which the execution of the appellants' decree was stayed was excluded from the period during which limitation would run, the application for execution of the 18th April, 1925, was not time-barred.

Now, it appears that in the execution case No. 101 of 1919 (31st July 1919) Rs. 7,844-4-0 were realised in part satisfaction of the decree, and this case was dismissed on part satisfaction on 30th April, 1920. On the 19th May, 1920, the appellants again applied for execution of the decree in case No. 129 of 1920, and on the 23rd June, 1920, this execution case was dismissed for default. In

these circumstances it cannot reasonably be contended that the application for execution of the 18th April, 1925, was in continuation of the former execution cases which had been determined; and the first contention urged on behalf of the appellants, therefore, fails. *Raghunath Sahay Singh v. Lalji Singh* (1) and *Dhukiram Srimani v. Jogendra Chunder Sen* (2).

On the 14th April, 1920, however, the learned Subordinate Judge of Asansole had passed the following stay order:—

"As it appears that the judgment-debtors, Jogendra Lal Sarkar and others, have instituted a suit for recovery of Rs. 3,170-15 6 for royalties against the decree-holders (in M. Suit No. 58 of 1918), on the petition of the judgment-debtors let the execution be stayed under O. XXI, r. 29."

The judgment-debtors' suit was decreed by the Subordinate Judge of Asansole on 16th June, 1920. Against that decree an appeal was lodged, and the judgment-debtors' claim against the decree-holders was finally determined by a decree of the learned District Judge of Burdwan of the 24th November, 1924. By this decree the learned District Judge of Burdwan awarded the judgment-debtors a sum of Rs. 2,253-14-0 and costs.

Upon these facts the appellants urged that the stay order of the 14th April, 1920, remained in force until the claim in the judgment-debtors' suit was finally decided by the decree of the learned District Judge of Burdwan of the 24th November, 1924, and that if the time that elapsed between the 14th April, 1920, and the 24th November, 1924, is excluded from the period of limitation, the present application for execution was presented within the time limited by the Statute of Limitation. On the other hand, the respondents contend that the stay order remained in force only while the judgment-debtors' suit was pending in the trial Court, and ceased to be operative after the decree was passed by the learned Subordinate Judge on the 16th June, 1920. The adoption of the literal construction for which the respondents contend would provide an easy solution of the problem. But, in my opinion, such a construction would render nugatory the two-fold object which, I think, the Legislature had in view when enacting O. XXI, r. 29, namely, to

prevent (1) the judgment-debtor being compelled to satisfy the decree by providing the sum due when it might be proved (after his claim against the decree-holder was finally determined) that on balance he owed the decree-holder less than the decretal sum or, it might be, nothing at all; (2) the multiplicity of execution proceedings. Now, it may well happen, after a stay order has been passed under O. XXI, r. 29, that the trial Court might dismiss the suit, while on appeal a sum might be decreed in favour of the judgment-debtor, and on a further appeal he might be awarded a sum larger than that for which the decree-holder had obtained his decree. In that event the result of adopting the construction which the respondents have urged upon us would be that both the objects which the Legislature had in mind when enacting O. XXI, r. 29 would be defeated. On the other hand, if the view for which the appellants contend is accepted the decree-holder need suffer no hardship by reason of the delay necessarily incident to an appeal by the judgment-debtor, for under r. 29 the executing Court is at liberty to grant a stay of execution upon whatever terms it thinks meet. There is no magic in the words "until the pending suit has been decided," for it is conceded by the learned Advocate for the respondents that the executing Court in any case would have jurisdiction under s. 151 to grant a further stay if the judgment-debtor preferred an appeal. In my opinion the words "until the pending suit has been decided" mean until the claim in the pending suit has finally been decided. The result, therefore, is that the application for leave to execute the decree of the 14th January, 1918, that was preferred on the 18th April, 1925, was not barred by limitation; the appeal will be allowed and the order under appeal set aside. It is represented to us that an appeal has been preferred to the High Court from the order of the learned District Judge of Burdwan of the 24th November, 1924. The execution proceedings will be returned to the learned Subordinate Judge of Asansole to be disposed of according to law. Whether the learned Subordinate Judge adjourns or dismisses or otherwise determines the present application for execution is a matter that must be left to the decision of the learned Subordinate Judge; and the costs of this appeal will abide the event;

(1) 23 O. 397; 12 Ind Dec. (N. S.) 264.

(2) 5 O. W. N. 317.

the hearing-fee is assessed at two gold mohurs.

Graham, J.—The sole question involved in the appeal is whether the application for execution was time-barred or not, and the answer turns upon the proper construction of O. XXI, r. 29 of the Code of Civil Procedure and in particular upon the meaning of the words "pending suit has been decided" which occur therein. Do these words merely refer to the suit or do they include an appeal, if any, and mean "finally decided," that is to say, after all rights of appeal have been exhausted? If the former is the case then the plea of limitation must prevail, while if the latter view is correct then that plea fails.

The learned Vakil for the respondents has called our attention to O. XXII, r. 11 whereby that Order is made applicable to appeals as well as suits and argued that from the fact that there is no similar provision in the case of O. XXI, r. 29, it may be inferred that the word "suit" in the latter rule was not intended to include appeal. The word "suit" has not been defined in the Code, and it is possible to interpret it in two ways either as restricted to the suit itself, or as meaning a suit from commencement until final decision, that is to say, as including the period of appeal, if any.

On the whole I am of opinion that the better view is that the word was intended to include the period of appeal and that "decided" means "finally decided." The adoption of the other view would entail multiplicity of proceedings which it has always been the object of the Legislature to avoid.

For these reasons I agree with my learned brother that the appeal must be allowed.

A. N. A.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2058 OF 1924.

June 29, 1927.

Present :—Sir George Claus Rankin, Kt., Chief Justice, and Mr. Justice Mitter.

ROY MONMATHA NATH MITRA

BAHADUR—PLAINTIFF—APPELLANT

versus

RAJESWAR RAI CHOUDHURI

AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Permanent tenancy—Inference

from proved facts—Question of law—Burden of proof of permanency—Mere unaltered rent and transfer of holding, effect of—Permanent structures—Amalgamation of permanent and precarious holdings—Consequences—Admission of permanency by gomashta in rent receipt, whether binding on landlord—Gomashta's powers.

The question whether a tenancy is permanent or precarious is a question of legal inference from proved facts and, consequently, a question of law. [p. 82, col. 2.]

When a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant. [p. 84, col. 2.]

Nainapillai Marakayar v. Ramanathan Chettiar (6) and *Secretary of State for India v. Luchmeswar Singh* (7), followed.

An entry with regard to the nature of the tenancy in a rent receipt is superfluous and unnecessary in the case of tenancies governed by the Transfer of Property Act and the admission of the nature of tenancy by a gomashta in such rent receipt is gratuitous and not binding on the landlord. [p. 84, col. 1.]

There is no inflexible rule of law that a landlord is bound by every statement made by his gomashta in a rent receipt. [*ibid.*]

Moharani Beni Pershad Koeri v. Goberdhan Koeri (2), *Sri Maharani Beni Pershad Koeri v. Ramdakin Pandey* (3) and *Bhojohuree Bunick v. Aka Golam Ali* (4), relied on.

Pyari Mohun Mukhopadhyaya v. Gopal Paik (5), distinguished.

Ordinarily the gomashta is authorised to receive rents, to give a discharge to tenants for such rents and in some cases even to recognise the transferee of an occupancy holding, but it certainly is not usual for a gomashta to confer any permanent right on tenants or to make any admission in respect of tenants' rights which may be binding on the landlord. [p. 83, col. 2.]

Mere unaltered rents for a number of years and a single instance of transfer of the holding are not sufficient to raise the inference of permanency. [p. 84, col. 2.]

The fact that holdings which were not permanent were amalgamated with a holding on which at one time a pucca structure stood cannot give these holdings the character of permanency [*ibid.*]

The mere fact of amalgamation of four holdings into one would not change the respective incidents of the holdings in the absence of a contract to the effect that it was intended to change those incidents and give a higher status to the tenant of the amalgamated holding. [p. 86, col. 1.]

A document in which a right is asserted is admissible under s. 13 of the Evidence Act even though it is not *inter partes*. [p. 85, col. 2; p. 86, col. 1.]

Appeal against a decree of the Subordinate Judge, 24-Parganas, dated the 21st July, 1924, affirming that of the Munsif at Alipur, dated the 15th December, 1921.

Messrs. N. C. Bose, A. N. Bose and Babu Satyendra Nath Mitter, for the Appellant.

Babus Brojo Lal Chakraborty and Suresh Chandra Taluqdar, for the Respondents.

JUDGMENT.

Mitter, J.—The suit in which this appeal arises was for ejectment of the respondents from some 25 *cottas* of land in *punja nyabasti*, within the Municipal boundaries of Calcutta. The plaintiff-appellant alleges in his plaint that the defendants-respondents are tenants-at-will liable to ejectment on a proper notice to quit and that such notice had been served upon the defendants' predecessor, one Biseswar Roy Chowdhuri.

The claim of the respondents is that the disputed land has been held by them and their predecessors on a permanent tenure and that no notice to quit was served on them.

The Munsif of Alipur who tried the suit held that the notice to quit was properly served but decided in favour of the respondents on the ground that the respondents' tenure is permanent. The plaintiff appealed to the Subordinate Judge of 24-Parganas who came to the conclusion that the holding in suit is permanent and that the defendants are not liable to ejectment and on this finding dismissed the plaintiff's appeal.

In second appeal the learned Advocate on behalf of the plaintiff-appellant contends that the findings of fact arrived at by the lower Appellate Court do not give rise to the legal inference that the tenure of the respondents is a permanent tenure. It has not been seriously contended before us by the learned Vakil for the respondents that the finding of the Subordinate Judge that the respondents' tenancy was permanent, was one of fact and was binding on us in second appeal; nor could such a contention be successfully raised. The question here, as in all other similar cases, is whether the true inference from the facts is that the tenure is permanent or precarious, the burden of proof being on the tenants-respondents. In this connexion I need only refer to the following observations of the Judicial Committee in a recent case: "A third question, more formidable in character, must be disposed of before their Lordships further proceed. The learned District Judge, on appeal here, dismissed the respondent's suit, finding that the appellants' tenancy was permanent. It is thereupon contended by the appellants that this finding was one of fact by the learned Judge not open to review either by the High Court on second appeal or by this Board.

"Now their Lordships would be the last to seek to abridge the effect of ss. 100 and 101 of the Code of Civil Procedure or weaken the strict rule that on second appeal the Appellate Court is bound by the findings of fact of the Court below. They are well aware, moreover, that questions of law and of fact are often difficult to disentangle. It is clear, however, that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them, in a case like the present, to be a legal inference from facts and not itself a question of fact.

"The High Court has described the question here as a mixed question of law and fact—a phrase not unhappy if it carries with it the warning that, in so far as it depends upon fact, the finding of the Court of first appeal must be accepted. On these lines, which the High Court appears strictly to have observed, the appeal to that Court was competent and it was in their Lordships' judgment open to the learned Judges there to entertain it as they did." [See *Dhanna Mal v. Moti Sagar* (1).]

The facts found by the lower Appellate Court are these:—The disputed land which is now one holding originally consisted of 4 separate holdings which were subsequently amalgamated into one. The area of land, the name of the tenant and the rental payable for each holding are given in the table below.

Tenant.	Land.	Rent.			
		Rs.	As.	Gds.	K.
1. Jagannath Misty	7½ cottas	3	1	1	1
2. Abhoy Charan Shah.	16 "	12	0	0	0
3. Sreenath Sarkar	1½ "	1	1	1	1
4. Gopal Bairagi ...	½ "	1	4	0	0

The date of creation of the first of these holdings is unknown. The other three

(1) 101 Ind. Cas. 355; 31 C. W. N. 677 at p. 681; 52 M. L. J. 663; A. I. R. 1927 P. C. 102; 29 Bom. L. R. 870; (1927) M. W. N. 481; 39 M. L. T. 161; 8 Lah. 573; 26 L. W. 634; 25 A. L. J. 959; 28 P. L. R. 658 (P. C.).

tenancies were created after 1258 B. S. (1851 A. D.) and before 1268 B. S. (1861 A. D.). The last two holdings were amalgamated in 1268 when the rent was increased to Rs. 2-8. The rent of the second holding was increased to Rs. 24 in 1265 B. S. (1858 A. D.) and the rent of the first holding was increased to Rs. 10 in 1261 B. S. (1864 A. D.). There has been no change in the rental of any of these four holdings since 1271 B. S. (1864 A. D.). On the 6th of Aghrayan 1289 B. S. (1882 A. D.) defendants' predecessor Barada Kristo Roy purchased these holdings from Anandamoyi Dasi, wife of the tenant Abhoy Charan Saha in the *benami* of Rakhal Chandra Mukherjee. Biseswar was the son of Barada Kanta Roy and the defendants are the sons of Biseswar. Notice to quit was served on Biseswar by the plaintiff. The conveyance in favour of Anandamoyi from the original tenant of these four holdings has not been produced in this case. But the conveyance in favour of Barada by Anandamoyi Ex. "B" shows that the four holdings were regarded as two; one was the amalgamation of holdings Nos. 1, 3 and 4 with the consolidated increased rental of Rs. 12-8 and the other was holding No. 2 with the increased rental of Rs. 24. In Ex. "B" holdings were described as *kayemi mourashi* (permanent). Exhibit "B" also shows that the second holding of 16 *cottas* was Anandamoyi's dwelling-house and that she had one *pucca* one-storied house on the same, besides there was one "*golepata*" hut on the amalgamated holdings of Rs. 12-8. The lower Appellate Court also referred to certain *dakhilas* (rent-receipts) from 1295 B. S. (1888 A. D.) to 1303 B. S. (1896 A. D.). In each of those *dakhilas* there is an entry made by the *gomashta* of the plaintiff that the holding was a *mokarrari mourashi* one. No document has been produced in this case to show to what extent the *gomashta* had authority to bind the plaintiff by an admission of the kind made in the *dakhilas* as to the permanent character of the holding in question. If these admissions can be regarded as admissions made by or on behalf of the plaintiff, they would be very strong evidence in support of the defendants' case. Apparently it was considered in the lower Court that unless the plaintiff could displace the statements of his *gomashta* by showing his ignorance of their being made, his case would be defeated or seriously damaged. Indeed the

lower Appellate Court goes to the length of holding that the statement in the *dakhilas* would conclusively prove that the holding is a *mokarrari mourashi* holding. Although there is a column in the rent-receipts showing the nature of the tenancy, in cases governed by the Transfer of Property Act it is not usual to indicate the nature of the tenancy in the rent-receipts. The admission made by the *gomashta* was a gratuitous admission and may be withdrawn unless there is some obligation not to withdraw it. Ordinarily the *gomashta* is authorised to receive rents, to give a discharge to tenants for such rents and in some cases even to recognise the transferee of an occupancy holding, but it certainly is not usual for a *gomashta* to confer any permanent right on tenants or to make any admission in respect of tenants' rights which may be binding on the landlord. It is true the landlord might have proved the extent of the authority of his *gomashta* but in the absence of such authority it cannot be laid down as an inflexible rule that the presumption must be that the *gomashta* had authority for doing everything which he may do even to the detriment of his master in connexion with matters which are not properly within the scope of his employment. In this case a former *naib* of the plaintiff deposed that the *gomashta* had no authority for writing the words "*mokarrari mourashi*" in the rent-receipts. The lower Appellate Court does not refer to this evidence. All that it says is that the onus lay on the plaintiff to prove the extent of his *gomashta*'s authority as that fact was within the special knowledge of the plaintiff and the plaintiff has not proved it and he presumes from this that the *gomashta* had authority to give the description in the *dakhilas* as to the permanent nature of the tenancy. It cannot be affirmed as a general proposition of law that a landlord is always bound by every statement given in the receipts of rent by his *gomashtas*. There are cases in the books which go to show that when an agent of the landlord has accepted from the various tenants in the occupation of a holding at one rental proportionate parts of the rents, it does not bind the landlord to recognise a separation of the tenancy in absence of evidence to connect the landlord with the receipt of any proportionate rate of rent by the agent. See *Moharani Beni Pershad Koeri v. Gober-*

dhan Koeri (2) and *Sri Maharani Beni Pershad Koeri v. Ramdahn Pandey* (3).

In the case of *Bhojohuree Bunick v. Aka Golam Ali* (4) this Court held that the purchaser of a *raiya* tenure is bound to communicate with the *zemindar* and obtain his consent to the transfer of the tenure; without this being done, a *gomashta's* receipts of rent are not binding on the *zemindar*. On the other hand, in a Full Bench case—*Pyari Mohun Mukhopadhyaya v. Gopal Paik* (5), it was held that a landlord was bound by a receipt given by his agent consenting to a division of the holding and a distribution of the rent payable in respect thereof, within the meaning of s. 88 of the Bengal Tenancy Act. In this Full Bench case it was assumed that the agent was duly authorised to give such a receipt. It seems to me that no inflexible rule of law can be laid down to the effect that the landlord is bound by every statement made in receipt. It has been conceded by the learned Vakil for the respondent in this case that the entry with regard to the nature of the tenancy in a rent receipt would be a superfluous and unnecessary entry in cases of tenancies governed by the Transfer of Property Act. So this admission of the nature of the tenancy by the *gomashta* as I have already pointed out was a gratuitous admission. There was not here any title on which such an admission can rest. No papers have been produced to show that the landlord before the admission treated the tenancy in question as a permanent tenancy. It is to be noticed also that this admission of the *gomashta* is contained in receipts for eight years ending with the year 1896 and since 1896 no receipts were granted because of the dispute between the parties as to the nature of the tenancy. The admission, therefore, being out of the way, we have now to consider whether the findings lead to the inference that all these four tenancies aforesaid are permanent tenancies.

Summarising the findings of the lower Appellate Court we find the broad facts to be these:—With regard to the first holding of 7½ *cottas* the origin is unknown;

its rent was enhanced to Rs. 10 in 1271 B. S., it was amalgamated with holdings Nos. 3 and 4 sometime before 1289 B. S. (1882 A. D.). Some "*golepata*" huts stood on this consolidated holding at some time. With regard to holdings Nos. 3 and 4 their origin is traceable and they were created between 1258 and 1268 B. S., they were amalgamated in about 1268 and the rent was increased to Rs. 2.8 in about the same time; these two amalgamated holdings were again amalgamated with holdings Nos. 1 and 2 in about the year 1289. With regard to holdings Nos. 1, 3 and 4 rent had not remained unchanged before 1271 but there has been uniformity of rent since 1271; it does not appear that these three holdings were let for residential purposes; the land is a homestead land within the Municipality and has been used as an "*Arat*," i. e., for the purposes of a shop. These circumstances alone, namely, unaltered rents for 57 years and one transfer of these holdings are not sufficient to raise the inference of permanency. It has not been shown that the claim of permanent tenure as asserted in Ex. "B," i. e., the *kabala* by Anandamoyi in favour of defendants' predecessor-in-interest Barada Kristo Roy in the *benami* of Rakhal Chandra Mukherji was brought home to the knowledge of the appellant or his predecessor-in-title and was acknowledged by them. There are no *pucca* structures in the land. It has not been shown that they were let for residential purposes. It is not shown that they were being used for residential purposes. And the fact that they were amalgamated with holding No. 2 on which at one time a *pucca* structure stood cannot give to these holdings the character of permanency.

In the case of *Nainapillai Marakayar v. Ramanathan Chettiar* (6), the Judicial Committee laid down the law in regard to the matter in hand in the following words:—"It cannot now be doubted that when a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant. In *Secretary of State for India v. Luchmes-*

(2) 6 C. W. N. 823.

(3) 10 C. W. N. 216.

(4) 16 W. R. 97.

(5) 25 C. 531; 2 C. W. N. 375; 13 Ind. Dec. (N. S.)

852.

(6) 82 Ind. Cas. 226; 51 L. A. 83 at p. 69; 47 M. 337; 28 C. W. N. 809; A. I. R. 1924 P. O. 65; 19 L. W. 259; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; L. R. 5 A. (P. C.) 33 (P. C.).

war Singh (7) it was held that the onus of proving that they had a permanent right of occupancy in lands was upon the defendants who alleged it as a defence to a suit by their landlord to eject them, and that proof of long occupation at a fixed rent did not satisfy that onus." And again—"A permanent right of occupancy in land in India is a right, subject to certain conditions, of a tenant to hold the land permanently which he occupies. It is a heritable right, and in some places it possibly may be transferable by the tenant to a stranger. That permanent right of occupancy can only be obtained by a tenant by custom, or by a grant from an owner of the land who happens to have power to grant such a right, or under an Act of the Legislature." Having regard to these pronouncements we are not satisfied that the defendants have satisfied the onus of proving that they have a right of permanent tenancy in these holdings.

The learned Vakil for the respondent has relied on two decisions of the Judicial Committee, *Upendra Krishna Mandal v. Ismail Khan Mahomed* (8) and *Nilratan Mandal v. Ismail Khan Mahomed* (6). In the first of these cases the case of the tenants rested on a series of transmissions of properties by sale and mortgage which went back as far as 1826 and the continued possession of the tenants and their predecessors-in-title at an unaltered rent and on a *kabuliyat* which shows that these transmissions of property as permanent tenancy was brought home to the landlord who recognised the right created by this document by accepting a *kabuliyat*. In the second case the land had been occupied by the tenants' predecessors at an unaltered rent for 100 years. They had built on it and had dealt with the property by sale and mortgage. A *kabuliyat* and a *patta* were executed which brought home to the landlords' knowledge and recognition of the tenants' transmission of the property by sale in an instrument which purported to convey a permanent and inheritable right.

Reliance has been placed by the learned Vakil for the respondent on the case of

Caspersz v. Kader Nath Sarbadhikari (10). That case is also distinguishable. For in that case the following facts co-existed:—

(i) Long possession by the defendants and their predecessors;

(ii) the landlord's permission to the defendants' predecessors to build a *pucca* house upon it;

(iii) the existence of the house there for a considerable time;

(iv) the addition to the building by successive tenants;

(v) the transfers of the tenure from time to time by succession and purchase;

(vi) the acquiescence of the landlord in such transfers of which he could not have been ignorant as he accepted rent from the transferees.

So far as holdings Nos. 1, 3 and 4 are concerned all these elements do not exist in the present case. For the reasons above stated the legitimate inference to be drawn from the facts in the present case is that with regard to 9 *cottas* of land covered by holdings Nos. 1, 3 and 4 the position of the defendants is that of a tenant-at-will.

The case with regard to holding No. 2 (16 *cottas* of land) stands on a somewhat different footing from that of other holdings. It appears from the *kabala* (Ex. B) by which defendants' predecessor Barada Kristo purchased the holdings along with three other holdings from Anandamoyi that this holding was her (*i. e.*, Anandamoyi's) *bhadrasanbati* (dwelling house) and that she had one *pucca* one-storied house on this holding. This holding was created between 1258 and 1268 B. S., and we find that some time before 1289 B. S. there were *pucca* structures on the holding so that at any rate the inference might be legitimately drawn that the land of this holding which was being used for residential purposes was let for such purposes. The rent had not varied for 57 years and the transfer was recognised by the landlord and in all these circumstances it may be legitimately inferred that the appellant through his agent had notice of the existence of *pucca* structure on it. It has been argued on behalf of the appellant that Ex. B is not admissible in evidence against him as he was no party to the said document. But I think that this argument has no substance,

(7) 16 A. 6; 16 C. 223; 13 Ind. Jur. 10; 5 Sar. P. O. J. 275; 8 Ind. Dec. (N. S.) 147 (P. O.).

(8) 31 I. A. 141; 32 C. 41; 8 C. W. N. 889; 8 Sar. P. O. J. 632 (P. O.).

(9) 31 I. A. 149; 32 C. 51; 8 C. W. N. 895; 8 Sar. P. O. J. 695 (P. O.).

(10) 28 C. 738; 5 C. W. N. 856.

for the document although not *inter partes* is admissible in evidence as a transaction within the meaning of s. 13 of the Evidence Act by which the right to this property was asserted, so that we have it that the buildings which were of a substantial character were erected so far back as 1882 and that the predecessor-in-title of the defendants lived for some time in it. In these circumstances it is indeed difficult to say that the inference drawn by the Courts below that this holding No. 2 is a tenancy of a permanent character is wrong.

If we consider the incidents of the four holdings together after amalgamation into a single holding we find that an unaltered rent has been paid for 57 years and that there existed a *pucca* building on a small portion of it at some distant time. These two elements alone are not sufficient to raise the presumption of permanency. But it has been possible in the present case by reason of the evidence furnished by Ex. "B" to distinguish between the lands of holdings Nos. 1, 3 and 4 on which no permanent structures stood and the lands of holding No. 2 on which such structures existed. The mere fact of amalgamation of four holdings into one would not change the respective incidents of the holdings in the absence of a contract to the effect that it was intended to change those incidents and give a higher status to the tenant of the amalgamated holding. No such contract has been proved in the present case and it is not suggested that any existed. We are, therefore, left to infer from proved facts the nature of the new consolidated tenancy. The fact of unaltered rent and existence of a *pucca* structure on a portion, as I have already stated, is not sufficient to raise the inference of permanency. It is because of the fact that buildings existed on the 16 *cottas* holding that we are able to infer that the purpose for which the said land was held was a residential purpose and this fact brings the case within the purview of the decision of Sir Richard Garth, O. J., in the case of *Gangadhar Shikdar v. Ayimuddin Shah Biswas* (11) which was cited on behalf of the respondent.

The result, therefore, is that the decrees of the Courts below are set aside and in lieu thereof there will be a decree in

favour of the plaintiff for ejectment from the 9 *cottas* of land covered by the holdings Nos. 1, 3 and 4. The claim of the plaintiff for ejectment from holding No. 2 (16 *cottas* of land) will be dismissed.

The plaintiff will be entitled to mesne profits from the date on which the tenancy was determined by notice to quit. The mesne profits will be ascertained in the execution Court.

Each party will bear its costs throughout.

Rankin, C. J.—I agree.

A. N. A.

Decree set aside.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 42 OF 1927.

November 11, 1927.

Present:—Justice Sir Charu Chunder Ghose, Kt., and Justice Sir Philip Lindsay Buckland, Kt.

EZRA MEYER AARON COHEN—
DEFENDANT—APPELLANT

versus

Kumar DEBENDRA LALL KHAN—
PLAINTIFF—RESPONDENT.

Landlord and tenant—Covenant to repair—New building, whether covered by covenant—General covenant and covenant to repair demised premises only, distinction between.

A general covenant to repair in a lease deed includes not only buildings in existence when the demise is made but all those which may be erected during the term. A covenant to repair the demised premises applies only to those existing at the date of the demise unless the new buildings are made a part of the old ones. [p. 88, col. 2.]

An indenture of lease provided that the lessee shall "at all times during the said term of years keep the said premises in good and substantial repair and the same in good and substantial repair deliver up to the lessor, his heirs or assigns at the expiration or sooner determination of the said term." There was also a subsequent clause which ran as follows: "And it is hereby agreed and declared by and between the parties hereto notwithstanding anything hereinbefore contained that the said lessee shall be at liberty to make all necessary additions and alterations to the demised premises to improve the buildings with the written consent of the lessor at his own costs during the continuance of the said term and all such changes, additions, fittings and fixtures so made shall become and be considered the property of the said lessor and the lessee shall have no right to remove the same either before or after the expiration of this lease." The lessee erected certain new buildings which formed additions to and became part of the buildings originally demised:

Held, (1) that the covenant to repair was a general one and applied to the new buildings; [p. 88, col. 2.]

(2) that even if it was a covenant to repair the demised premises alone it applied to the new buildings as they were so erected as to become a part of the old buildings. [p. 89, col. 1.]

Field v. Curnick (1), followed.

Appeal from a judgment and decree of Mr. Justice Page, dated the 25th February, 1927, reported as 106 Ind. Cas. 477.

Messrs. N. N. Sircar and A. K. Roy, for the Appellant.

Sir Binode Mitter, Mr. A. N. Chaudhuri and S. S. Roy, for the Respondent.

JUDGMENT.

C. C. Ghose, J.—This is an appeal against a judgment and decree passed and made by my learned brother Mr. Justice Page on the 25th February, 1927, in an action by the plaintiff to recover possession of a block of buildings lying at the corner of Wellington Street and Dhurramtolla Street. The plaintiff based his cause of action for recovery of possession of the premises upon the breach of (1) a covenant to pay rent and (2) a covenant to repair contained in the Indenture of lease, dated the 3rd August, 1906. As regards the covenant to pay rent, it appears that, before the suit came on for hearing, the defendant who is the assignee of the original lessee had deposited in Court the amount of rent due by and from him to the lessor. Mr. Justice Page came to the conclusion that, in these circumstances, the Court was entitled to exercise its powers under s. 114 of the Transfer of Property Act and give the necessary relief to the tenant. On the question whether there had or had not been a breach of the covenant to repair, Mr. Justice Page came to the conclusion that, so far as the demised premises were concerned, there had been no breach of the covenant to repair but that, in respect of certain buildings which were erected after the date of the Indenture of lease and which buildings had been so constructed that they, in his opinion, formed part of the demised premises, there had been a breach of the covenant to repair, and accordingly he passed a decree in ejectment in favour of the lessor.

On appeal before us, it has been contended that the additional buildings referred to in the judgment of Mr. Justice Page and which were subsequently erected on a part of the demised premises which was then vacant land, did not form part of the two-storeyed house as it stood at the date of the Indenture of lease but were

entirely separate buildings, having no connection with the original buildings and that, therefore, the covenant to repair did not extend to the new erections, and accordingly there had been no breach of the covenant to repair, and in the circumstances no decree for ejectment should have been made in favour of the lessor.

Apart from what is contained in the said Indenture of lease, Mr. Justice Page relied in support of his finding that the new erections had been and were made part of the original buildings, upon the evidence of the original lessee Sassoon Jacob Cohen wherein he stated that the new buildings were joined on to the original buildings and made a portion of the same so that the buildings, i. e., the original buildings and the subsequent erections became thereafter one whole building. The expression "joined on to the old buildings" is somewhat misleading and it does not convey with any degree of precision what exactly became the state of things after the new buildings had been erected. In these circumstances, Sir Binode Mitter for the respondent and Mr. Sarkar for the appellant invited us to go down to the spot and see for ourselves the state of things and appreciate the evidence on record on the question whether or not the old buildings were joined on to the new buildings in such a manner that the new buildings became part of the old buildings, or whether the new buildings were separate by themselves having no sort of connection whatsoever with the original buildings. Having regard to the evidence to which our attention was drawn and having regard to the difficulty which we experienced in understanding and appreciating the evidence on record, we thought it proper to accept the invitation and to go down to the spot and see for ourselves the state of things for the purpose of understanding and appreciating the evidence. Having seen the premises as they stand now, I have no difficulty in understanding the evidence of Sassoon Jacob Cohen and I have no hesitation whatsoever in saying that, on the evidence on record, the new buildings were so constructed that in various portions thereof they were made part of the original buildings and in other portions they were so constructed that they could be made part of the original buildings at a moment

notice. The beams supporting the roof of the new one-storeyed buildings had been introduced into the walls of the original buildings and the roof of the new buildings is used as a terrace by the occupants of the first floor of the original building. In these circumstances, it is difficult to resist the conclusion that the new buildings were so constructed as to form part of the original buildings and that they have been treated ever since as parts of the original buildings. Therefore, on the question of fact bearing on this issue, I am in entire agreement with Mr. Justice Page in holding that the new buildings could not be treated as separate by themselves but were, in fact and in truth, made part of the original buildings.

Now the question arises whether the covenant to repair contained in the Indenture of lease extended to such new erections. It has already been stated above that Mr. Justice Page did not find that there could be any reasonable complaint on account of the breach of the covenant to repair so far as the original buildings were concerned. The only question that arises, therefore, is whether the covenant to repair extended to such new erections. It is unnecessary, in my opinion, to go through the cases on the subject from 1683 downwards. The cases are all collected in a very concise form on pages 325 and 326 of Vol. XXXI of the English and Empire Digest and it would be sufficient for our purpose if we refer for the enunciation of the law on the subject to the last case bearing on it, namely, the case of *Field v. Curnick* (1). In that case, it appears that by a lease, dated 1837, the lessors demised to the lessee for 99 years a piece of ground "together with the messuages or tenements and all other erections and buildings which at any time thereafter during the said term should be built on the same piece of ground or any part thereof" and the lessee covenanted to build on the lands demised two good and substantial brick messuages or tenements, and to repair and keep repaired "the said premises." The lessee built six houses as to which it was impossible to say which two were actually completed first. In that state of things, the learned Judge came to the conclusion, on the evidence on record, that the six houses were built simultaneously and finished at the same time. He further

held that the covenant to repair extended not only to the two houses which the lessee covenanted to build but to all the six houses. Mr. Justice Sankey then observed as follows:—"In my view, the law is as follows: If a lessor demises a house and there is an express covenant to repair, the lessee is, of course, bound by it. If, on the other hand, the lessor demises a piece of land and there is an express covenant by the lessee to repair any houses subsequently erected thereon, equally the lessee is bound by it. Further, a general covenant to repair includes not merely buildings existing when the demise is made, but all those which may be erected during the term: See *Cornish v. Cliefe* (2) and *Foa on Landlord and Tenant*, 6th Edition, page 248. If, however, the covenant to repair is only one to keep in repair the demised premises, it applies to those existing at the date of the lease only unless the new buildings are made part of the old ones."

Now, in this case the Indenture of lease contained the following proviso:—"And at all times during the said term of years keep the said premises in good and substantial repair and the same in good and substantial repair deliver up to the lessor, his heirs or assigns at the expiration or sooner determination of the said term." Further: "And it is hereby agreed and declared by and between the parties hereto notwithstanding anything hereinbefore contained that the said lessee shall be at liberty to make all necessary additions and alterations to the demised premises to improve the buildings with the written consent of the lessor at his own costs during the continuance of the said term and all such changes, additions, fittings and fixtures so made shall become and be considered the property of the said lessor and the lessee shall have no right to remove the same either before or after the expiration of this lease."

Having regard to the terms of the Indenture of lease in the present case, there is no doubt that the covenant to repair is in very general terms and it would, in my opinion, extend to the subsequently erected buildings. But, even if it be held that the covenant to repair does not extend to the subsequently erected buildings, in this case there could not be much doubt on the evi-

(1) (1926) 2 K. B. 374; 95 L. J. K. B. 756; 135 L. T. 474; 42 T. L. R. 510.

(2) (1864) 3 H. & C. 446; 34 L. J. Ex. 19; 11 Jur. (N. s.) 181; 13 W. R. 389; 11 L. T. 606; 140 R. R. 547; 159 E. R. 605.

dence that the new buildings were, in fact, additions to and had become part of the two-storeyed buildings which were originally demised and that, therefore, the covenant to repair would extend to the subsequently erected buildings. It follows, therefore, that the finding of Mr. Justice Page on the evidence on record that the covenant to repair extended to the newly erected buildings is one that cannot be seriously quarrelled with and that the appeal so far as it relates to that point must fail.

A small point has been taken that there is internal evidence in the Indenture of lease that the covenant to repair is restricted to what is described as the demised buildings, that is, the original buildings as they stood at the time of the grant of the lease. The argument is as follows:—It is said that the landlord is under no obligation to restore any portion of the subsequently erected buildings if and when they are destroyed by reason of the causes specified in the Indenture of lease, whereas if any portion of the original building is destroyed by any of the said causes the landlord is under an obligation to repair. In the second place, it is stated that no additional rent was payable by reason of the erection of the subsequently erected buildings. So far as the last point is concerned, it may be stated that the lessee was under no obligation to erect new buildings. But if he did erect additional buildings with the consent of the lessor, they were to be considered the property of the lessor and the lessee would have no right to remove the same before or after the expiration of the lease. As Mr. Justice Page points out, the special provisions introduced into the lease with respect to the additions and alterations were inserted for two reasons; first, in order to get out of the provisions of s. 108 of the Transfer of Property Act, and, secondly, in order that it should not be open to the defendant in the event of some part of the additional premises that he might erect being destroyed in the manner set out in the lease to escape proportionate payment of rent so long as the additional structures were not re-built or repaired. I think, therefore, that the appellant cannot derive any comfort whatsoever from the provisions in the lease last referred to.

There is still a further small point to be noticed. It is stated that at the time when the lease was executed a sum of Rs. 2,500 was deposited with the lessor for the due

fulfilment of the terms of the lease. The lease having now come to an end, the appellant urges that he should be given credit for this sum in calculating the amount ultimately payable to the lessor. Sir Binode Mitter on behalf of the respondent states that there has been no question at any time that the appellant is entitled to the credit of the said sum and he is willing that, in the accounts, when they are taken, credit should be given to the appellant for the said sum of Rs. 2,500.

The result, therefore, is that the appeal fails on all the points which the learned Counsel for the appellant has taken and it must stand dismissed with costs subject to credit being given to the defendant for Rs. 2,500 as stated above.

Buckland, J.—I agree. I only desire to add a few words with regard to the principal question of fact which has been argued on this appeal; that is, as to whether or not the state of the premises is such that the general covenant to repair applies to the additional premises. The evidence on that point has been quoted *in extenso* by the learned Judge in his judgment. What has to be proved is expressed in the passage which my learned brother has referred to in the judgment of Mr. Justice Sankey in the case of *Field v. Curnick* (1). It is necessary to establish that the new buildings are made part of the old ones. All the evidence has not been read to us; but we have been informed by learned Counsel for the appellant that the passages quoted in the judgment of Mr. Justice Page are all the evidence on the point and he has also informed us that no evidence was given on behalf of the plaintiff on this point and that the answers on which the plaintiff relied were elicited in the cross examination of the witness for the defendant. On two occasions, this witness, Sassoon Jacob Cohen was asked whether or not the new rooms were made part of the premises of the two-storeyed building and to each question, his answer was that they were joined. He did not accept the questions in the form in which they were put and he expressed his answer in different words. In consequence, I felt considerable difficulty in knowing what the witness meant by using the word "joined." A horse is joined to a cart, but nobody suggests that the horse becomes a part of the cart. The word "joined" is not necessarily, therefore, conclusive on the point and I was very glad to welcome the invitation of

learned Counsel on both sides that we should go and see the buildings for ourselves. We have done so and, having seen the buildings, what I have observed with my own eyes has enabled me to understand the witness's evidence. I am satisfied that when the witness Cohen used the word "joined," he referred to conditions and a state of facts which brings the matter within the passage in the judgment of Mr. Justice Sankey to which I have referred. The view which I have had of the premises has enabled me to understand what the witness meant and his evidence, therefore, in my judgment, supports the finding beyond all question. I concur in the order to be made in this appeal.

A. N. A.

*Appeal dismissed.***CALCUTTA HIGH COURT.**

GOVERNMENT APPEAL No. 4 OF 1927.

August 24, 1927.

Present:—Justice Sir Oharu Chunder Ghose, Kt., and Mr. Justice Cammiade.

THE LEGAL REMEMBRANCER—

APPELLANT

versus

JAHEY SHEIKH AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 297, 307—Jury trial—Verdict of 'guilty'—Judge preparing reference to High Court in anticipation of first verdict—Second charge—Verdict of 'not guilty'—Procedure, illegality of.

Where a Jury returned a unanimous verdict of 'guilty', but the Sessions Judge charged them again and they returned a unanimous verdict of 'not guilty' and it also appeared from the record that the Sessions Judge had before his second charge anticipated the Jury bringing in a verdict of 'guilty' in the first instance, and written out a letter of reference to the High Court disagreeing with the Jury:

Held, that the procedure followed by the Sessions Judge was entirely illegal and unwarranted by law and that the accused should be re-tried. [p. 91, col. 1.]

Appeal against an order of the First Additional Sessions Judge, Mymensingh, dated the 9th March, 1927.

Mr. Khundkar, Deputy Legal Remembrancer for the Appellant.

Babu Sachindra Kumar Roy, for the Accused.

JUDGMENT.—This is an appeal by the Local Government under the provisions of s. 417, Criminal Procedure Code, against an order of acquittal passed by the First Additional Sessions Judge of Mymensingh in

a case in which the two accused before us were charged before him and a Jury under s. 395, Indian Penal Code. The case is in many ways an extraordinary one, and it is desirable, therefore, to set out the facts briefly.

The two accused Jahéy Sheikh and Katua alias Javed Ali were charged with having committed an offence punishable under s. 395, Indian Penal Code. They were duly committed to take their trial in the Sessions Court. The First Additional Sessions Judge of Mymensingh, Mr. N. V. H. Symons, tried the case with the aid of a Jury. On the 9th March, 1927, the trial was concluded and the Jury were directed to retire and bring in their verdict. What happened thereafter is set out below as appears from the record:—

Q.—As regards both accused are you unanimous?

A.—Yes.

Q.—What is your verdict?

A.—Guilty under s. 395, Indian Penal Code.

Q.—Did you find that Ismat mentioned Katua's name immediately after the occurrence?

A.—We thought it unlikely that the family could have made up the story so soon and we did not think that the explanations of the accused about enmity were sufficient to enable Abdul to bring a false case.

The Jury is then charged again on the matter concerned in the last question. They retired at 3-53 P. M. and returned at 4-30 P. M.

Q.—Do you find that Ismat mentioned Katua's name immediately after the occurrence?

A.—No, we find that he did not.

Q.—Does the Jury wish to make any statement about their verdict of guilty?

A.—We did not follow the meaning of "fair complexion" nor did we understand fully the importance of the passage in the *ejahar*, and the evidence of the independent witnesses. We now see that Katua is a dark man, and that Ismat could not have mentioned his name as he has said that he only knew him by sight. We wish to amend our verdict and return a unanimous verdict of "not guilty."

As will be seen from the above the Jury at first brought in a unanimous verdict of guilty against the accused under s. 395, Indian Penal Code. The learned Additional Sessions Judge apparently was of a contrary opinion and he proceeded to charge

the Jury again. After the second charge was finished the Jury retired again and returned at 4-30 p. m. What the learned Additional Sessions Judge stated to the Jury in the course of the second charge does not appear from the record. But it appears from the record that he had previously anticipated the Jury's bringing in, in the first instance, a verdict of "guilty" against the accused and that he had intended to refer the case to this Court for final orders. With that view he had written out a letter of reference and signed the same, but it appears that having regard to the events which subsequently happened, he placed the letter of reference on the record though he had not despatched the same to this Court. The procedure adopted by the learned Additional Sessions Judge is one which is entirely opposed to the procedure laid down in the Criminal Procedure Code and is one for which there is no warrant anywhere in the law obtaining in British India.

In this view of the matter we cannot allow the verdict of the Jury to remain. We must set aside the verdict of the Jury and set aside the order of acquittal, dated the 7th March, 1927, and direct that the matter be sent back in order that the accused may be re-tried in accordance with law before the Sessions Judge of Mymensingh.

A. N. A.

Order set aside;
Case remanded.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 12 OF 1927.

July 22, 1927.

Present:—Sir George Claus Rankin, Kt.,
Chief Justice, and Mr. Justice
Mitter.

NARIPENDRA NATH MUKHERJI
AND ANOTHER—DEFENDANTS—APPELLANTS
versus

DHARENDRA NARAYAN NANDI

AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Bengal Land Registration Act (VII of 1876), s. 78—
and comprised in several estates—Right of co-sharer
indlord to recover his share of rent—S. 78, whether
applicable—Entry in Collector's register, effect of—
apportionment of rent—Principles—Long payment of
rent—Inference.*

Section 78 of the Bengal Land Registration Act has
no application to a case where the land in the
possession of the tenant is comprised in more than
one estate. [p. 94, col. 1.]

Rakhal Das Adhya v. Prodyot Kumar Tagore (1),
allowed.

The plaintiffs whose names were registered in the Collectorate for a share of 4-annas 8-gandas in three *touzis* and of a 19½ *gandas* in another *touzi*, and who were receiving their share of rent at the rate of Rs. 49-4-8 *gandas* for over thirty years from the defendants, sued the defendants for arrears of rent at that rate alleging that they were entitled to a share of 4-annas 12-gandas in all the four *touzis*. The defendants contended that in view of the entry in the Collector's register and s. 78 of the Bengal Land Registration Act the plaintiffs' claim could not be decreed in full:

Held, (1) that s. 78 of the Bengal Land Registration Act had no application to the case as the lands were comprised in more than one estate; [p. 94, col. 1.]

(2) that the rent could not be apportioned upon the assumption that each of the *touzis* was of equal value; [p. 94, col. 2.]

(3) that the rent which was being paid by the defendants must under the circumstance be held to be correct amount of rent due to the plaintiffs on account of their share in the *touzis*, and that the plaintiffs' claim must be decreed. [p. 95, col. 1.]

Letters Patent Appeal against the decision of Mr. Justice Majumdar, dated the 7th March, 1927, in Appeal from Appellate Decree No. 2103 of 1921, against the decree of the Subordinate Judge, Second Court, 24-Parganas, modifying that of the Munsif, Second Court, Barasat, dated the 6th July, 1922.

FACTS are set out in the following judgment of

Majumdar, J.—(March 7, 1927).—This appeal arises out of a suit for arrears of rent from 1324 to Falgoon 1327 at the rate of Rs. 49-4-8 *gandas* per year with cesses at the rate of Rs. 2-8-14 *gandas* per annum. It is stated in the plaint that the plaintiffs have been realising their share of rent from the tenants separately. It appears that the tenancy extends to entire lands of four *touzis*, namely, *Touzis* Nos. 843, 2482, 2527 and 2524 of the Collectorate of the 24-Parganas. It is stated in the plaint that the plaintiffs have got 4-annas 12 *gandas* share in all the *touzis*, and that the defendants hold all the lands of the said four *touzis* at a consolidated rent of Rs. 179-2-18 *gandas* and have been paying Rs. 49 odd to the plaintiffs as their share of rent. With reference to the first three *touzis* it is admitted that the plaintiffs' share is 4-annas and 8 *gandas* and not 4-annas 12 *gandas* as stated by mistake in the plaint. But with reference to the last *touzi*, namely, No. 2524 the plaintiffs' names were registered only with reference to 19½ *gandas*.

The defendants' main contentions were that plaintiffs not being in separate collection of their share, the suit was not maintainable, and secondly, the amount of rent

claimed was not actually payable to the plaintiffs.

The first Court held that the plaintiffs' share with reference to the first three *touzis* was 4-annas 8-*gandas* and not 4-annas 12-*gandas* but with reference to the last *touzi* plaintiffs' share was only 19½ *gandas*. He found further that the plaintiffs were in separate collection of their share from the defendants. He also found that the plaintiffs had been collecting on account of their share rent from the defendants at the rate of Rs. 49-4-8 *gandas* for about 30 years but he thinks that under s. 78 of the Land Registration Act because the plaintiffs' names are registered to the extent of 19½ *gandas* and not to the extent of 4-annas 8-*gandas* they are not entitled to the entire amount claimed at the rate stated in the plaint but only at the rate of Rs. 39-10-6 *gandas*. So far as the present record goes there is absolutely no evidence to show that the lands of the four *touzis* are separate and there is nothing further to show what respective areas of these respective four *touzis* are. How the learned Munsif came to find Rs. 39-10-6 *gandas* to be the share of the plaintiffs taking their share of the last *Touzi* No. 2524 to be 19½ *gandas*, I fail to understand, unless it is on the supposition that the lands of all the four *touzis* are equal in extent and equal in value. There is nothing in record to raise any inference upon which such calculation can be made, though in the plaint it was wrongly stated that they have got 4-annas 12-*gandas* share in all the four *touzis* but it is stated in the plaint in clear terms that the entire amount of rent on account of the share of all the landlords was Rs. 179-2-18 *gandas*, and that the defendants have been paying rent to the plaintiffs at the rate of Rs. 49-4-11 *gandas* from a long time past.

Against the decision of the learned Munsif an appeal was preferred by the plaintiffs in the lower Appellate Court. The learned Subordinate Judge before whom the appeal came on for hearing held that as the defendants had been paying rent at the rate of Rs. 49 and odd the amount might be the result of an understanding among the proprietors and that as such they were bound to pay the same to the plaintiffs and he decreed the appeal and passed a decree in favour of the plaintiffs at the rates claimed.

Two points have been taken in second appeal before me by the learned Advocate on behalf of the defendants. First, that the plaintiffs are not entitled to get rent at the rate of Rs. 49 and odd regard being had to the provision of s. 78 of the Land Registration Act; and second the judgment of the learned Subordinate Judge on appeal was wrong as it proceeded upon certain suppositions and surmises not warranted by the evidence on the record.

With regard to the first point the learned Advocate argued that though the defendants had been paying at the rate of Rs. 49 and odd that would not operate as estoppel as there cannot be any estoppel against the express wording of a Statute, and furthermore, that the plaintiffs would be entitled to rent only in proportion to their shares in the *Touzi* No. 2524 and that the calculation arrived at by the learned Munsif was the amount really due to the plaintiffs. With reference to this first point, the question is whether s. 78 of the Land Registration Act applies to this case or not. There is no question that there cannot be any estoppel as against the express wording of the Statute but that question hardly arises in this particular case. As to the question whether s. 78 of the Land Registration Act applies to this case or not, I think it does not. My first ground is that there is absolutely no data in the record to find out that Rs. 49-4 and odd *gandas* does not represent the plaintiffs' share in the four *touzis* taking their share in the last one, i.e. No. 2524 to be 19½ *gandas*. It might be perfectly consistent if the area of the different *touzis* are found to be different and the area of the last *touzi* is much more than the area of the other three *touzis*. In that case it is possible that notwithstanding the fact that the plaintiffs' share in the last *touzi* is 19½ *gandas* and not 4 annas, and odd *gandas* still in the aggregate their share of rent might amount to Rs. 49-4 and odd *gandas*. When there is no such data on the record it is impossible to say that the rent of Rs. 49 does not bear the same proportion to the whole of such rent as the extent of the interest in respect of which such proprietor is registered to the entire estate. My second ground on which I hold that s. 78 of the Land Registration Act has no application to the facts of the present case is based upon the view that that section applies only to the tenure or

holding which lies entirely within the ambit of one *touzi* and to cases where such a holding or tenure lies within *touzis* more than one when the extent of such holding or tenure which lies in any particular *touzi* is known or specifically ascertainable. In that case alone s. 78 would apply. Similar view was expressed by the learned Judges of this Court in the case of *Rakhal Das Adhya v. Prodyot Kumar Tagore* (1). The learned Judges say at page 309*: "Section 78 provides that no person shall be bound to pay rent to any person claiming such rent as proprietor of an estate in respect of which he is required by the Act to cause his name to be registered, unless the name of such claimant shall have been registered under the Act. The section further provides that no person being liable to pay rent to two or more such proprietors holding in common tenancy, shall be bound to pay to any one such proprietor more than the amount which bears the same proportion to the whole of such rent as the extent of the interest in respect of which such proprietor is registered bears to the entire estate. It is clear that the proprietor mentioned in the section is the proprietor of one estate within the ambit of which the lands in possession of the tenants are comprised. The Legislature had not in view the contingency which has happened in the present case, namely, a case where the lands in occupation of the tenants are comprised in a number of estates in one or more of which alone the plaintiff is interested." Reliance is placed upon the case of *Gobinda Chandra Patra v. Ishan Chandra Singh* (2). The facts of this case are altogether different and distinct from the facts of the present case. In that case the plaintiffs were the proprietors to the extent of 14 annas and the defendants were tenants under them and they were also proprietors to the extent of the remaining 2 annas. But the plaintiffs were recorded in the Collectorate *sherista* as proprietors to the extent of $8\frac{1}{2}$ annas only. When the case came on for hearing an objection was taken that under s. 78 of the Land Registration Act as their names were not recorded to the extent of 14 annas the whole suit should be dismissed, and the plaintiffs were not entitled to get rent even

according to the share in which their names were recorded in the Collectorate's *sherista*. Their Lordships held that this could not operate as a forfeiture. At least the plaintiffs would be entitled to $8\frac{1}{2}$ annas for which they were recorded as proprietors in the Collectorate's *sherista*. The only question that was before their Lordships was whether there would be any entire forfeiture or there would be a partial decree. The exact point which now arises in the present case was never before their Lordships and was not so decided. In this view I think the first point taken by the learned Advocate fails.

Then as to the second point, namely, the judgment is based upon surmise. He draws my attention to one passage of the lower Appellate Court, namely, that "evidently the owners of the four *touzis* have some mutual understanding among them by which the plaintiffs have been allowed to realise the rent at the rate claimed in spite of the fact that their names are registered in respect of $19\frac{1}{2}$ *gandas* share in one *touzi*." The learned Advocate says that there is nothing to support this surmise. But I do not think so. The facts of this case are that the defendants have been paying rent to the plaintiffs at this very rate of Rs. 49 for a period extending over 30 years. No objection was ever taken by the plaintiffs nor by the other co-sharers of the plaintiffs. Under such circumstances the Court of Appeal below was perfectly justified in coming to an inference that might have been due to the same mutual understanding among the proprietors themselves.

That being so, both the points fail and the appeal is dismissed with costs.

Mr. Sarat Chandra Roy Chaudhury and Babu Indu Bhusan Roy, for the Appellants.

Babu Nanda Gopal Banerjee, for the Respondents.

JUDGMENT.

Rankin, C. J.—This is the defendants' appeal from the judgment and decree of my learned brother Mr. Justice Majumdar affirming a decision of the lower Appellate Court.

The plaintiff is one of several co-owners of four revenue-paying estates with separate *touzi* numbers. It appears that the whole of the area of these four *touzis* has been settled in *talukdari* right with the defendants for a consolidated *jama* of Rs. 179-2-8 *gandas*

(1) 6 Ind. Cas. 121; 15 C. L. J. 308.

(2) 2 C. W. N. 600.

*Page of 15 C. L. J.—[22]

In my judgment, the circumstance that the tenure is co-extensive with the whole area of the four *touzis* is of no importance for the present purpose, but it is a fact, as I understand, that the whole of the land comprised in the four *touzis* is comprised in this tenure at the consolidated rent of Rs. 179-2-8 *gandas*.

The facts are these that the plaintiff is registered in the Collectorate as having in three of the *touzis* a share of 4-annas 8-*gandas* and in one of the *touzis* as having a share of 19½-*gandas* not quite one anna. The suit was brought on the footing that the plaintiff had an equal share in all the four that being put as 4-annas 12-*gandas*. In point of fact the share of the plaintiff is now admitted to have been wrongly stated in the plaint, and the facts are as I have given. Upon that footing the plaintiff bringing his suit for rent is met with the provisions of s. 78 of the Land Registration Act (VII B. C. of 1876). It is said that it is wrong to give judgment for the amount claimed by the plaintiff because under that section a tenant is entitled to say that he will pay no greater share of the rent to a co-sharer landlord than the landlord is registered in the Collectorate as having.

Mr. Justice Majumdar has disagreed with the figure found by the learned Munsif and has criticized his calculation in a way which seems to me to be sound, that is to say, he has shown that the Munsif's calculation is based upon an assumption that one can treat each of the *touzis* as of equal value for the purpose of apportioning rent. On the question whether s. 78 applies to a case like this Mr. Justice Majumdar has followed the decision of Mr. Justice Mookerjee and Mr. Justice Teunon in *Rakhal Das Adhya v. Prodyot Kumar Tagore* (1). He has held that it is not right to apply s. 78 to any case except the case of a holding under one single estate or revenue-free property. The case before Mr. Justice Mookerjee was a case where the plaintiff was a co-sharer landlord, the tenancy lands comprised lands in more than one *touzi* and the plaintiff was interested as co-sharer in one or more *touzis* but not in all. The Court disposing of that case gives as its opinion that a close examination of the section makes it reasonably plain that it has no application to cases where the land in possession of the tenant is comprised in more than one estate; and, again, that the

proprietor mentioned in the section is the proprietor of one estate within the ambit of which the lands in possession of the tenants are comprised. It has been pointed out to us that that reasoning goes further than was necessary for the decision of that case because, on the facts of that case, it was found to be one where the lands in occupation of the tenants were comprised in a number of estates in one or more of which alone the plaintiff was interested. In my judgment, the present case where the plaintiff is interested in all the *touzis* but not to the same extent in each is just as strong a case on the facts for the purpose of excluding s. 78 as the case before Mr. Justice Mookerjee. In both cases s. 78 is inapplicable because it cannot be applied. It is not possible in this case to say, without assuming that each of those *touzis* is of the same value for purposes of apportioning rent, what is the share that these tenants are bound to pay; and, in my judgment, therefore, whether that case went beyond what was necessary or not the present case is just as strong as that in favour of the landlord. I think, however, that the proposition that the section has no application to cases where the land in possession of the tenant is comprised in more than one estate is a sound proposition, particularly as regards the second part of s. 78. It is quite true that s. 78 is enacted to compel people or to give them an adequate motive to obey the provisions which require registration to be made of these interests in land. Section 78 is controlled by s. 81 which contains a saving for the conditions of any written contract, but it is a section in aid of s. 38.

It is quite true that one might be disposed to argue that for that reason s. 78 must apply to all cases of revenue paying estate or revenue-free property and that as nothing is intended to be left uncovered under s. 38 so nothing is left to be uncovered or out of the reach of s. 78. That, however, is not, I think, a valid argument. Section 78 gives a certain sanction inducing people to make sure to register their interests, but it may well be that the Legislature has thought it sufficient sanction if in all cases where there are tenancies confined to one revenue-paying estate the proprietor is apt to lose what he does not register. From the nature of the case it could not well go further without creating difficulties. It does not follow that the

sanction will hit every case because the intention is to require a complete registration.

In my judgment, in this case the learned Judge has rightly decided that s. 78 was of no avail to the defendants. Had it been, I think, the result of the case would have been different, because no estoppel would prevail against the Statute. But, in my judgment, the estoppel by the Statute not being shown, there is in the rest of the case no difficulty in holding that the rent which the defendants have been in the habit of paying for many years is really due as between the plaintiff on the one hand and the defendants on the other.

I think, therefore, that the appeal should be dismissed with costs.

Mitter, J.—I agree.

A. N. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3
OF 1925.

June 24, 1927.

Present:—Sir George Claus Rankin, Kt.,
Chief Justice and Mr Justice Mitter.

MOHESH CHANDRA CHAKRABARTY

AND OTHERS—DEFENDANTS—APPELLANTS

versus

HEMENDRA NATH SEN CHOWDHURY

AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Suit for possession of waste land—Limitation—Presumption of possession from title—Landlord and tenant—Bona fide settlement by de facto landlord—Right of true owner to eject tenant—Actual possession, necessity of.

In a suit for recovery of possession of waste lands if title is found with the plaintiff he must be presumed to have been in possession until he was dispossessed and in the absence of evidence as to entry by some other person on the land beyond twelve years of suit the question of limitation does not arise. [p. 96, col. 1.]

The principle that a tenant who has taken a settlement *bona fide* from a *de facto* landlord cannot be ejected by the true owner is applicable only to cases where the person claiming to be the *de facto* landlord is in actual possession. [p. 96, col. 2.]

Bino Lal Pakrashi v. Kalu Pramanik (1), distinguished.

Appeal against the decree of the Subordinate Judge, Third Court, Mymensingh, dated the 28th June, 1924, reversing that of the Munsif, Third Court, Tangail, dated the 12th February, 1923.

Mr. Sarat Chunder Bose (with him Babu Ramgati Sarkar), for the Appellants.

Babu Surendra Nath Guha and Mr. Nuruddin Ahmed, for the Respondents.

JUDGMENT.

Mitter, J.—This is an appeal from a decision of the Subordinate Judge of Mymensingh, dated the 28th June, 1924, which reversed a judgment and decree of the Munsif of Tangail, dated the 12th February, 1923. The appeal arises out of a suit commenced by the plaintiffs, now respondents, for declaration of the plaintiffs' *zemindari* right to the disputed lands and for recovery of *khas* possession. The case as stated in the plaint is that the suit lands were formerly waste lands and appertained to plaintiffs' *zemindari* Mouza Garaki and they were subsequently settled with the *pro forma* defendants who possessed them and that sometime after the settlement the defendants Nos. 1 and 2, now appellants, brought a suit against the *pro forma* defendants for establishment of title to and for *khas* possession of the lands now in dispute.

The *pro forma* defendants contested the suit but ultimately they could not continue their defence with the result that the defendants Nos. 1 and 2, now appellants, obtained an *ex parte* decree and in execution of that decree took *khas* possession of the lands now in suit. This gave rise to the cause of action in the present suit.

The defence of the defendants Nos. 1 and 2 was that the suit lands appertained not to plaintiffs' Mouza Garaki but to Mouza Baradam of the *pro forma* defendants. There was a local investigation and after trial the Munsif dismissed the plaintiffs' suit holding that the lands appertained not to plaintiffs' Mouza Garaki but to Mouza Baradam. The Munsif also held that the defendants being settled *raiyyats* of Baradam, acquired occupancy right to the disputed lands and could not, in any event, be evicted.

An appeal was carried by the plaintiffs to the Court of the Subordinate Judge of Mymensingh. The learned Subordinate Judge held on a consideration of the evidence that the lands in dispute fell within the plaintiffs' Mouza Garaki. He also held that the plaintiffs had been in possession of the disputed lands within twelve years of suit and that the defendants' possession for a period short of twelve years did not give them any right to resist the suit for possession commenced by the plaintiffs. The Subordinate Judge accordingly allowed the appeal and decreed the plaintiffs' suit in part for 3 *bighas* 19 *cottas* and 2 *chattaks* of the disputed lands which according to the

Commissioner's report and map fell within the plaintiffs' *mouza*.

The defendants Nos. 1 and 2 have, as I already said, preferred a second appeal and three points have been taken before us by the learned Advocate for the appellants. It is said in the first place, that the lower Appellate Court was not right in not entering into the question of limitation and in not deciding on the same. It is said in the second place, that in any event the defendants having taken possession of the lands from a trespasser under the *bona fide* belief that the said trespasser had right to these lands, were protected from eviction by reason of the principle of the decision in the Full Bench case of *Binod Lal Pakrashi v. Kalu Pramanik* (1). The third ground which related to the question of plaintiffs' title to the suit lands was not ultimately pressed. It is now conceded on behalf of the appellants that the finding that a portion of the lands in suit (3 *bighas* 19 *cottas* 2 *chattaks*) belongs to plaintiffs' *Mouza Garaki* cannot be challenged in second appeal.

We have now to consider the two grounds which were urged by the learned Advocate for the appellants. With regard to the question of limitation the finding is that according to the defendants' own case they took settlement in the year 1316 corresponding to the English year 1909 and the suit was commenced in 1921 within twelve years of that date. Reliance has been placed with regard to this point on an entry in the Settlement record, which shows that in any event the defendants' lessor was in possession in 1314 corresponding to the English year 1911. That possession was also within twelve years of the suit. The lands are waste lands and if title has been found with the plaintiffs, possession in respect of these lands must be presumed to follow title and in the absence of any finding as to entry by some other persons on these lands beyond 12 years of suit no question of limitation can arise. There is no dispossession or discontinuance of possession, unless one person's possession terminates and is followed up by some body else's possession. It is not defendants' case that any body else was in possession beyond twelve years of suit and defendants' possession on their own case began in 1909/1316 within 12 years of suit. There is, therefore, no substance in the first ground urged.

With regard to the second ground taken,

(1) 20 C. 708; 10 Ind. Dec. (N. S.) 477 (F. B.).

the finding of the lower Appellate Court is, that the entry of the defendants was not in good faith as the lessor was not in actual possession of the lands. This circumstance distinguishes the present case from the Full Bench case of *Binod Lal Pakrashi v. Kalu Pramanik* (1). As will appear from the judgment of Sir Comer Pethe-ram, C. J., in that case the persons from whom the tenants took the settlement were in actual possession of the *zemindari* within which the lands in dispute in that suit were situated and who were then the only persons who could give possession of the lands of the *zemindari* to the cultivators. One of the reasons of the decision in that case was that the tenants took settlement *bona fide* from the persons who were in actual possession of the lands, which were ultimately ascertained by judgment of a Court of Law not to belong to them. In this connection the decision in the case of *Tepu Mahammad v. Tefajit Mahammad* (2) might be referred to where Richardson, J., in delivering judgment of the Court said as follows:—"Where a person has been in possession of particular estate or a particular portion of an estate as *de facto* landlord, it may be that *raiyyats* settled by him on the land would have a good answer to a suit for ejectment brought by the true owner, but to carry the principle laid down by the Full Bench to the extent to which it has been carried in this case is to go much too far" and again the learned Judge said:—"No case is made, therefore, for the application of the principle of the Full Bench decision. That principle only applies where *raiyyats* are settled upon land by a person in *de facto* possession as landlord, who is afterwards found to have no title. It is not applicable to every boundary dispute or in every case where a question of parcel or no parcel arises." The question as to whether a settlement is *bona fide* or not depends on the circumstance as to whether the settlement was taken from a person who although was ultimately found to have no title, was at any rate in actual possession of the lands in suit. This distinguishes the present case from the Full Bench case. There is, therefore, no substance in the second ground urged. The appeal, therefore, fails and is dismissed with costs.

Rankin, C. J.—I agree.

A. N. A. *Appeal dismissed.*

(2) 29 Ind. Cas. 216; 19 C. W. N. N. 772.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 954 OF 1927.

December 7, 1927.

Present:—Sir Shadi Lal, Kt.,

Chief Justice, and Mr. Justice Bhide.

NARAINA SON OF BIR SINGH—ACCUSED—

APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 114, illus. (b), 133—
 Approver—Conviction based on uncorroborated testimony of approver, legality of—Corroboration required, nature of.

It is not an inflexible proposition of law that a conviction cannot be based upon the uncorroborated testimony of an accomplice, but it is the usual practice of the Courts to require corroboration of the story of the approver before declaring an accused person to be guilty of a crime. The amount or kind of corroboration required in a particular case must, however, depend upon the peculiar circumstances of that case. [p. 98, col. 1.]

Criminal appeal from an order of the Sessions Judge, Ludhiana, dated the 29th August, 1927.

Dr. Nand Lal, for the Appellant.

Mr. R. C. Soni, for the Government Advocate, for the Respondent.

JUDGMENT.—On the 31st of March, 1927, the corpse of a human being was found in the Sirhind Canal, near the Dalla Bridge in the District of Ludhiana; and was subsequently identified to be the body of one Rakha, a *Jat* of the village of Sherpur Kalan situate in the Jagraon Tehsil of that District. The medical witness, who conducted the *post mortem* examination, found eleven incised wounds on various parts of the body, including an injury on the throat cutting the neck and the spinal cord. Two persons, namely, the victim's widow *Musammatt Kishno* and her alleged paramour *Naraina* were prosecuted for the murder, the former for having abetted the crime and the latter for having participated in the murder; but the learned Sessions Judge, while holding *Naraina* guilty of the murder, has acquitted *Musammatt Kishno* on the ground that the evidence on the record was not sufficient to bring the guilt home to her.

The facts of the case as disclosed by the approver *Anokha* may be shortly stated:—

The prisoner *Naraina* lived in a house adjacent to that occupied by the deceased *Rakha* and his wife *Musammatt Kishno*, and it appears that five or six months before

the murder, which took place probably on the night of the 29th of March, 1927, *Naraina* had contracted an illicit intimacy with *Musammatt Kishno*. The paramour was anxious to abduct the woman and four or five days before the incident in question he disclosed the plan to the approver *Anokha*, with whom he was on terms of friendship, and sought his help for removing her garments from the house of her mother-in-law *Musammatt Bhago*. The approver acceded to the proposal, with the result that one night they entered the house of *Musammatt Bhago* stealthily and removed the garments from a box lying in that house. They then packed up the clothes in two bundles and hurled them in a field outside the village. *Musammatt Kishno* at that time told her paramour that her husband *Rakha* would kill her if he came to know that her clothes had been removed; and she suggested that *Rakha* should be got rid of. In pursuance of this suggestion *Naraina* arranged to decoy *Rakha* on the pretext that they should abduct a woman from the village of *Malla* in order to sell her and share the proceeds of the bargain. He also induced the approver to accompany them, and, when they had gone about eight or nine miles from the village on the night in question, both *Naraina* and *Anokha* attacked *Rakha* with a sword and *takwa* and killed him on the spot. The prisoner *Naraina* then absconded from the village, and it was not until the 15th of April, 1927, that he was arrested in another village called *Lakha*.

This, in brief, is the story related by the approver and there is ample evidence to prove the fact that the approver, at any rate, participated in the affair. The question, however, is whether his testimony is corroborated by independent evidence in so far as the complicity of the prisoner is concerned. Now, we have examined the evidence on the record and reached the conclusion that the following facts have been fully established:—

(1). Several witnesses state that *Musammatt Kishno* used to quarrel with her husband *Rakha* and the latter's mother *Musammatt Bhago*, and that the husband sometimes chastised the wife. The husband's uncle *Mota Singh* also deposes to the fact that *Musammatt Kishno* had contracted a liaison with *Naraina*. Moreover, we have the evidence of the investigating officer and other witnesses to the effect that it was *Naraina*

who on the 15th of April, 1927, produced the garments of the woman from a place near the Tarkhanwala well.

(2) The accused absconded from his village immediately after the commission of the crime and was not arrested until the 15th of April, 1927.

(3). The loin cloth, which he was wearing at the time of the arrest, bore a large number of blood stains, and the report of the Imperial Serologist shows that the garment was stained with human blood.

We have subjected the evidence of the approver to a careful scrutiny, and we are unable to discover any reason for holding that he has invented an entirely false story. The testimony of the approver, corroborated as it is by the existence of the motive for the crime and by other circumstances mentioned above, leaves no reasonable doubt, in our mind, that the appellant participated in the murder. It is nowhere laid down as an inflexible proposition of law that a conviction cannot be based upon the uncorroborated testimony of an accomplice; but it is the usual practice of the Courts to require corroboration of the story of the approver before declaring an accused person to be guilty of a crime. The amount or kind of corroboration required in a particular case must, however, depend upon the peculiar circumstances of that case. Bearing these principles in mind we have examined the whole material before us and we are convinced that the prisoner's guilt has been satisfactorily established.

We accordingly uphold the conviction and in the absence of any extenuating circumstances we confirm the sentence of death imposed by the Sessions Judge and dismiss the appeal.

R. L.

Appeal dismissed.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1348
OF 1927.

November 25, 1927.

Present:—Mr. Justice Harrison.

SAUDAGAR—ACCUSED—PETITIONER
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 498—Legal marriage, necessity of—Hindu Law—Marriage with maternal aunt, legality of—Chadar andazi, whether recognised by Hindu Law.

To sustain a conviction under s. 498 of the Penal Code it is necessary to establish that the marriage between the complainant and the enticed is a legally valid marriage.

An Arora Hindu cannot under Hindu Law contract a valid marriage with his maternal aunt.

Marriage by *chadar andazi* is not recognised by Hindu Law as a valid marriage.

Petition for revision of an order of the District Magistrate, Montgomery, dated the 11th August, 1927, affirming that of the Magistrate, Second Class, Tahsil Okara, District Montgomery, dated the 27th of July, 1927.

Mr. J. L. Kapur for Mr. R. C. Soni, for the Petitioner.

Mr. Jamna Das, for the Respondent.

JUDGMENT.—Saudagar has been convicted under s. 498 of enticing and retaining *Musammat Jawali*, who is said to be the wife of one Sawan Ram. The question raised on revision is that the parties being Aroras no valid marriage could have taken place by *chadar andazi* or any other form of ceremony between this man Sawan Ram and Jawali. The relationship is that Sawan Ram is the sister's son of the deceased husband of *Musammat Jawali*. There is evidence of two witnesses to the effect that such a marriage is valid, one a Muhammadan and the other a Brahmin, who stated in the widest possible terms that Hindus can marry their maternal aunts a proposition which is not supported by Counsel for the complainant. The position, therefore, is that if the parties are governed by Hindu Law, and the presumption is that Aroras are so governed, the marriage was no marriage. Further if it was performed at all it was performed by the *chadar andazi* ceremony, which I understand from both sides is not recognised by the strict Hindu Law. The only possibility, therefore, is that, although Aroras as a whole are governed by Hindu Law, the members of the particular family are governed by the agricultural custom of the people amongst whom they live, a fact

which would only be established by clear and convincing evidence. There is none. The case must, therefore, fail as the first essential has not been proved. I accept the application for revision and acquit the accused.

R. L.

Application accepted.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1013 OF 1927.

December 15, 1927.

Present:—Mr. Justice Broadway and Mr. Justice Tek Chand.

MUHAMMAD SULTAN—ACCUSED—

APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Brutal murder—Youth of accused, whether ground for lesser penalty.

When the murder committed is of a very brutal nature, the mere youth of the accused is no ground for imposing the lesser penalty of transportation. [p. 100, col. 1.]

Criminal appeal from an order of the Additional Sessions Judge, Lahore, dated the 5th September, 1927.

Messrs. Byrne and Noor Din, for the Appellant.

The Government Advocate, for the Respondent.

JUDGMENT.—Muhammad Sultan, a Kashmiri youth aged 18, has been sentenced to death for the murder of *Musammât Sakina* and her husband Munshi. He has appealed and the case is also before us under s. 374 of the Criminal Procedure Code.

The facts are detailed in the judgment of the learned Additional Sessions Judge and need not be recapitulated here. Briefly, the case for the prosecution is that Muhammad Sultan was carrying on an intrigue with *Musammât Sakina*. Munshi, the husband of *Musammât Sakina*, had rented a *Katri* in the city and had sub-rented various rooms in it to tenants; Muhammad Sultan was one of those sub-tenants. On

the 14th of May, 1927, an altercation took place between *Musammât Sakina* and the appellant. Munshi at this time was not at home. According to the evidence for the prosecution the altercation arose out of the fact that some of the tenants had quarrelled amongst themselves and *Musammât Sakina* had told them all to vacate their various quarters. Muhammad Sultan asked if he was included in that order to vacate and was told that he was. The woman and the appellant abused each other, whereupon the appellant took *Musammât Sakina* into her house and chained the door from inside. He then proceeded to kill her. The medical evidence shows that she was very badly cut about, having no fewer than twenty-one separate cuts on her. Having killed *Musammât Sakina* Muhammad Sultan came out of the house and proceeded into the bazar. He there, apparently by chance, met Munshi who was returning with his bullocks and at once attacked him stabbing him with a clasp knife which he had in his hands and which he had already used on *Musammât Sakina*. Munshi went into the house of Khuda Yar, *Jat*, which was close by but was followed by his assailant and again stabbed. This attack on Munshi was witnessed by Lal Khan (P. W. No. 8) and S. Walayat Hussain (P. W. No. 9). Both these witnesses agree in saying that the assault on Munshi was wholly unprovoked and that Munshi on receiving the first injuries endeavoured to escape. Munshi's statement was recorded that evening at 6-15 P. M. by Muhammad Afzal, a Magistrate of the First Class. In this statement he related how he was attacked by Muhammad Sultan without any provocation and that he endeavoured to escape but was again attacked. The medical evidence shows that he had no fewer than seven incised wounds on him, three of these apparently were inflicted from behind.

The evidence leaves no room for doubt that Muhammad Sultan is responsible for the death of both *Musammât Sakina* and Munshi, and the learned Counsel who appears on his behalf frankly admitted that he cannot contest the fact that his client, the appellant, is responsible for the death of both Munshi and *Musammât Sakina*. He urges, however, that the assault on both these persons was made under such severe and grave provocation as entitles his client to being treated with a certain

amount of leniency. The evidence as to the actual origin of the attack on *Musammât Sakina* is a little conflicting and it is not clear whether it was Muhammad Sultan who first abused *Musammât Sakina*, or whether it was *Musammât Sakina* who began abusing the appellant. We are not, however, told what the abuse actually was. On the other hand, the appellant made a statement before Mehdi Hussain, Magistrate First Class, at 6 P. M. on the 14th of May, 1927, the day of the occurrence. In that statement he alleged that he had been carrying on a liaison with *Musammât Sakina* for about a year and that that evening she had abused him and told him that she would expose him to her husband and get him murdered. This, he stated, enraged him and caused him to think that she would continue to live while he and her husband would have a fight which probably would result in his being hanged. Enraged at this thought he attacked her with a pen-knife. He goes on to say that later on her husband arrived at the house and attacked him with a pen-knife, whereupon he himself retaliated and thus Munshi came to be killed.

There is no doubt that the story told by the appellant before Mehdi Hussain is not true in its entirety for there can be no doubt whatever that Munshi met with his death in the bazar and not at his house. I am unable to see any provocation or excuse for the attack on *Musammât Sakina* as far as the record is concerned and certainly there was no justification or excuse for the assault on Munshi which took place in the bazar.

It was next contended that the death penalty should not be imposed on the appellant because he is eighteen years of age. Having regard to the brutal nature of the attack on these two unfortunate victims I am unable to see that the youth of the appellant by itself is any ground for imposing the lesser penalty. In this connection I would refer to Criminal Appeal No. 954 of 1926, a case decided by Fforde and Addison, JJ., on the 15th of December, 1926. In that case the only reason why the sentence of death had not been passed by the Sessions Judge was that the culprit was 19 or 20 years of age. The Crown prayed for enhancement of sentence and the sentence was enhanced. Fforde, J., said as follows:—

"As I have already stated the learned

Sessions Judge has given as his reason for not imposing the death penalty the fact that the appellant is 19 or 20 years of age. In my opinion that reason is wholly inadequate. The murder in the present case was a particularly ruthless and brutal crime. There are no extenuating circumstances whatsoever, and the mere fact that the murderer is 19 or 20 years of age, in my opinion is a wholly insufficient reason for not imposing the appropriate sentence provided by law."

Similarly I am unable to see any extenuating circumstances in this case, and I would, therefore, dismiss this appeal and confirm the sentence of death.

Tek Chand, J.—I agree.

R. L.

Appeal dismissed.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 631 OF 1927.

November 18, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice.
Mian TAJ MAHMUD—ACCUSED—

APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 191—Perjury—Statement not shown to be intentionally false—Deposition not read over to witness—Conviction for perjury, legality of—Deposition of witness, whether should be signed by all the Presiding Officers—Contradictory statements—Prosecution in respect of later statement alone, maintainability of—Defence of India Act (IV of 1915), s. 5—Duty of Commissioner to read over deposition of witness—Criminal trial—Duty of Magistrates—Private conference with Prosecuting Officer—Invoking intervention of superior Executive Officers—Putting accused to inconvenience—Improper conduct—Prosecution—Omission to examine material witness—Inference.

In order to sustain an indictment for perjury the prosecution must establish, *inter alia*, two things: (1) that the statement was false, and (2) that it was known or believed to be false or not believed to be true; in other words, the statement must be intentionally false. [p. 102, col. 1.]

A person who has made two contradictory statements cannot be convicted for perjury on that ground unless it is clearly proved that the two statements are wholly irreconcilable. [p. 101, col. 1.]

The mere fact that a person had on a previous occasion made an inconsistent statement does not necessarily prove that the previous statement was true and that the latter statement is false, and does not, therefore, afford a basis, in itself for a conviction of perjury in respect of the latter statement. [p. 103, col. 2.]

A deposition which is not read over to the witness in accordance with the requirements of the law under which it was taken cannot be used against him on a charge of perjury. [p. 103, col. 1.]

Where a Court is composed of more than one Judge the deposition of a witness need not necessarily be signed by all the Judges of the Court before whom the witness is examined and the fact that it is signed by only one of them alone does not vitiate the deposition. The object of requiring the Presiding Officer of the Court to sign the deposition of the witness examined by him is to ensure the accuracy of the record and it cannot reasonably be urged that that object can be achieved only if all the Judges composing the Court sign the record. [p. 102, col. 2.]

The fact that Commissioners trying a case under the Defence of India Act are authorised to make a memorandum only of the evidence of witnesses examined by them, does not relieve them from their duty to have the depositions read over to the witnesses as required by s. 360, Criminal Procedure Code. [p. 103, col. 1.]

It is an elementary principle of justice that a person cannot simultaneously perform the functions of a prosecutor and those of a Judge in a criminal case. A Magistrate ceases to be an Executive Officer when he is sitting in a Court to try a criminal case. [p. 104, col. 2.]

A District Magistrate as such is directly subordinate to the High Court and he cannot be allowed to invoke the intervention of his superior Executive Officers in a matter concerning the discharge of his judicial duties for which he owes responsibility only to the High Court. [*ibid*]

It is improper on the part of a Judicial Officer to hold private conferences with the Prosecuting Officers in respect of a criminal case upon which he has to adjudicate. [p. 106, col. 1.]

One of the most important duties of a Court of Law is to create and maintain confidence in the administration of justice and to conduct itself in such a manner as to produce in the minds of the parties an impression that nothing but absolute justice would be done to them. [p. 107, col. 1.]

Failure of the prosecution to examine a material witness justifies an inference that the witness if examined would have deposed against the prosecution. [p. 102, col. 2.]

Criminal appeal from an order of the District Magistrate, Shahpur District at Sargodha, dated the 6th June, 1927.

Dr. Sir Mian Mohammed Shafi, Kt., Messrs. Brij Lal Puri, Mukand Lal Puri and Abdul Ghani, for the Appellants.

Mr. J. K. Mackey, for the Government Advocate, for the Respondent.

JUDGMENT.—The appellant, Mian Taj Mahmud, has been found guilty

of having committed perjury in a judicial proceeding and has been sentenced under s. 193, Indian Penal Code, to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 5,000.

The prosecution arose out of a transaction which took place more than nine years ago, and in order to appreciate the questions of law and facts upon which I have to pronounce my opinion it is necessary to give a short sketch of the various events which have a bearing upon the case for the prosecution. On the 28th July, 1918, Sayed Nadir Hussain Shah, the Tehsildar of Bhalwal in the Shahpur District, visited the village of Bekh Lurke in the south of the Tehsil to enlist recruits for the army. He was accompanied by the appellant Taj Mahmud, a *zaildar* of another village called Mela and several other persons and was received at the village boundary by the *lambardar* and the *zaildar* and other inhabitants of the village. The Tehsildar went to the village *daira* and partook of some refreshment. Shortly afterwards, a large number of villagers who were evidently dissatisfied with the method adopted by the Tehsildar in his campaign of recruiting, came armed with bludgeons and hatchets and attacked him and his companions with the weapons. The Tehsildar sustained severe wounds to which he succumbed on the spot. Of his companions Taj Mahmud received a large number of injuries including compound fractures of the bones of an arm and escaped death by concealing himself in a mosque. From this place of safety he did not emerge until after the arrival of the Police.

It appears that as a result of the panic which ensued practically the whole of the village was deserted but the few persons who could be found were asked to appear before a Magistrate, Khan Ahmed Hassan Khan, who recorded their statements. The appellant Taj Mahmud also was examined by the Magistrate first on the 28th July, 1918, and again on the 5th August, 1918, and the latter statement has been relied upon by the prosecution in support of the charge of perjury.

A few months after the tragedy, 30 persons who were arrested for complicity in the murder were tried by a Tribunal of three Commissioners constituted under the Defence of India Act, IV. of 1915, and Taj Mahmud was one of the witnesses examined

by the Tribunal on behalf of the prosecution. Deposition of Taj Mahmud was recorded on the 7th and 9th of December, 1918, and this deposition has been produced as an exhibit in the present case.

The Tribunal decided the case in January, 1919, but there are still some persons who are alleged to have participated in the assault on the Tehsildar and could not be tried at that time as they were fugitives from justice. These men were arrested several years afterwards and the question of their guilt depended upon their identification by certain persons who claimed to be the eye-witnesses of the assault on the Tehsildar. In the course of the enquiry held by a Magistrate into the case against certain accused persons, Taj Mahmud was produced as a witness for the Crown on the 16th May, 1925, and it is the statement made by him on that day that is alleged to be false.

The portion of the statement which forms the subject of the indictment, is to the effect that he could not identify three accused, namely, Jallu, Amir and Salehon and that he could not say that he had known them before. Now a perusal of s. 191, Indian Penal Code, which defines the offence of 'giving false evidence' shows that in order to sustain an indictment for perjury the prosecution must establish, *inter alia*, two things: (1) that the statement was false, (2) that it was known or believed to be false or not believed to be true. In other words, the statement must be intentionally false.

Let us now examine the evidence in order to see whether these requirements of the law have been fulfilled in the present case. It must be remembered that we are not dealing here with a case where a person makes contradictory statements and is charged, in the alternative, with giving false evidence on one or other of the two occasions. The appellant was charged with having given false evidence on the 16th May, 1925, and it was only this specific charge that he was required to meet.

It may be stated at the outset that there is no oral evidence to prove the falsity of the statement and the case for the prosecution depends entirely on the depositions made by the prisoner before the Commissioners in December, 1918, and before the Magistrate in August, 1918. It is, however, contended on his behalf that the deposition before the Commis-

sioners is inadmissible in evidence, as it was signed by only one Commissioner and not by all the Commissioners. The learned Counsel for the appellant is unable to cite any authority in support of his contention and I am not prepared to subscribe to the doctrine that where a Court is composed of more than one Judge the deposition of a witness must necessarily be signed by all the Judges of the Court before whom the witness is examined and that if it is signed by only one of them that irregularity alone vitiates the deposition. The object of requiring the Presiding Officer of the Court to sign the deposition of the witness examined by him is to ensure the accuracy of the record and it cannot reasonably be urged that that object can be achieved only if all the Judges composing the Court sign the record.

While I cannot accede to the contention that the mere circumstance that the deposition was signed by only one of the three Commissioners renders it inadmissible in evidence, I observe that the deposition was not even read over to the witness, and that defect cannot, in my opinion, be overruled. It is clear that the statement alleged to have been made by the prisoner before the Commissioners does not bear a certificate that it was read over to him and there is no oral evidence to show that it was in fact read over to the deponent. Mr. Justice Jai Lal, who was a member of the Tribunal, does not remember whether the evidence was read over to Taj Mahmud; and Nafis-ud-Din who acted as the Reader to the Tribunal is clear that he was never asked to read the statements over to the witnesses examined by the Tribunal and he adds that they were not read over to the witnesses, otherwise there would have been the usual certificates to that effect. It is significant that though the *Ahlmed* of the Tribunal was examined as a witness for the prosecution he was not examined at the trial and this failure to examine a material witness justifies the inference that the evidence if examined would have deposed against the prosecution.

I need not, however, dilate upon this subject because it is neither found by the trial Magistrate nor suggested by the learned Counsel for the Crown that the record of the deposition was read over to the appellant. What is urged before me is that the Commissioners were required

only to make a memorandum of the substance of the evidence of each witness examined by them and that they were under no obligation to read the depositions over to the witnesses. Now the fifth section of the Defence of India Act enacts that subject to any rules made by the Local Government, the Commissioners in trying the accused persons shall follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by Magistrates and s. 360 of the Code of Criminal Procedure which governs the trial of warrant cases, prescribes in clear terms that as the evidence of each witness is completed it shall be read over to him. This section was *prima facie* applicable to the proceedings before the Commissioners and my attention has not been invited to any rule which dispensed with the requirement of the law enacted by the section. Nor do I think that the provision authorising the Commissioners to make only a memorandum of the substance of the evidence of each witness, can be viewed as containing, by implication a repeal of the important and salutary rule prescribed by s. 360. The rule was enacted in order to ensure accuracy in recording the evidence given by a witness and to give him an opportunity to correct any mistake made by the writer thereof.

There is ample authority in support of the proposition that when a deposition is not read over to the witness in accordance with the requirements of the law under which it was taken, it cannot be used against him on a charge of perjury, *vide. inter alia*, *Empress v. Mayadeb Gossami* (1), *Emperor v. Jogendra Nath Ghose* (2), *Mohendra Nath Misser v. Emperor* (3), *Kamatchinathan Chetty v. Emperor* (4) and *Kartar Singh v. Emperor* (5).

If the statement made by the prisoner before the Commissioners is excluded and I think that it must be excluded, from consideration, the question for determination is whether there is any other material on the record to show that the evidence given by him on the 16th May, 1925, was

intentionally false. In this connection reliance is placed by the prosecution upon the deposition made by the prisoner on the 5th August, 1918, implicating Jallu, Amir and Salehon among others in the murder of the Tehsildar and alleging that he was previously acquainted with them. I have already pointed out that this is not a case of alternative charges in respect of two contradictory statements so that it may be argued that one of the two statements must be false and that it is not necessary to prove which of them is false. The assignation of perjury in this case is founded on the falsity of the evidence given by the appellant on the 16th May, 1925, and it is the duty of the prosecution to establish that charge. The mere fact that he had on a previous occasion made an inconsistent statement does not necessarily prove that the previous statement was true and that the latter statement is false. It is to be observed that the earliest statement made by Taj Mahmud was on the 28th July, 1918, shortly after the assault on the Tehsildar and that on that occasion he did not mention the names of Jallu, Amir and Salehon but merely stated that he would be able to identify the assailants. With respect to the statement made on the 5th August, 1918, the Magistrate who recorded it deposes that Taj Mahmud when making that statement referred two or three times to a paper which he was holding in his hand and it is contended that it was that paper which contained the names of Amir, Jallu and Salehon. There can be little doubt that Taj Mahmud had sustained very severe wounds on the 28th July and considering that he was practically a stranger to the inhabitants of the village there is nothing improbable in the suggestion that he was not previously acquainted with the offenders and that on the 5th August he read out their names from a piece of paper which had been given to him by the Police or by some other person interested in the prosecution.

Be that as it may, there is nothing to choose between the deposition of the 5th August, 1918, and that recorded on the 15th May, 1925, and there is not a scintilla of evidence to warrant the conclusion that the former was true and the latter false.

The discussion so far has proceeded upon the assumption that the two depositions contradicted each other. It has, however, been repeatedly pointed out that in order

(1) 6 C. 762; 8 C. L. R. 292; 3 Ind. Dec. (N. S.) 494.

(2) 24 Ind. Cas. 571, 42 C. 210; 18 C. W. N. 1242; 15 Cr. L. J. 483.

(3) 12 C. W. N. 845; 8 Cr. L. J. 116.

(4) 28 M. 308; 2 Cr. L. J. 756.

(5) 39 Ind. Cas. 847; 12 P. R. 1917 Cr.; 15 P. W. R. 1917 Cr.; 18 Cr. L. J. 607.

to establish the charge of perjury it is necessary to prove that the two statements are wholly irreconcilable. Is this fact satisfied in the present case? It is to be remembered that when Taj Mahmud gave evidence in 1925 he was deposing to a transaction nearly seven years old and that the absconder had in the meanwhile taken steps to disguise themselves by growing beards. In these circumstances he cannot be blamed if he failed to pick them out of a group of persons. Nor can it be held that he intentionally gave false evidence when he stated that he could not say that he had known them before. As observed already Taj Mahmud neither belonged to village Bekh Lurka nor had any official connection with it and it appears that he had visited it only once or twice before the murder of the Tehsildar. His acquaintance, if any, with the offenders must, therefore, be of a very casual character and if after the expiry of nearly seven years he expressed his inability to say definitely whether he was previously acquainted with them, he could not be deemed to have made a statement which he knew or believed to be false. There are cases in which a person might honestly or conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time he might be convinced that he was wrong and swear to the reverse, without meaning to swear falsely on either of the two occasions.

The learned District Magistrate appeared to be under the impression that proof of the falsity of the evidence is all that is required to bring the case within the purview of s. 193, Indian Penal Code; but the rule of law is perfectly clear that in order to establish a charge of perjury it is necessary to prove, not only that the prisoner made a statement which was false, but also that he knew or believed it to be false or did not believe it to be true.

The result of the above conclusion is that the evidence upon the record does not warrant the conclusion that the deposition made by Taj Mahmud on the 16th of May, 1925, was false, much less intentionally false.

Before concluding I cannot help remarking that the District Magistrate has not in the conduct of the trial maintained that freedom from bias which was incumbent upon him and has committed some

characteristically unjudicial acts. The proceedings taken by him betray his ignorance of the elementary principles of justice that a person cannot simultaneously perform the functions of a prosecutor and those of a Judge in a criminal case. The Magistrate does not realise that he ceases to be an executive officer when he is sitting in Court to try a criminal case. Nor does he fully understand that as District Magistrate he is directly subordinate to this Court and that he cannot be allowed to invoke the intervention of his superior executive officers in a matter concerning the discharge of his judicial duties for which he owes responsibility only to the High Court.

The learned Counsel for the appellant has strongly animadverted upon the conduct of the trial by the Magistrate and has referred to various incidents in support of his contention that the Magistrate started with a bias against the accused and did not try the case in a fair and impartial manner. He has laid stress upon the fact that his client has repeatedly complained that the prosecution against him was instituted in pursuance of the instructions given by Mr. Macnabb, in his capacity as the Deputy Commissioner of the District. This complaint finds expression *inter alia* in an affidavit made by the accused in this Court on the 11th January, 1927, which in cl. (a) of para. (2) distinctly states that he along with certain other persons was being prosecuted under the instructions of the District Magistrate, and that the application under s. 476, Criminal Procedure Code, for filing a complaint of perjury was made in pursuance of the directions given by the latter to the Public Prosecutor. In accordance with the practice of this Court a copy of the affidavit was forwarded to the District Magistrate in order to give him an opportunity to submit his explanation with respect to this allegation and other allegations contained therein. The learned Magistrate instead of submitting directly to the High Court his explanation, stating in clear and unequivocal terms whether he admitted or denied the correctness of the allegations sought the intervention of the Commissioner by writing a letter to him from which the following extract may be transcribed here:—

"I have the honour to forward to you copies of letter No. 288-J, dated the 14th of January, 1927, from the Deputy Registrar

of the High Court, Punjab, to my address together with copies of the enclosures.

"The observations which I have to make are legally of an official and confidential nature, and in view of ss. 123, 124 and 125 of the Evidence Act, I do not consider that it would be proper for me to make a reply direct to the High Court without previous reference to you. I am, therefore, sending my observations on these paragraphs and would suggest that they may be forwarded to Government for such actions as may be deemed advisable.

"I understand that consultations between a Magistrate and the Police, with regard to the conduct of a case are confidential and no Magistrate should be forced to disclose before any Court the details or results of his consultations."

Now I fail to understand how the District Magistrate expected the Commissioner or the Government to interfere in a matter which dealt purely with the question whether the Magistrate had taken such interest in initiating the criminal proceedings as to disqualify him to adjudicate upon the guilt or otherwise of the accused. It is obvious that the Magistrate was labouring under a misconception of the duty which he, as a Subordinate Judicial Officer, owed to the High Court and it appears that the Commissioner did not take the action suggested by the Magistrate and the latter then submitted a copy of his explanation to this Court. I cannot too strongly deprecate the attempt of the Magistrate to invoke the aid of the executive officers in trying to evade the duty of submitting to this Court his explanation in respect of the allegations made by an accused person against him. Nor do I see how ss. 123, 124 and 125 of the Indian Evidence Act have any bearing upon the question. Section 123 prohibits a witness from giving evidence, derived from unpublished official records relating to any affairs of state, without the permission of the head of the department concerned and s. 124 forbids the Court to compel a Public officer to disclose communications made to him in official confidence when he considers that public interests would suffer by the disclosure. Similarly s. 125 does not allow the Court to compel a Magistrate or a Police Officer to say whence he got any information as to commission of an offence. It appears that the sections were quoted by the District Magistrate in a haphazard

manner without taking the trouble of understanding their meaning, and it is clear that none of them could be invoked for the purpose of avoiding to answer the simple question as to whether he had given instruction to the Public Prosecutor to take steps to prosecute the appellant for perjury. It is futile to suggest that there was in this case any privileged communication received by the Magistrate which he could not disclose. I need not pursue the subject any further for the learned Counsel for the Crown frankly admits that he cannot defend the conduct of the Magistrate in trying to shirk his duty to the High Court by writing to the Commissioner upon a matter with which the latter had no concern whatsoever.

Nor can the answers given by the Magistrate to the allegations contained in the affidavit be regarded as satisfactory or dispel the apprehension of prejudice in the conduct of the trial. One of these allegations was in the following terms:—

"That generally almost on each hearing consultations are held by the District Magistrate with the Public Prosecutor and Court Inspector before the hearing commences".

Now in his replies the District Magistrate does not deny this allegation but seeks to justify his conduct by saying that he sees "nothing objectionable in a Magistrate consulting the prosecution with regard to a case. Obviously he cannot do so in public since many of the matters, which the Police would have to communicate, are of the confidential nature".

In support of his action he also refers to the fact that he is a busy officer and "It is, therefore, necessary for him to see that his time is not wasted by the tendering of unnecessary evidence or the failure to produce a witness which is really required in a case on the first possible occasion. It was, therefore, in order to save time in the long run that I had to consult the Public Prosecutor and the Prosecuting Inspector with regard to the conduct of the case in order to expedite it as much as possible".

The practice of holding private consultations with the prosecuting agency before commencing the hearing, of the case was repeated on the 16th December 1926, and it is described in the affidavit in these terms: "That the climax was reached on the last hearing (16th December, 1926) when the

District Magistrate came to the Court room, called the case and then went inside his retiring room, where he remained closeted with the Court Inspector and Sub-Inspector Sultan Ahmed, who had been investigating the Bekh Lurka case, for about an hour and a half. Khan Ahmed Hassan Khan, Extra Assistant Commissioner, Gujrat, who was the witness to be examined on that date was also summoned to the retiring room and some sort of consultation had with him."

Here again the private conference with the prosecuting officers is not denied by the Magistrate who seems to justify it by relying upon his "previous remarks about the general conduct of the case by the prosecution" and by pointing out that "I was not anxious to waste any unnecessary time on the case since I have many other duties to perform, but since the case was an important one and it had not been properly worked out by the prosecution it was my duty to see that it was properly worked out".

The learned Magistrate also admits that he asked the witness Khan Ahmed Hassan Khan to come into his retiring room but expresses his inability to remember "exactly what sort of consultation I had with the witness". He again cites ss. 123 to 125 of the Indian Evidence Act to claim privilege for the conversation he had with the witness, and explains that the principal subject of the conversation, so far as he could remember was water-logging in the Gujrat District.

It is a matter for surprise that a Judicial Officer occupying the position of a District Magistrate does not see impropriety of holding private conferences with the prosecuting officers in respect of a criminal case upon which he had to adjudicate. The practice followed by him offends against the elementary principles governing the administration of criminal justice, and the learned Counsel for the Crown had no alternative but to admit that it was indefensible. I trust that no Magistrate will ever be guilty of such improper conduct in the discharge of his judicial functions or forget the fundamental rule with its necessary implications that he is an impartial adjudicator between the prosecuting agency and the people.

I do not propose to deal with other instances of the unjudicial manner in which the Magistrate has acted in this case, beyond

mentioning certain incidents which took place at the concluding stage of the trial and to which my attention has been specially invited. It appears that after framing the charge against the accused the District Magistrate declined to summon all the witnesses cited on his behalf and took upon himself the duty of arbitrarily selecting only a few witnesses who were to be summoned to give evidence for the defence. He then adjourned the case for hearing at a place called Kathwai. Now according to the affidavit filed by the accused in the High Court on the 19th May, 1927, this place "is unconnected by rail or by any vehicular traffic with the rest of the District. It is only possible to reach Kathwai on foot or on ponies."

The accused urged before the trial Court that apart from the convenience to him and his witnesses "it will be impossible for the petitioner to take any good Counsel to such a far away place which could only be reached by ponies, and that he (Magistrate) should be pleased to fix any place in the District which is a Railway Station".

It cannot be said that the request was an unreasonable one but the learned Magistrate took no notice of it. The accused thereupon moved this Court which passed on the 23rd May, 1927, an order directing the Magistrate to give every reasonable facility to the accused to produce his defence evidence and to hold the trial of the case either at the Head-Quarters of the District or at a place which is either a Railway Station or easily accessible from a Railway Station.

It appears that before the hearing of the case on the 6th June, 1927, the Magistrate had moved on to another place called Sodhi, and while Kathwai is 17 miles from the nearest Railway Station Sodhi is nine miles further on in the Salt Range. Before he commenced the hearing of the evidence on the 5th June a certified copy of the order of the High Court quoted above was placed before him, but he persisted in holding the trial at Sodhi and paid no heed to the request of the accused that the case should be heard at a place, where his Counsel from Lahore could appear without inconvenience. He then recorded the evidence of the witnesses present at that place and closed the case for the defence. In his judgment the District Magistrate explains that Sodhi is not an inaccessible part of the Salt Range, but this explanation is contradicted by the

affidavit of the prisoner who describes in detail the difficulties of the journey from the Railway Station at Khushab to Kathwai and Sodhi.

In the absence of further information, it is difficult to decide which of these divergent versions is correct, but one thing is clear that Sodhi cannot be regarded as a place "easily accessible from a Railway Station" as contemplated by the order of this Court, and that the Magistrate should not have held the trial at such an out of the way place.

The learned Magistrate, not only closed the case for the defence on the 6th June, 1927, but even went so far as to call the accused and his Counsel in the middle of the night and pronounced judgment at 1 A. M., inflicting upon the convict the maximum term of imprisonment permissible under the law. He was then taken into custody and had to remain in Jail before he was admitted by the Appellate Court to bail. It is incontrovertible that one of the most important duties of a Court of Law is to create and maintain confidence in the administration of justice and to conduct itself in such a manner as to produce in the minds of the parties an impression that nothing but absolute justice would be done to them. The proceedings taken by the Magistrate show that he did not hear the case with that judicial detachment which should characterize the trial of a criminal case and that he allowed his executive zeal to outrun his judicial discretion.

For the reasons stated above I hold that the guilt of Taj Mahmud has not been established. I accordingly allow his appeal and setting aside the conviction and the sentence, I direct that he be released from his obligation under the bail-bond.

R. L.

Appeal allowed.

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 1186 OF 1927.

December 16, 1927.

Present:—Mr. Justice Broadway.

EMPEROR—PETITIONER.

versus

AKBAR—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 562—Release of accused on probation in perjury case, propriety of.

It is not desirable to apply the provisions of s. 562 of the Criminal Procedure Code to a person found

guilty of deliberately committing perjury to screen an offender.

Case reported by the District Magistrate, Attock at Campbellpur with his No. 3778-G., dated the 26th August, 1927.

Facts appear from the following report of the District Magistrate:—

REPORT.—The matter arose out of a case under s. 307, Indian Penal Code. One Hans Raj fired a pistol shot at the said Akbar at Ghurghushti in Police Station Hazro. The bullet hit him in the shoulder and remained in the body. Hans Raj was challaned under s. 307, Indian Penal Code. Akbar was produced as a witness by the prosecution and while on oath he told material lies in the Court to save Hans Raj. Some other witnesses did the same. Hans Raj was, however, convicted by Khan Abdul Majid Khan, M. B. E., Magistrate of the First Class exercising enhanced powers under s. 30 of the Criminal Procedure Code, and the conviction was upheld in appeal. Complaints under s. 193, Indian Penal Code, were lodged against Akbar and one Jullundhur. Akbar was convicted and released on probation under s. 562, Criminal Procedure Code.

The infection of the prosecution witnesses going hostile particularly amongst the residents of Ohhachh (Police Station Hazro), is daily increasing. It is a well-known fact that in cases of perjury it is extremely difficult to obtain evidence sufficient to bring the guilt home to the perjurer. If the very few cases, in which prosecution succeeds in convincing a Judge, are also lightly dealt with merely because, as the Court has remarked, the convict had received a bullet wound and was probably seduced by interested people, there will be no end to the matters. The people should not be suffered to understand that a perjurer if convicted, which is very seldom, has still a chance of escape on probation. If the complainants themselves succumb to accused's allurements what is to be expected of the corroborating witnesses? This sentence has had a very bad effect on the witnesses in other cases. I, therefore, forward the record to their Lordships and recommend that the order of release on probation be set aside and a deterrent sentence inflicted on the convict.

ORDER.—Akbar has been found guilty of an offence under s. 193, Indian Penal Code and has been dealt with under s. 562, Criminal Procedure Code. The reason for

this is that he was the complainant in the case against Hans Raj and had received a bullet wound. There is no doubt that he was won over by the defence in the case against Hans Raj and that he deliberately committed perjury intending to screen Hans Raj. In these circumstances I do not think the Magistrate was right in dealing with Akbar under s. 562, Criminal Procedure Code. Perjury is far too rife for any such leniency which I consider misplaced. Bearing in mind that he was shot I set aside the order under s. 562, Criminal Procedure Code, and sentence Akbar to rigorous imprisonment for one year.

R. L.

Revision allowed.

LAHORE HIGH COURT.
CRIMINAL MISCELLANEOUS PETITION
No. 211 of 1927.
November 30, 1927.

Present:—Mr. Justice Agha Haidar.

MASHAR KHAN AND ANOTHER

—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Counsel—Affidavit by Counsel, propriety of—Criminal Procedure Code (Act V of 1898), s. 526—Grounds for transfer.

According to the well-recognised practice which prevails wherever members of the English Bar practise, a Counsel should never file an affidavit in a case in which he is appearing professionally. It not only hampers his freedom of action as an Advocate but he thereby gives up his dignified position of detachment as an Advocate and lowers himself to the level of either a *pairōkar* or a witness who has to support the case of a particular party by giving evidence on his behalf. [p. 108, col. 2.]

Applications for transfer cannot be lightly granted where they are based on fanciful and sentimental grounds or are supported by false affidavits. [p. 109, col. 1.]

Petition under s. 526, Criminal Procedure Code, for transfer of a case from the Court of the District Magistrate, Kangra at Dharamsala, to some other Court in another District.

Mr. Shah Nawaz, for the Petitioners.

Diwan Ram Lal, Assistant Legal Remembrancer, for the Respondent.

ORDER.—This is an application for transfer. It came before me on the 14th of October, 1927, and I issued notice on it. I further directed that copies of the application and the affidavit should be sent to the District Magistrate, Kangra at Dharamsala, Mr. Labhu Ram and also to Mr. Kanwar Bhan and Mr. Disney, Magistrates in the same District. These officers were directed to submit

such explanation as they might think necessary. These explanations came up before me on the 11th of November, 1927. On this date a very unusual document was filed before me by Chaudhri Shuja-ud-Din, Bar-at-Law Dharamsala, Counsel for the applicants. This is an affidavit in connection with the application for transfer and the declarant Chaudhri Shuja-ud-Din has been appearing apparently as Counsel for the applicants. According to the well-recognised practice which prevails wherever members of the English Bar practise, the Counsel should never file an affidavit in a case in which he is appearing professionally. The reason is obvious. To begin with, it hampers his freedom of action as an Advocate. Besides, he gives up his dignified position of detachment as an Advocate and lowers himself to the level of either a *pairōkar* or a witness who has to support the case of a particular party by giving evidence on his behalf. Chaudhri Shuja-ud-Din has not exercised proper judgment as a Counsel and he has been, in any case, ill-advised in adopting the course that he did. As to the affidavit itself, it has got no evidentiary value as such because it is not such an affidavit at all which a Court of Justice can take into consideration. However, the so-called affidavit of Chaudhri Shuja-ud-Din was placed on the file by me on the 11th of November, 1927. Mr. B. H. Bevan Petman asked for further adjournment with the view of filing an additional affidavit or statement.

The case came up before me on the 25th November, 1927, and it was argued by Mr. Shah Nawaz for the best part of the day. In fact his arguments alone took about three hours. The Crown was represented by the Assistant Legal Remembrancer, Mr. Ram Lal, and naturally he took some time in replying to Mr. Shah Nawaz's arguments. Mr. Ram Lal placed on the record a document which purports to be a letter addressed by Mr. Labhu Ram, District Magistrate, Kangra, to the Government Advocate. I understand that a copy of that letter had also been given to Mr. Shah Nawaz, Counsel for the applicants. In any case no objection was taken to this document being placed on the record of the present case, and Mr. Shah Nawaz directed part of his arguments to this document. I regret to say that this document plainly and categorically contradicts the main allegations of Chaudhri Shuja-ud-Din's so-called

affidavit. It is a very serious matter if either Chaudhri Shuja-ud-Din's statement is incorrect or the District Magistrate's explanation is erroneous. However, I am satisfied on the explanation submitted by the District Magistrate and Mr. Kanwar Bhan and Mr. Disney that the present application is without force. I do not think that the District Magistrate has conducted himself at any stage in such a way as to create an impression upon the mind of an accused person that the Magistrate was prejudiced against him and that he would not have a fair and impartial trial in his Court. It is true that there has been some bungling during the course of the trial of this case and proceedings have been inordinately protracted, but for this result I find from an order of Mr. Labhu Ram dated the 15th of September, 1927, that the applicants are mainly responsible.

At the request of Mr. Shah Nawaz at the last hearing I ordered Mr. Abdul Rab, Additional District Magistrate, Kangra, to give his explanation also in case he thought fit to do so. He has done so. It appears from that explanation that there is some feeling among a certain section of the people in the district which on one occasion, at any rate, took the form of a demonstration which ended in a riot. But for this side issue the District Magistrate, who is trying the case, cannot be held responsible. Furthermore, I do not think that the feeling is of such volume and intensity as to create an atmosphere in the whole District so inimical to the applicants that the trial of the case against them would in any way be affected.

Applications for transfer cannot be granted lightly on fanciful and sentimental grounds, and I may also mention that it is not my practice, as a rule, to grant such applications when they are supported by false affidavits. I find, I am sorry to say, that the affidavits filed on behalf of the applicants are such that I cannot take any action upon them. I am sure the District Magistrate would try this case with all expedition and would show all fairness and impartiality to the accused persons which is expected of him.

With these observations I reject this application for transfer.

R. L.

Application rejected.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 320
OF 1927.

November 17, 1927.

Present:—Mr. Justice Zafar Ali.
YUSUF AND OTHERS—DEFENDANTS—
PETITIONERS.
versus

MUSA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, Sch. I, para. 15—Order setting aside award, appealability of—Interference with such order in appeal—Revision.

An order setting aside an award, is not open to appeal and where a Court interferes with such an order in appeal it acts without jurisdiction and its decision is liable to be set aside in revision.

Ram Jawaya Mal v. Devi Ditta Mal (1), followed.

Petition, under s. 44 of the Punjab Courts Act of 1918 as amended, for revision of the order of the Additional District Judge, Lahore, dated the 16th February, 1927, reversing that of the Subordinate Judge, Fourth Class, Chunian, District Lahore, dated the 11th December, 1926.

Mr. Hukam Chand Bhasin, for the Petitioners.

JUDGMENT.—The trial Court having set aside the award, the plaintiff appealed against the order and the Additional District Judge of Lahore accepted the appeal and made the award the rule of the Court. The defendants have made an application to this Court in revision urging, *inter alia*, that the order rejecting the award was not appealable. No body appears to oppose this application and the objection raised appears to be well founded [see *Ram Jawaya Mal v. Devi Ditta Mal* (1)]. The order of the Additional District Judge was, therefore, *ultra vires* and without jurisdiction. I, therefore, set it aside and restore that of the trial Court. No order as to costs.

R. L.

Revision allowed.

(1) 34 Ind. Cas. 192; 117 P. R. 1916; 107 P. W. R. 1916; 70 P. L. R. 1917.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2801 OF 1926.

June 6, 1927.

Present :—Mr. Justice Addison.

WAZIR CHAND—PLAINTIFF—

APPELLANT

versus

KARAM CHAND AND ANOTHER

—DEFENDANTS—RESPONDENTS.

Fraud—Party to fraud, competency of, to plead fraud—Civil Procedure Code (Act V of 1908), s. 11, Expl. (iv)—Res judicata—Matter which ought to have been set up as ground of attack, meaning of.

A defendant is not precluded from pleading the joint fraud of himself and the plaintiff and showing the real nature of a transaction though the object of fraud has been accomplished. [p. 112, col. 1.]

[Case-law discussed.]

It cannot be said of any matter that it ought to have been set up as a ground of attack in a former suit, if its introduction would have been incongruous. [p. 112, col. 2.]

A executed a mortgage to B to defraud his creditor C. B instituted a suit against A and C under O. XXI, r. 63, Civil Procedure Code, in which it was held that B's mortgage was for consideration and valid. B then sued to enforce the mortgage against A. The latter pleaded that the mortgage was fraudulent and not supported by consideration:

Held, (1) that A could set up the plea that the mortgage was fraudulent even though the fraud had been accomplished; [p. 112, col. 1.]

(2) that the decision in the prior suit that the mortgage was valid and supported by consideration did not operate as *res judicata*. [p. 112, col. 2.]

Vilayat Hussain v. Misran (7), *Raghupati Chatterjee v. Nrishingha Hori Das* (8) and *Jiwan Singh v. Jora* (9), followed.

Sidlingappa v. Harisa (1), *Nahanna Pachhasaheb v. Sabinibibi* (2), *Voddina Kamayya v. Gudisa Mamayya* (3), *Parthasarathy Reddiar v. Kandaswami Mudaliar* (4), *Pachayammal v. Devanaimmal* (5) and *Sarup Narain v. Madho Singh* (6), not followed.

Second appeal from the decree of the Court of the Additional District Judge, Gujranwala at Sialkot, dated the 10th August, 1926, reversing that of the Sub-Judge, Second Class, Gujrat, dated the 22nd January, 1926.

Mr. Shambu Lal Puri for Mr. Mukand Lal Puri, for the Appellant.

Mr. Mehr Chand Mahajan, for the Respondents.

JUDGMENT.—The Firm Baldev Das-Sunder Lal had a money decree against Karam Chand, defendant No. 1 and applied on the 17th February, 1906, for attachment of his one-third share of a house. The attachment was effected either on the 18th or

19th February, 1906. One Beli Ram preferred objections on the 20th February, 1906, on the ground that the property had been mortgaged with possession to him by Karam Chand for Rs. 1,000 on the 19th February, 1906, and that his rights as mortgagee should be recognised. These objections were dismissed on the 5th May, 1906. Beli Ram waited nearly a full year and then instituted a suit under O. XXI, r. 63, Code of Civil Procedure, on the 3rd May, 1907, for a declaration that the property was mortgaged to him with possession for Rs. 1,000 and that its attachment and sale in execution of the decree in question was of no effect against his mortgage rights. He impleaded Karam Chand as well as the decree-holder. The judgment-debtor Karam Chand, however, did not take part either in the objection proceedings or in the suit. It was held in the suit that the attachment took place on the 19th February, i. e., on the date of the mortgage, and that it was valid as it was for consideration and was executed in good faith. The mortgagee's suit was accordingly decreed on the 3rd February, 1911.

The present suit has been brought by Wazir Chand, brother of Beli Ram, the mortgagee, for sale of the mortgaged property on the allegation that the mortgage-deed in question fell to his share on partition with his brother. Beli Ram has added as a defendant, but did not appear. Karam Chand, defendant No. 1, pleaded that the property was still in his possession, that there was no consideration for the mortgage, which was fraudulently entered into to defeat the rights of the decree-holders already referred to, and that his personal liability could not be enforced owing to the suit having been instituted after six years from the date of the mortgage. The lower Appellate Court has held (1) that the mortgage-deed was without consideration and was fraudulently entered into to defraud the decree-holders, Baldev Das-Sunder Lal, an object which was accomplished, (2) that Karam Chand, defendant No. 1, could be allowed to plead his own fraud so as to defeat the fraudulent claim of the plaintiff, and (3) that the question of validity of the mortgage was not *res judicata* by reason of the decision in the suit, instituted by Beli Ram on the 3rd May, 1907. The suit was, therefore, dismissed and the plaintiff had preferred this second appeal.

It was argued that the decision of the learned Additional District Judge, on the first of the three points stated above could not stand as he ignored the fact that Karam Chand admitted in an abortive insolvency application the factum of the mortgage in question. But the Additional District Judge had this circumstance clearly before him and mentioned it in his judgment. His finding was based on ample and appropriate evidence and is one of fact, which cannot be attacked in second appeal. That means that the finding must stand, that the mortgage-deed was without consideration and fraudulently entered into, in order to defend the decree-holders, Baldev Das-Sunder Lal, by Beli Ram and Karam Chand. The mortgagor has remained in possession throughout.

It was also contended that Karam Chand could not be allowed to plead his own fraud, even though Beli Ram was equally in fault with him, that the mortgage must be taken at its face value, i. e., that the estate must be allowed to lie where it falls: and that that party must fail who has first to raise and plead the fraud in which he participated, that is, *allegans suam turpitudinem non est audiendus*. As against this it was urged that, where both parties are equally in fault, the fraud, even though accomplished, could be pleaded by the defendant on the principle *in pari delicto, potior est conditio possidentis*. The view taken by the Bombay High Court in *Sidlingappa v. Harisa* (1) and *Nahanna Pachhasaheb v. Sabinibibi* (2) is in favour of the appellant. The former of these rulings is indistinguishable from this case, except that there was a *benami* or fraudulent sale in it, instead of a fraudulent mortgage as here, the object in both cases being accomplished. It was admitted in the Bombay case that there was authority both ways but the better way was held to be (1) that *allegans suam turpitudinem non est audiendus* and (2) that true effect was given to the maxim "let the estate lie where it falls" by not allowing the plaintiff's apparent title to be displaced. The Madras High Court has taken the same view in *Voddina Kamayya v. Gudisa Mamagya* (3), *Parthasarathy*

Reddiar v. Kandaswami Mudaliar (4) and *Pachayammal v. Davanaimmal* (5). It was held in these rulings that that party must fail who first has to allege the fraud in which he participated and that where it is necessary for a party who wishes to establish a certain state of things to set up his own wrong he will not be allowed to do so. A similar view was taken in *Sarup Narain v. Madho Singh* (6) by a Single Judge of the Oudh Judicial Commissioner's Court. In that case *Sidlingappa v. Harisa* (1) was followed.

The Allahabad High Court has taken a contrary view in *Vilayat Hussain v. Misran* (7) which dissented from *Sidlingappa v. Harisa* (1) and laid down that in circumstances like those in the present case the particular of the fraud may be pleaded by the defendant, that it was the duty of the Courts not to assist either party where there was no difference in the degree of the suit of the plaintiff and that of the defendant. The principle relied upon was *in pari delicto, potior est conditio possidentis*. A Division Bench of the Calcutta High Court, one of the members of which was Mr. Justice Mukerjee, independently came to the same conclusion in *Raghupati Chatterjee v. Nrishingha Hori Das* (8). It was, therefore, laid down that the balance of authority in cases like the present is in favour of permitting the defendant to set up the true transaction and that the maxim *allegans suam turpitudinem non est audiendus* gives way to the maxim *in pari delicto, potior est conditio possidentis*.

In *Jiwan Singh v. Jora* (9) a Judge sitting alone held that a defendant was not precluded from pleading the joint fraud of himself and the plaintiff, and showing the real nature of the transaction though the object of the fraud had been accomplished.

(4) 73 Ind. Cas. 954; 32 M. L. T. 349; (1923) M. W. N. 423; 18 L. W. 156; 45 M. L. J. 161; A. I. R. 1923 Mad. 711.

(5) 91 Ind. Cas. 776; 22 L. W. 313; A. I. R. 1925 Mad. 1016.

(6) 30 Ind. Cas. 253; 2 O. L. J. 399; 18 O. C. 131.

(7) 72 Ind. Cas. 92; 45 A. 396; 21 A. L. J. 303; A. I. R. 1923 All. 504.

(8) 71 Ind. Cas. 1; 36 O. L. J. 491; A. I. R. 1923 Cal. 90.

(9) 25 P. R. 1905; 65 P. L. R. 1905.

(1) 31 B. 405; 9 Bom. L. R. 542.

(2) 12 Ind. Cas. 583; 37 B. 217; 13 Bom. L. R. 1011.

(3) 43 Ind. Cas. 352; 32 M. L. J. 484.

In *Nand Lal v. Jethu Mal* (10) a Division Bench held in a case similar to *Sidlingappa v. Harisa* (1) which was not approved, that the maxim *allegans suam turpitudinem non est audiendus* must give way to the maxim *in pari delicto* etc. In Kerr on Fraud & Mistakes, 5th Edition, page 462, it is said: "It is a general rule that a Court of Justice will not interfere actively in favour of a man who is *particeps criminis* in fraudulent transactions. The Court will take objection as to the illegality of the transaction even though the defendant does it. Where both parties are equally offenders against the law the maxim *potior est conditio possidentis* prevails." Again in Broom's Legal Maxims, 9th Edition, page 465, the matter is concisely summarised as follows:—

"Not only in *æquali jure*, but likewise in *pari delicto*, is it true that *potior est conditio possidentis*; where each party is equally in fault, the law favours him who is actually in possession... 'If', said Buller, J., 'a party come into a Court of Justice to enforce an illegal contract, two answers may be given to his demand; the one, that he must draw Justice from a pure fountain, and the other, that *potior est conditio possidentis*'".

In this state of the authorities I prefer to follow the view taken by this Court, and the Calcutta and Allahabad High Courts and to hold that the defendant can plead his own fraud in a case like the present.

There remains the questions of *res judicata* that is, whether the defendant can plead want of consideration and fraud. Seeing that he was a party to the suit instituted by the mortgagee against the decree-holder on the 3rd May, 1917, and was thus in a position to raise these questions then. This seems to me to beg the whole question. At that time the fraud was being carried out and the mortgagee was acting on behalf of the mortgagor and was trying to defeat the rights of the decree-holders so as to help the judgment-debtor. There was no contest then between the mortgagee and the judgment-debtor. Nor could there be any contest as the *benamidar* mortgagee was merely acting on behalf of the judgment-debtor. There,

therefore, can be no question of these matters being *res judicata*. Even if it could be held that the judgment-debtor was a necessary party in the declaratory suit brought by the *benamidar*, for which there appears to be no authority, except an *obiter dictum* in *Ghasi Ram v. Mangal Chand* (11) that would make no difference as the *benamidar* was at that time engaged in helping the judgment-debtor against the decree-holder and there was no contest between the first two of these persons. The want of consideration could not be pleaded by the judgment-debtor in the first suit and Expl. (iv) to s. 11 of Civil Procedure Code cannot, therefore, apply. It is clear that it cannot be said of any matter that it ought to have been set up as a ground of attack in a former suit, if its introduction would have been incongruous to the matter of that suit. In fact, the judgment-debtor was only a nominal defendant in the first suit and the plaintiff represented his interests in it. The suit must be held to have been one against the decree-holder by the *benamidar* on behalf of the judgment-debtor and no question of *res judicata* arises.

For the reasons given I dismiss the appeal with costs.

R. L.

Appeal dismissed.

(11) 28 A. 41; A. W. N. (1905) 172; 2 A. L. J. 491;

(10) 33 Ind. Cas. 255; 21 P. R. 1916; 197 P. W. R. 1915.

PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL
COMMISSIONER'S COURT.

December 6, 1927.

Present:—Viscount Sumner,
Lord Atkinson, Lord Sinha and
Sir John Wallis.

Seth MAGANMAL SINCE DECEASED
AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

DARBARILAL CHOWDHRY—DEFENDANT.
—RESPONDENT.

Practice—Appellate Court—Weight attaching to findings of fact of trial Court which had not seen the witnesses—Burden of proof—Suit to enforce mortgage—Onus of proof of non-receipt of consideration—Party failing to produce his principal witness—Presumption—Contract Act (IX of 1872), s. 23—Creditor obtaining guarantee from third party by stifling prosecution—Validity of guarantee.

Where in a case which entirely depends upon questions of fact, the Judge of the trial Court pronounces judgment merely upon the record of evidence made by his predecessor-in-office and has not had the benefit of seeing the witnesses give their evidence, and the Appellate Court, on the same evidence, comes to the opposite conclusion as to the facts, their Lordships of the Judicial Committee will not attach the same importance as they otherwise would to the findings of fact of the trial Court, and will be slow to disturb the judgment of the Appellate Court unless convinced that it is wrong. [p. 114, col. 2; p. 115, col. 1.]

In a suit to enforce a registered mortgage-bond, the plaintiff alleged that the defendant executed the mortgage in question after having received the consideration money in cash. The defendant admitted the execution of the mortgage but denied that he had received the consideration alleged and also that he owed any money to or had received any money from the plaintiff:

Held, that the onus lay heavily on the defendant to prove this defence which was admittedly inconsistent with his own admissions in writing. [p. 115, col. 1.]

Held, also, on the evidence, that the defendant had in this case discharged the onus which rested upon him. [p. 118, col. 2.]

Where a party failed to call as his witness the principal person involved in the transaction, who was in a position to give a first hand account of the matters in controversy and to throw light on them, and who could have refuted on oath the allegations of the other side, and the Appellate Court drew an inference adverse to the party who thus intentionally kept back his principal witness, their Lordships of the Privy Council considered that it was, under the circumstances, a legitimate inference to draw. [p. 117, col. 2; p. 118, col. 1.]

[The question whether a creditor can by stifling a prosecution for a non-compoundable offence obtain a valid guarantee for his debt from a third party, was left open by the Judicial Committee.] [p. 118, col. 2.]

Appeal from a judgment of the Court of the Nagpur Judicial Commissioner's Court (Dhobley, A. J. O.), dated the 21st

December, 1921, reversing that of the Subordinate Judge, Damoh, dated the 17th November, 1919.

FACTS.—The suit was brought by the plaintiffs-appellants to enforce a mortgage, dated the 5th March, 1913, and executed by the defendant-respondent in their father's favour, and the main question for determination in the appeal to their Lordships was, whether the said mortgage was given for valuable consideration or whether it was given, as alleged by the defendant, without any valuable consideration but "for the purpose of compounding a non-compoundable offence committed by Gajadhar, brother of the defendant".

The material facts of the case are given in their Lordships' judgment.

The trial Court disbelieved the defence and found for the plaintiffs and made a decree in their favour, and from that decree the defendant appealed to the Court of the Judicial Commissioner, Central Provinces.

The appeal was heard by Rao Bahadur Dhobley, Additional Judicial Commissioner. He came to the opposite conclusions, and held that the defendant was threatened with a prosecution of his brother for the offence of embezzlement which was not compoundable, and that the mortgage was, therefore, invalid and unenforceable. He accordingly allowed the defendant's appeal, and made a decree dismissing the plaintiffs' claim.

The learned Judicial Commissioner's judgment on the question of law involved was as follows:

"The next question is whether on these facts the defendant is liable on the mortgage in suit. On his behalf it is contended that the consideration for the mortgage was illegal, while it is urged for the plaintiffs that the defendant having accepted his brother's liability must satisfy it. The argument is that there was a civil liability on Gajadhar to make up the deficiency and that the defendant merely undertook that responsibility in consequence of which the plaintiffs released Gajadhar. That was said to be a good, valid and enforceable consideration. Whether Gajadhar was or was not guilty of the offence of criminal breach of trust, or whether he would have on being prosecuted, been convicted of the offence or not, is not very material. The fact is that he was threatened with a prosecution for that offence, which was not

compoundable. The law on the subject is laid down in the case of *Kishanlal v. Aman Singh* (1) and it is to the effect that a mere adjustment by compromise of the private damage caused to a person by an offence, which leaves inviolate the public right to prosecute, is valid and enforceable in the Civil Court, but that every agreement to stifle a prosecution for a non-compoundable offence is based upon illegal consideration and is, therefore, void. In the present case though there was no express agreement made by Rai Saheb Sukhdeo not to prosecute Gajadhar, such agreement can be inferred from the threat that unless the defendant gave the mortgage bond, Gajadhar would be prosecuted. The defendant was not in any way liable to the plaintiffs and the consideration which prompted him to give the mortgage was to avoid Gajadhar's prosecution. As observed in *Flower v. Sadler* (2) there is a distinction between getting a security for a debt from the debtor himself and getting it from a third person who is under no obligation to the creditor. In the present case an agreement that there should be no prosecution must be implied. The defendant in giving the mortgage to the plaintiffs was actuated by the desire to prevent his brother's prosecution. The creditor cannot by stifling a prosecution obtain a guarantee for his debt from third parties: *Kessowji Tulsidas v. Hurjivan Mulji* (3). My opinion is that the mortgage bond in suit is unenforceable and that the plaintiffs cannot obtain any decree on it."

Mr. De Gruyther, K. C. (with him Mr. Pariksh) for the Appellants.—The mortgage suit is not illegal. Refer to s. 23, Indian Contract Act, 1872. Illustration (h) to the section deals with this class of cases.

The following cases on stifling a prosecution were cited :

Kessowji Tulsidas v. Hurjivan Mulji (3), *Flower v. Sadler* (2), *Ward v. Lloyd* (4) *Kishanlal v. Aman Singh*, (1) decided in the year 1911, *Kishanlal v. Aman Singh* (1).

Mr. Dube, for the Respondent.—The offence of criminal breach of trust is not compoundable.

[LORD SINHA.—If the books show falsification, that is proof of defalcation.]

(1) 16 Ind. Cas. 555; 8 N. L. R. 97.

(2) (1883) 10 Q. B. D. 572 at p. 576.

(3) 11 B. 556; 6 Ind. Dec. (N. S.) 373.

(4) (1843) 7 Scott. N. R. 499; 6 Man. & G. 785; 1 Dowl. & L. 763; 13 L. J. C. P. 5; 64 R. R. 847; 134 E. R. 1109.

[SIR JOHN WALLIS.—Is not compounding a felony an offence under the Penal Code?]

Yes, it is.

[LORD SUMNER.—In a case like this, where neither Court below has heard the witnesses, our duty is to try and unravel the truth.]

Mr. Dube cites *Lal Kunwar v. Charanji Lal* (5) and relies on the observations of Lord Atkinson there as regards the presumption to be made against a party who does not give evidence though he is the principal witness in the case. It is apparent that Rai Sahib Sukhdeo was a very important witness for the plaintiff. He was summoned to give evidence, but he evaded it.

[SIR JOHN WALLIS.—These people in India sometimes do not like going in the witness-box. I know a man, there proving his good character by saying that he has never been a witness in his life.]

JUDGMENT.

Lord Sinha.—This is an appeal from a judgment and decree of the Court of the Judicial Commissioner of the Central Provinces, which reversed a judgment and decree of the Subordinate Judge of Damoh in a suit which was filed on the 11th December, 1916, in order to enforce a mortgage executed by the defendant on the 5th March, 1913.

The case has been tried under peculiarly unsatisfactory circumstances. The plaint was registered on the 2nd January, 1917. No written statement was filed, but only oral statements of the Pleders on both sides recorded, and issues were framed on these. The evidence was heard from time to time and at long intervals, and appears to have taken altogether a period of nearly three years. Judgment was pronounced by a Subordinate Judge who had not heard any of the witnesses except two, and even of these one had been partly examined by his predecessor-in-office. The result is that in a case which entirely depends upon questions of fact, neither of the Courts dealing with the case had the benefit of seeing the witnesses and had to appreciate the evidence recorded by another Judge. Under these circumstances their Lordships are unable to attach the same importance as they otherwise would to the findings of fact of the trial Court

(5) 5 Ind. Cas. 549; 32 A. 104; 14 C. W. N. 285; 11 C. L. J. 172; 7 M. L. T. 57; (1910) M. W. N. 8; 12 Bom. L. R. 244; 20 M. L. J. 182; 37 I. A. 1 (P. O.).

and it is necessary that they should feel convinced that the judgment of the Judicial Commissioner under appeal is wrong before they can advise that it should be set aside.

The plaintiffs alleged that the defendant executed the mortgage in question after having received the sum of Rs. 7,000 in cash, and they prayed for the usual mortgage decree.

The defendant admitted the execution of the mortgage but denied that he had received the consideration alleged and also that he owed any money to or had received any money from the plaintiffs.

It is obvious that the onus of proving this defence lay on him, and lay heavily, seeing that it is inconsistent with his own admissions in writing hereafter referred to. It is necessary to scrutinise the defence story in detail and to see whether it is corroborated in every material part in such a way as to neutralise the effect of these admissions. For that purpose, such of the main facts as are not in dispute may be stated as follows:—

The plaintiffs have their principal shop at Damoh, which is called "Badi Dukan". Rai Seth Sukhdeo was its *Munim*. The plaintiffs had also a branch shop in the Mawganj quarter of that town, doing only grain business. It was usually called the "Adat shop." In that shop the defendant's brother, Gajadhar, was the managing partner without any share in the capital. In the *paki rokad* (fair cash book) of the Adat shop there are three debit entries in the handwriting of Gajadhar showing that the following sums had been advanced to the defendant on the dates mentioned against them:—

- | | |
|-----|-----------------------------------|
| Rs. | |
| (1) | 2,600, dated 13th February, 1913. |
| (2) | 3,400, dated 12th February, 1913. |
| (3) | 1,000, dated 17th February, 1913. |

Total 7,000

The *sarkat* or acknowledgment book of that shop contains acknowledgments of the defendant in his own handwriting purporting to have been written on these dates and admitting these loans.

The plaintiffs alleged that the defendant had borrowed from their Badi Dukan Rs. 7,000, and given the mortgage in suit in order to satisfy the debts due by him

to the Adat shop as evidence by the above documents. What the defendant had to say with reference to these facts will be apparent from the following statement made for him by his Pleader on the 5th December, 1917:—

"A few days before the execution of the bond in suit, Gajadhar had gone to Jubbulpore in connection with the defendant's marriage. During his absence Rai Sahib Seth Sukhdeo found some money short in the Adat shop and wired to Gajadhar to come back. When Gajadhar came he was threatened by Rai Sahib Sukhdeo with prosecution and arrest for the alleged defalcation. As Rai Sahib Sukhdeo holds the position of an Honorary Magistrate and is an influential man, and as Gajadhar was the only person of the defendant's family to arrange for the marriage of the defendant, the defendant in order to avoid the threatened prosecution of his brother executed a *sarkat* for Rs. 7,000 in favour of Badi Dukan as required by Rai Sahib Sukhdeo. (The Judicial Commissioner states in his judgment that the words Badi Dukan appear to be a clerical mistake. It should have been Adat shop.) In order to give a colouring of truth Rai Sahib Sukhdeo coerced the defendant into showing in the *sarkat* that the amount of Rs. 7,000 was taken on three different dates. None of these items was taken as a loan. The amount of defalcation was said to be Rs. 7,000. By executing the *sarkat* the defendant avoided complications during his marriage. On return of the marriage party the said *Munim* again threatened the defendant that he would prosecute unless a mortgage deed for Rs. 7,000 was given, as there was no security for the *sarkat* debt. The defendant subsequently learnt that there was no shortage of money in the Adat shop. The bond is, therefore, void for want of consideration and also because it was executed under undue influence, coercion and for stifling prosecution for a non-compoundable offence."

This story is entirely denied by the plaintiffs, and it is their case that the three loans in February were actually advanced from the till of the Adat shop by Gajadhar to the defendant on the three different dates as shown in its books.

The real question, therefore, is whether the defendant had in fact borrowed from the Adat shop those three sums of money

amounting to Rs. 7,000, for the satisfaction of which the mortgage is said to have been executed. The Judicial Commissioner considered that the mere fact of the actual payment before the Registering Officer or the ultimate removal of the money to the Badi Dukan did not affect the question as the consideration of the mortgage bond was intended to satisfy the defendant's liability to the Adat shop. The crucial question is the defendant's antecedent liability to the Adat shop.

The defendant and his brother, Gajadhar, denied that any such advance was made and, though the trial Court did not believe their story, the Judicial Commissioner came to the conclusion that no cash loans were taken by the defendant from the Adat shop, and that the acknowledgments in the *sarkat* book and the entries in the *pakki rokad* were made under the circumstances spoken to by them. He considered that their evidence received material corroboration from the following circumstances:—

(a) A telegram dated the 14th February, 1913 (Ex. D. 1), from Damoh, addressed to Gajadhar at Jubbulpore, to prove that Gajadhar was not at Damoh on the 14th February;

(b) the non-production by the plaintiffs of the *katchi rokad* (or rough cash book) of the Adat shop for 1913, which would be the best evidence of the transaction in that month as it would contain entries made from day to day;

(c) the fact that though all the account books were written by subordinate clerks, the only entries in the *pakki rokad* (or fair cash book), which was written up at varying intervals from the *katchi rokad*, which were in the handwriting of Gajadhar, were under the dates 13th to the 17th February;

(d) the failure of the plaintiffs to call the *Munim*, Sukhdeo, who died before the hearing was actually concluded, but who could have been called on several previous dates when the case was heard, and

(e) the evidence of several witnesses which proved that some credit entries in their names were falsely made after the 17th February in the *pakki rokad* of the Adat shop to square up corresponding debit entries, which were equally fictitious and which had been made before

the 17th February in order to cover up defalcations or deficits, whether Gajadhar was himself guilty of the same or not.

It was argued before their Lordships that none of the circumstances above related either singly or taken together justified the Judicial Commissioner in accepting the defendant's story.

Taking the telegram first, it purports to be sent by Nathoolal, is addressed to Gajadhar c/o Kodoolal Dasratlal Jubbulpore, and is despatched from Damoh at 8-25 P. M. The contents are as follows:—

"Come by first train soon."

Nathoolal, examined as a witness on behalf of the defendant, stated that the *Munim* Sukhdeo sent for him in *Magh*, 1968 (February, 1913), and asked for Gajadhar's address at Jubbulpore. He having left Damoh a day or two before, that he gave the address and thereupon the *Munim* sent a telegram (to Gajadhar) through his man, but he did not know its contents. Gajadhar deposed that Ex. D. 1 was the telegram he received. He had gone into the interior of the district when the telegram was received by his relative to whose care it was addressed. He got it on his return from the interior to Jubbulpore, and he immediately returned to Damoh, which he reached on the 17th or 18th February. The Judicial Commissioner came to the conclusion that Gajadhar was not at Damoh on the 14th February, 1913, and that the evidence of the plaintiffs witnesses that the three different sums of money were actually advanced by Gajadhar to the defendant on the dates shown in the account-books could not be accepted.

It is urged on behalf of the plaintiffs (appellants) that even though the telegram was sent on the 14th February, Gajadhar might have been at Damoh during business hours on that date, as the telegram was not despatched till 8-25 P. M. This depends on the distance between the two places, Damoh and Jubbulpore, and the times of the train service between them. That argument was apparently not urged, either before the Subordinate Judge or the Judicial Commissioner, both of whom were in a better position to deal with it than their Lordships, who are, therefore, unable to hold that the Judicial Commissioner was wrong in holding that the tele-

gram was conclusive to show that Gajadhar was not at Damoh on the 14th February.

It would further appear that the entry of the 17th February is equally fictitious, even if it is assumed that Gajadhar returned to Jubbulpore on the 17th and not on the 18th. The telegram purporting to come as it did from Nathoolal, an employee of the Adat shop, was as an urgent summons to return and could not but convey that something serious had occurred in connection with the Adat shop, and it is difficult to believe that on the very day Gajadhar returned to Damoh he should lend a further sum of Rs. 1,000 to his brother, and thereby commit another grave irregularity in connection with the cash of the shop—for such it was alleged to be by evidence on the plaintiffs' side.

The next question to consider are the facts mentioned as (b) and (c) above.

As regards the *katchi rokad*, this is what the Judicial Commissioner says:—

"*Pakki rokad* is not written from day to day, but is written at the convenience of the clerks when they get time. It is the *katchi rokad* in which transactions are entered at the very time. These are copied in the *pakki rokad* afterwards at the convenience of the clerks. It is, therefore, the *katchi rokad* which is the really important document. If these amounts were really advanced in cash to the defendant, as was the plaintiffs' case, they must have found place in the *katchi rokad*. Though the defendant had made determined efforts to get the plaintiffs to produce the *katchi rokads* of the Adat shop, they failed to produce them. No satisfactory explanation was given for their non-production, and the plaintiffs merely made a bald statement they had not got any *katchi rokad* of that shop. It was never alleged by the plaintiffs that Gajadhar had removed them. Rampal's evidence given as D. W. No. 9, to the effect that the *katchi rokads* of the Adat shop were with Gajadhar cannot, therefore, be believed. Gajadhar had already been divested of all his powers over the Adat shop, and it seems very unlikely that he would have been permitted to retain these books or to remove them. From hearing to hearing the defendant was pressing for the production of the *katchi rokads* and still no suggestion was made on behalf of the plaintiffs till Rampal was examined that these had been taken away by Gajadhar."

Similarly as regards the entries in the

pakki rokad the Judicial Commissioner observes:—

"There is one very important circumstance for which no explanation has been offered for the plaintiffs. All the account books were written by subordinate clerks. On no other days were any account books of the Adat shop written by Gajadhar. It was only the *pakki rokad* of 13th February, 1913, to 17th February, that was written by Gajadhar. Gajadhar swears that he had gone through the whole of the *pakki rokad* for that year and that on no other date were any entries made by him. This has not been denied by the plaintiffs. This extraordinary circumstance of Gajadhar writing *pakki rokad* only on these particular dates could not have been a mere accident. It was apparently done with the sole object of preventing the defendant from subsequently denying his liability for these items. The plaintiffs' *Munim* was, it appears, taking all possible precautions to cover the real nature of the debits and to give them an appearance of ordinary loan transactions which the defendant may not subsequently deny, otherwise there was no meaning in Gajadhar writing the *pakki rokad* only on these four days."

Their Lordships are unable to hold that the Judicial Commissioner was wrong when he says with reference to the above as follows:—

"The fair conclusion to be drawn from these circumstances is that the *katchi rokads* of the Adat shop were intentionally suppressed by the plaintiffs, and that their production in Court would have gone against them. The entries in the *pakki rokad* of these particular dates were made by Gajadhar after his return from Jubbulpore. These circumstances support the defendant's allegation that they were all made on one day. Gajadhar's statement that different dates against the different items debited to the defendant were put in order to ward off suspicion cannot be said to be without any foundation."

As regards (d) the Judicial Commissioner says:—

"The absence of the evidence of Rai Sahib Sukhdeo in the case is also remarkable. He was the principal person involved in all these transactions, and could have given us the first-hand account thereof. He could have denied on oath the allegations made by the defendant and his witnesses and his cross-examination by the defendant

would have elicited several points. He attended the Court on many hearings and should have been the first witness to be put in the witness-box on the plaintiffs' behalf. The principal evidence of the plaintiffs began on 10th December, 1918, and Sukhdeo was alive till the end of May following. It was said that from before 10th December, 1918, till his death, Sukhdeo was ill and unable to give his evidence. This illness did not, however, prevent his going about on tour in the interior of the district and travelling by train, as is apparent from the ordersheets of the 4th March and the 15th April, 1919. He was intentionally kept back, the idea perhaps being to put him as the last witness on the plaintiffs' side."

Their Lordships are again unable to hold that this inference is unwarranted, or that on the facts established, the learned Judicial Commissioner was in error in finding material corroboration of the defendant's story.

As regards the last mentioned circumstances of corroboration noted as (e) above, Gajadhar's evidence was that in the books of the Adat shop certain items had been debited on dates prior to the 17th February, 1913, in the names of certain persons, though the transactions never took place. The effect was to withdraw so much money from the till. These bogus debit entries were squared up by corresponding credit entries made after the 17th February, *i. e.*, after the defendant had undertaken the liability of Rs. 7,000 as being defalcations for which his brother was responsible. If the question of these defalcations rested on the evidence of Gajadhar alone it would have been difficult to accept the story of the alleged deficiency. But the Judicial Commissioner found that some, though not all, of the alleged bogus entries were proved to be such by independent and disinterested witnesses who proved that the credit and debit entries in question appearing in the plaintiffs' books, and purporting to be records of transactions with those witnesses or their firms, did not appear in their own books of account, and that no such transactions took place in fact. It was hardly to be expected that such independent evidence would be available in respect of all the various items relied upon by the defendant as bogus items. But the books are sufficiently discredited if a certain number are proved which precludes the possibility of error or accident, and their Lordships are unable to

hold that the Judicial Commissioner was wrong in holding that the evidence of the witnesses examined by the defendant left no reasonable doubt about there having been defalcations and deficits.

In the result the Judicial Commissioner accepted the story of the defendant, and held that the acknowledgments in the *sar-kat* book were given and the mortgage in suit executed by the defendant under the circumstances alleged by him.

Their Lordships consider that no sufficient reason has been shown to disturb these findings of fact, which are sufficient to dispose of the case.

The plaintiffs having made a substantive case as to the consideration for their mortgage, cannot now be allowed to shift their ground and urge that the defendant accepted the civil liability of his brother Gajadhar for the defalcations which he alleged and which they denied. Their Lordships therefore, consider it unnecessary to go into the question whether a creditor can or cannot by stifling a prosecution obtain a valid guarantee for his debt from third parties.

Their Lordships will humbly advise His Majesty that the judgment and decree of the Judicial Commissioner should be affirmed, and this appeal dismissed with costs.

K. J. R.

Appeal dismissed.

Solicitors for the Appellants:—Messrs. Downer and Johnson.

Solicitors for the Respondent:—Messrs. T. L. Wilson & Co.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 29, 1927.

Present:—Lord Buckmaster, Lord Carson,
Lord Darling, Lord Warrington of Clyffe
and Sir Lancelot Sanderson.

MADHAVRAO GANPATRAO DESAI

AND OTHERS—DEFENDANTS—

APPELLANTS

versus

BALABHAI RAGHUNATH AGASKAR

SINCE DECEASED AND OTHERS—PLAINTIFFS

—RESPONDENTS.

Hindu Law—Construction of deed of trust—Gift to settlor's daughter for life, and after her death to her "male heirs"—Gift of income, carries the whole estate—Rule in Shelley's case, inapplicable.

The settlor, a Hindu dwelling in Bombay, on the 1st May, 1889, in consideration of the natural love and affection which he bore to his children and grand children, conveyed by deed of that date certain immoveable properties to trustees upon trust to pay the income to the settlor for life; and after his death upon certain trusts expressed in the following words:—"As to one-quarter of the said rents, dividends and profits upon trust to pay the same to my daughter Krishnabai during her life for her sole and separate use and after her death in trust for the male heirs of the said Krishnabai share and share alike". On July 14th, 1894, the settlor died. Krishnabai survived the settlor and died in 1897, leaving six sons, all of whom were living at the date of the settlement. The question arose as to the true meaning of the gift in favour of Krishnabai and her male heirs. The heirs of the settlor contended that the limitations in favour of her (Krishnabai's) male heirs after her death were contrary to Hindu Law and void, and that in consequence there was a resulting trust in favour of the settlor:

Held, (overruling this contention) that the gift in favour of Krishnabai's male heirs was a valid gift under the Hindu Law, inasmuch as they did not take by inheritance from her and it was by virtue of a wholly independent gift that they were beneficiaries under the deed. [p. 123, col. 2.]

Held, also, that the gift, though in the form of a gift of income, carried the whole estate. [p. 124, col. 1.]

[Technical meaning given to similar words in the English Law, disregarded, and the rule in *Shelley's case* held to be inapplicable.] [p. 123, col. 1.]

Balabhai Raghunath Agaskar v. Matabhai Babaji Rave, 89 Ind. Cas. 934, reversed.

Appeal from a decree of the Bombay High Court in its Appellate Jurisdiction (Macleod, C. J., and Coyajee, J.), dated the 15th April, 1925, reported as 89 Ind. Cas. 934, varying that of the same High Court, in its Ordinary Original Civil Jurisdiction (Mulla, J.) dated the 16th October, 1924.

FACTS.—The litigation is in respect of a deed of trust executed by the late Rao Bahadur Janardhan Wasodey who was

the first Indian Judge of the High Court of Bombay, and the true construction of the deed was the subject-matter for consideration before the Privy Council.

The material facts of the case, as well as the relevant portion of the deed of trust, are given in their Lordships' judgment.

The trial Judge (Mulla, J.) held that the sons of Krishnabai being all in existence at the date of the settlement took a contingent interest under the gift to her male heirs which vested at her death and he also held that the gift was of an absolute interest in the quarter of the settled property. The following extracts from the learned Judge's judgment are instructive:—

"A person capable of taking under a deed of trust must be such a person as could take a gift *inter vivos* and, therefore, must either in fact or in contemplation of law be in existence at the date of the deed. ... As to the one-fourth share of the income allotted to Krishnabai's branch it is provided by the deed that it shall be held by the trustees after the death of Krishnabai in trust for her male heirs share and share alike. It was contended for the plaintiffs that the trusts in favour of the male heirs of Krishnabai after her death were void and that there was a resulting trust on Krishnabai's death as regards the one-fourth allotted to her branch in favour of the heirs of Raghunath. Counsel for the plaintiffs argued that a gift to the heirs of a living person was not recognized either by the English or the Hindu Law; that even if it was, it was not a gift to an ascertained class of persons as it should be under the Hindu Law, that the expression 'male heirs' meant the whole body of sons, grandsons, great grandsons and so on, that the intention of the settlor was that the income should be paid to Krishnabai's sons and then to their descendants in the direct male line and, if so, the gift was bad since to exclude females from the succession was to exclude the legal course of inheritance and that in any event the gift was invalid as the corpus of the one fourth share remained in abeyance until Krishnabai's death. In support of those contentions Counsel relied on the decisions in *Tarokessor Roy v. Soshi Shik-*

huressur (1) and *Kristoromoni Dasi v. Narendro Krishna Bahadur* (2).

"On the other hand it was argued by Mr. Jinnah, Counsel for Krishnabai's heirs, that the estate created by the gift was not inconsistent with the general law of inheritance, nor did it violate any rule of Hindu Law. It was also contended that the deed afforded no indication that the enjoyment of the gift to Krishnabai's male heirs should be of a limited duration and that on the analogy of the provisions contained in s. 159 of the Indian Succession Act of 1865, the principal as well as the income belonged to the male heirs of Krishnabai.

"The first question to consider is whether a valid gift may be made to the heirs of a living person. A gift to the heirs of a living person is not unknown to the English Law. 'The rule is that *nemo est heres viventis*' and, therefore, a devise to the heirs of a living person is contingent, unless the term 'heirs' is so qualified by express words or by the general intention of the Will as to show that the testator meant by heir the heir apparent or presumptive or some other person, who will then take as *persona designata*—Theobald on Wills, 7th Edition, page 329. So far as I know there is nothing against the general principle of Hindu Law in allowing a Hindu to make a gift of his property to the heirs of a living person provided that the persons entitled to succeed as heirs of that person are in existence at the date of the gift. I think that the gift to 'the male heirs' of Krishnabai is a gift to such of her sons as were in existence at the date of the deed and such as might survive Krishnabai. It is a gift of a contingent remainder. In *Sreemuthy Soorjee-money Dossee v. Denobundoo Mullick* (3) Knight Bruce, L. J., in delivering the judgment of the Judicial Committee, said, 'Whatever may have formerly been considered the state of that (the Hindu) Law as to the testamentary power of Hindus over their property, that power has now long been recognized, and must be considered as

completely established. This being so, we are to say, whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu Law in allowing a testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the Law of England), upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist'. In the present case the gift is made to Krishnabai for life and the gift to her heirs is to take effect immediately on the close of a life in being. The two cases cited for the plaintiffs have no bearing on the present case. The terms of gift in both those cases were quite different from those in this case. I, therefore, hold that the gift in favour of Krishnabai's male heirs is a valid gift under the Hindu Law. All the six sons of Krishnabai that were in existence at the date of the deed were also in existence at her death, and they became entitled to take under the deed.

"The next question is whether the sons of Krishnabai are entitled to a one-fourth's share in the corpus of the properties or whether they are entitled only to an interest for their respective lives. It is contended on behalf of Krishnabai's heirs that the principle underlying s. 153 of the Indian Succession Act applies to the case and that they were entitled to the one-fourth share assigned to Krishnabai absolutely and not merely the income of that share. Mr. Jinnah also relied on the decision of the Madras High Court in *Krishna Ayyan v. Vythianatha Ayyan* (4). On the other hand it was contended for the plaintiffs that Krishnabai's heirs were entitled only to the income of the one-fourth share during their respective lives. As regards s. 159 of the Indian Succession Act it is to be observed that though it applies to Hindus, there is no corresponding section in the Transfer of Property Act, 1882. The English Law draws a distinction in the case of similar dispositions between those con-

(1) 10 I. A. 51; 9 C. 952; 13 C. L. R. 62; 7 Ind. Jur. 327; 4 Sar. P. C. J. 439; 4 Ind. Dec. (N. S.) 1284 (P. C.).

(2) 16 I. A. 29; 16 C. 383; 13 Ind. Jur. 90; 5 Sar. P. C. J. 285; 8 Ind. Dec. (N. S.) 252 (P. C.).

(3) 9 M. I. A. 123; 1 Sar. P. C. J. 337; 19 E. R. 88.

(4) 18 M. 252; 6 Ind. Dec. (N. S.) 525.

tained in a Will and those contained in a deed *inter vivos*. As to the former the rule in England is that a devise of realty without apt or any words of limitation passes of the estate* the testator had power to devise such realty, unless a contrary intention appears by the Will. The rule contained in s. 159 of the Succession Act is based on the English Law. As to deeds the rule of English Law is that a grant of an equitable estate in realty arising under an express trust without apt words of limitation passes *prima facie* an estate for life merely; but if it appears from the whole deed that it was the grantor's intention to pass the fee simple, that estate will pass.....It seems to me that to determine the extent of interest taken by Krishnabai's male heirs in the estate, one must look to the terms of the deed and discover the intention of the donor. Looking at the deed as a whole, I think it is impossible to escape the conclusion that the settlor did not intend to leave any interest in the properties comprised in the deed undisposed of. On the other hand, there is upon the face of the deed sufficient indication of intention on the part of the settlor that the heirs of Krishnabai should take an absolute interest in the one-fourth share assigned to Krishnabai. I, therefore, hold that the surviving sons of Krishnabai and the heirs of her deceased sons are entitled as between them to the one-fourth share assigned to Krishnabai absolutely.

"I now proceed to answer the questions:

"No. 1. The male heirs of Krishnabai are entitled absolutely to the one-fourth share assigned to Krishnabai.

"No. 2. The persons entitled to the corpus of the one-fourth share assigned to Krishnabai are the surviving sons of Krishnabai and the heirs of her deceased sons."

The Appeal Court (Macleod, C. J., and Coyajee, J.,) however, held that the gift to the male heirs of Krishnabai was void (1) as a gift to a class some of whom might not have been born at the date of the gift, (2) as excluding females and so excluding the legal course of inheritance and (3) as made with the object of creating a perpetuity. Macleod, C. J., in delivering the judgment of the Court, said:—

"The question is—What was the inten-

*There is apparently a clerical error in this part of the judgment.—[K. J. R.]

tion of the settlor? His intention is to be sought in his words. The deed is written in the English language; the settlor was himself a lawyer; but, it must be confessed, the instrument is not very easy to construe. In the case of Raghunath and of Krishnabai, he uses the words, 'his and her 'male heirs'. In the case of Pootlabai's daughter Sonabai the gift is to her 'children'. In Anandrao's case, it is to his 'male children.'

"Who, then, were intended to take the estate as Krishnabai's *male heirs*? The parties being Hindus, the donees must be in existence, either in fact or in contemplation of law, at the date of the settlement. In this case there is an uncertainty as to the existence of Krishnabai's *male heirs* at the material time. It was quite possible that none of her sons who were in existence at the date of the deed might survive Krishnabai and a wholly different person or a totally different set of persons answering to that description, 'her *male heirs*' might come into being after that date. If by Krishnabai's *male heirs* the settlor meant her sons who were then in existence, he has,—it must be allowed—used singularly in apt words to convey that meaning. The settlor, no doubt, was actuated by 'the natural love and affection' which he bore to his children and grand-children hereafter mentioned; but that circumstance does not justify the substitution of 'Krishnabai's sons' for 'Krishnabai's *male heirs*.' The words 'grand-children hereafter mentioned' have their application, for the gifts to Sonabai and Anandrao were gifts to the settlor's 'grand-children'. The learned Judge observes that 'there is upon the face of the deed sufficient indication of intention on the part of the settlor that the heirs of Krishnabai should take an absolute interest in the one-fourth share assigned to Krishnabai'. He, therefore, holds 'that the surviving sons of Krishnabai and the heirs of her deceased sons are entitled as between them to the one-fourth share assigned to Krishnabai absolutely'. The settlor, however, speaks not of her *heirs* but of her *male heirs* and thereby shows an intention to confine the inheritance to males, to the entire exclusion of female heirs; and the disposition is void as 'excluding the legal course of inheritance' *Tarokessur Roy v. Soshi Shikhuressur* (1).

"Reading the deed as a whole, it seems to me, that the disposition is also void on the other contention raised by the appellants, namely, that the object of the settlor was to create a perpetuity as regards these properties. The estate itself is not disposed of.....In my opinion, the object of the settlor was to create a perpetuity as regards the whole of the trust estate and to limit for an indefinite period the enjoyment of the rents and profits of the estate.

"The result is that the trusts after the death of...Krishnabai are invalid".

Mr. Lowndes, K. C. (with him Mr. Raikes), for the Appellants.—The rule in *Shelley's case* does not apply. See *Mithibai v. v. Limji Nowroji Banaji* (5). That decision has always been followed in Bombay. It was known to everybody in Bombay in 1889 that *Shelley's case* was not applicable.

[LORD CARSON:—Was the settlor aware of it?]

The settlor was a lawyer. He must have known it. The rule in *Shelley's case* is a law of property or tenure based on feudal considerations. In India we have no distinction between realty and personalty.

[LORD DARLING—By recent Act of Parliament the rule in *Shelley's case* has been rendered obsolete in England.]

That Rule often disappointed the intentions of the parties. See the judgment of Lord MacNaghten in *Van Gruthen v. Foxwell* (6).

Refers to the Transfer of Property Act, and to s. 159 of the Indian Succession Act, 1865.

[LORD BUCKMASTER.—What is the proper meaning of the gift? Is it not a gift to the heirs male of Krishnabai who were living at her death?]

Mr. Upjohn, K. C. (with him Mr. Hyam) for the Respondents, refers to judgment of Stirling, J., in *Johnson v. Johnson* (7).

Mr. Lowndes, K. C. cited Manu, Chap. 9, verse 192. It is the whole source of the Hindu Law.

JUDGMENT.

Lord Buckmaster.—On May 1st, 1889, Janardhan Wasoodev, a Hindu dwelling in Bombay, in consideration of the natural love and affection which he bore "to his children and grandchildren," made a voluntary settlement in their favour of property chiefly consisting of real estate. The children named as beneficiaries were four, Krishnabai, Pootlabai, Raghunath and Kashibai, all of whom were married and had children living at the date of the deed, while Raghunath had both children and grand-children. The settlement took the form of a conveyance of property to trustees upon trust to pay the income, after deducting, Rs. 25 per month for taxes and repairs, to the settlor for life; and, after his death, then upon certain trusts expressed in the following words:—

"Upon trust out of the said rents dividends and profits to pay one-fourth part of the net amount to Raghunath, Janardhan son of the said Janardhan Wasoodev during his life and from and after the decease of the said Raghunath Janardhan in trust to pay the same to all the male heirs of the said Raghunath Janardhan share and share alike and as to one-quarter of the said rents dividends and profits upon trust to pay the same to my daughter Krishnabai wife of Ganpatrao Moroji Zaoba during her life for her sole and separate use and after her death in trust for the male heirs of the said Krishnabai share and share alike. And as to another quarter of the said rents dividends and profits upon trust to pay the same to my daughter Pootlabai wife of Nanabhoy Ganpatrao during her life for her sole and separate use and after her death in trust for her child Sonabai wife of Ganpatrao Khunderao and after the decease of the said Sonabai in trust for all or such one or more of the children of the said Sonabai wife of Ganpatrao Khunderao in such share and at such times as the said Sonabai shall by deed or Will appoint."

Then follow provisions, in relation to Sonabai's share "if there shall be no child of the said Sonabai," in favour of his grandson Anandrao for life and after his death in trust for "the male children" of Anandrao, with trusts over in the event of there being no child of Anandrao, and an ultimate provision in favour of "the right

(5) 6 B. 151; 3 Ind. Dec. (N. S.) 559.

(6) (1897) A. C. 658 at p. 669; 66 L. J. Q. B. 745; 77 L. T. 170.

(7) (1887) 35 Ch. D. 345; 56 L. J. Ch. 326; 56 L. T. 163; 35 W. R. 329.

heirs of my son Raghunath." On July 14th, 1894, the settlor died. His daughter Krishnabai died in 1897, leaving six sons, all of whom were living at the date of the settlement. It was in relation to her share that the present dispute arose, the heirs of the settlor contending that the limitations in favour of her male heirs after her death were contrary to Hindu Law and void, and that in consequence there was a resulting trust in favour of the settlor. The learned Judge in the Court of first instance decided against this contention, but his judgment was reversed by the High Court of Bombay in its appellate jurisdiction, and hence this appeal.

The appellants are three of the children of Krishnabai and the respondents are the three other children and the heirs of the original settlor.

It is to be noted that there are different words used in settling the share of Raghunath and Krishnabai on the one hand and the daughters Pootlabai and Sonabai on the other, but this variation of language does not give much assistance in determining the true meaning of the gift in favour of Krishnabai and her male heirs, which is the sole subject of the present consideration. The difficulty is in part caused by the settlor having introduced into his settlement words which have a technical meaning in English Law but which they do not possess application in Hindu Law*. The use of the words "right heirs" in the ultimate limitation of the share given to Sonabai illustrates this difficulty. The phrase "right heirs" has a distinct meaning in English Law and there refers to the heirs at Common Law as opposed to the heirs by special local custom, but it has no such special significance in Bombay.

In settling the true construction of this deed, therefore, unless there is a special reason afforded by the deed itself to the contrary, the technical meaning given to words in English Law must be disregarded. So also must rules like the well-known rule in *Shelley's case*, based here upon feudal customs that have had no existence in Bombay. Further, it is to be remembered that a gift to a class of which no member existed at the date of the deed would be bad, and so also a definite attempt to create what in England would be regarded as an estate tail [see *Jatindra Mohan Tagore v.*

Ganendra Mohan Tagore (8)]. The main part of the respondents' argument depends upon this last consideration. They assert that this was the true meaning of the gift—to the male heirs of Krishnabai after Krishnabai's death—and that it consequently failed. They further argue that the words themselves connote a descendable quality of estate with which it was the intention of the settlor to impress the property either in the gift to Krishnabai or to the male heirs. Their Lordships are unable to accept this view, which is permeated by the suggestion that the words when used in a Bombay settlement are primarily words of inheritance denoting the character of an estate. They do not think that the male heirs of Krishnabai took by inheritance from her. They are of opinion that the estate that Krishnabai took was defined and limited by her life-interest, and that it was not by descent from her but by virtue of a wholly independent gift that her male heirs were beneficiaries under the deed. These male heirs being in fact living at the date of the deed, no difficulty arises.

The learned Judges in the High Court on appeal however took the view that the settlor in speaking of male heirs showed an intention to confine the inheritance to males to the entire exclusion of female heirs, and that consequently the limitation was bad. This conclusion, however, assumes that the words are words of inheritance and not of gift, and with this their Lordships are unable to agree.

It is also pointed out that, as none of Krishnabai's sons might have survived her, a different set of persons would have come into existence as her male heirs at her death, but this presents no difficulty if any such persons were living at the date of the deed; if they were not, the gift would fail.

Their Lordships are of opinion that the true interpretation is that the persons who answer the description of male heirs at the date of Krishnabai's death were the persons in whose favour an independent gift was made, but that by operation of the Hindu Law there would be excluded from that class people who were not living when the deed was executed. There is nothing whatever in the words of the grant to show

*Obviously some word in the judgment seems to be missing here.—[K. J. R.]

(8) I. A. Sup. Vol. 47; 18 W. R. 359; 9 B.L. R. 377; 3 Sar. P. C. J. 82; 2 Suth. P. C. J. 692 (P. C.).

that the estate so conferred was anything but an absolute estate upon such persons. For there is nothing to suggest, on the one hand, that such estate was limited to their life or, on the other, that any line of descent was marked out after their death. It is true that the gift is in the form of a gift of income, but it is a gift unlimited in point of time, and if there be no restriction in the gift and no limitations beyond the actual beneficiaries at Krishnabai's death such a gift carries the whole estate.

It is, however, argued, and this view found favour with the Court of Appeal, that the subsequent gift of the dwelling house shows that there was a contrary intention and that the occupation of this house was to continue for an indefinite period. But the gift of this house and its elaborate partition is, in their Lordships' opinion, only a means of providing how the people who had already been created beneficiaries in respect of the other settled estate should be at liberty to enjoy the property, and so far as Krishnabai's male heirs are concerned they are definitely entitled to occupy the share allotted to them and this is all that was decided by the learned Judge of first instance.

For these reasons their Lordships think that the judgment of the Appeal Court was wrong and should be reversed and the judgment of the Judge of first instance restored.

They will, therefore, humbly advise His Majesty that this appeal ought to be allowed with costs here and in the Court of Appeal.

K. J. R.

Appeal allowed.

Solicitors for the Appellants.—Messrs. T. E. Wilson & Co.

Solicitors for the Respondents.—Messrs. Barrow, Rogers & Nevill.

Note.—As regards gifts to unborn persons, see now the Hindu Disposition of Property Act, 1916, and Mulla's Hindu Law, 5th Ed., p. 358, *et seq.*—[K. J. R.]

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 28, 1927.

Present:—Lord Chancellor, Lord Buckmaster, Lord Carson, Lord Darling and Lord Warrington of Glyffe.

ARDESHIR BHICAJI TAMBOLI—

PLAINTIFF—APPELLANT

versus

THE AGENT, GREAT INDIAN PENINSULA RAILWAY COMPANY, BOMBAY

—DEPENDANT—RESPONDENT.

Railways Act (IX of 1890), s. 72—Risk Note, Form H—Signature of agent in name of firm, effect of non-attestation of signature—Risk Note attaches immediately on delivery and acceptance of goods—"Wilful neglect"—Destruction of goods by fire.

Under s. 72 of the Railways Act, 1890, an agreement (popularly known as a "Risk Note") limiting the liability of a Railway Company as bailee of goods delivered to it for carriage by Railway is required to be "in writing signed by or on behalf of the person sending or delivering to the Railway Administration the goods." The appellant, who carried on business at Amalner in the name of Tamboli Brothers, delivered certain goods at the Amalner Station of the respondent company for transport to the appellant's business premises at Kurla. The Risk Note in respect of these goods bore the signature of Tamboli Brothers. It appeared, however, that the signature of Tamboli Brothers affixed to the Risk Note was in the handwriting, not of the appellant himself, but of his nephew, Jamsetji (who was admittedly the appellant's duly authorized agent in the matter), and it was contended on behalf of the appellant that a signature in the name of the firm was ineffective unless it appeared on the face of the document that the signature was affixed either by the sender of the goods himself or by the hand of an agent whose agency was disclosed.

Held, (overruling this objection), that as it was plain on the evidence that the nephew, Jamsetji, had full authority to sign the name of the firm, it was unnecessary that he should purport to sign it as agent, and that the signature in question was, therefore, a sufficient compliance with the requirements of the Statute. [p. 126, col. 2]

France v. Dutton (1), relied on.

A form of Risk Note (Form H) approved by the Governor-General in Council under s. 72, sub-s. (2), (b) of the Railways Act, 1890, contained at the end of it space for the attestation of the execution of the document by two witnesses:

Held, that although attestation by two witnesses was contemplated in the form as approved, such attestation was not an essential part of the form and was not a condition precedent to the validity of the Risk Note, inasmuch as the section does not provide that the agreement (i.e., the Risk Note) shall be attested, and while it requires that the form shall be approved by the Governor-General in Coun-

oil, it does not entrust that functionary with the duty of providing for the attestation of the document. [p. 127, col. 1.]

A Risk Note, in the prescribed form (Form H) and duly signed, protects the Railway Company from liability as soon as the goods are delivered to it for carriage and accepted by the Company. In other words, the Risk Note attaches to the goods immediately on such delivery and acceptance, and not merely from the time when the goods are actually despatched by the Company to their destination. Their Lordships rejected as untenable the contention that "until the goods had been loaded on waggons for transport, or at all events until the Railway Company had given a receipt for the goods specifying that they were to be carried at the reduced rate, the Risk Note had no application to them, and the Railway Company were mere ordinary bailees of the goods." [p. 127, col. 2.]

Where under the express terms of a Risk Note (in Form H), the Railway Company was exonerated from liability for loss, etc., and to goods except where the loss was due to its wilful neglect, and there was (in the present case) ample evidence of negligence on the part of the Company, it was held that the Company could not be made liable merely on this account, in the absence of evidence or finding of 'wilful neglect.' The latter expression means that the act is done deliberately and intentionally and not by accident or inadvertence, but so that the mind of the person who does the act goes with it. [p. 128, col. 1.]

R. v. Downes (2) and *R. v. Senior* (3), relied on.

Goods delivered to the respondent Company at Amalner for being carried to Bombay were, while lying on the station platform at Amalner awaiting transport, destroyed by fire. It was found that the respondent Company's servants had been guilty of negligence:

Held, that the Company was protected from liability by reason of the Risk Note (Form H); and as wilful neglect was negatived, it was unnecessary or their Lordships to consider the effect of the final proviso to the Risk Note which declared (*inter alia*) that "the term 'wilful neglect' shall not be held to include fire." [*ibid.*]

G. I. P. Railway Co. v. A. B. Tamboli, 96 Ind. Cas. 93, affirmed.

Appeal from a judgment of the Bombay High Court (Fawcett and Madgavkar, JJ.) dated the 5th October 1925, reported as 5 Ind. Cas. 293 reversing that of the Subordinate Judge, Dhulia, dated the 18th September, 1922.

FACTS.—The material facts are given in their Lordships' judgment and also in the judgments of the Court of Appeal, where the authorities are discussed at length; see 96 Ind. Cas. 293; 10 Bom. 284; 28 Bom. L. R. 718]

The Risk Note in question (Form H) is set

out in the judgment of the Privy Council, and s. 72 of the Indian Railways Act, 1890 is given below for facility of reference:—

"72. (Measure of the general responsibility of a Railway Administration as a carrier of animals and goods). (1) The responsibility of a Railway Administration for the loss, destruction or deterioration of animals or goods delivered to the Administration to be carried by Railway shall, subject to the other provisions of this Act, be that of a bailee under ss. 152 and 161 of the Indian Contract Act, 1872:

(2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it—

(a) is in writing signed by or on behalf of the person sending or delivering to the Railway Administration the animals or goods, and

(b) is otherwise in a form approved by the Governor General in Council.

(3) Nothing in the Common Law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a Railway Administration."

Messrs. Geoffrey Lawrence, K. C., and Raikes, for the Appellant.

Messrs. Stuart Bevan, K. C. and K. Brown, for the Respondents.

JUDGMENT.

Lord Chancellor.—The appellant, who is a commission agent carrying on business in the Bombay Presidency, delivered, on the 5th February, 1920, 128 bales, and on the 7th February, 1920, 162 bales of cotton at the Amalner Station of the respondent company for transport to the appellant's business premises at Kurla. Of the 290 bales so delivered, 216 were duly put on board the respondent company's waggons and carried to Kurla, but the remaining 74 bales, together with a large number of bales belonging to other consignors, remained on the station platform at Amalner awaiting transport. On the

25th February a fire broke out in some of these bales and, the appliances available in case of fire being inadequate, the greater part of the bales at Amalner Station, including the 74 bales belonging to the appellant were destroyed. Thereupon the appellant brought this suit against the respondent company, alleging that the destruction of the 74 bales was due to the negligence of the company's servants, and claiming damages for his loss.

The suit was tried by the Subordinate Judge of Dhulia, who found that the respondent company's servants had been guilty of negligence, and gave judgment for the appellant for Rs. 10,518 as damages; but on appeal by the respondents to the High Court of Judicature at Bombay, that Court, while agreeing with the trial Judge as to the finding of negligence, held that the respondent company was protected from liability by a document dated the 3rd November, 1919, and referred to in the proceedings as a "Risk Note." The question to be determined on this appeal is whether the respondent company is so protected.

The Risk Note was in the following terms:—

"Whereas all consignments of goods or animals for which the G. I. P. Railway Administration quotes both owner's risk or special reduced rates and Railway risk or ordinary rates are (unless I/we shall have entered into a special contract in relation to any particular consignment) despatched by me/us at my/our own risk and are charged for by the G. I. P. Railway Administration at special or reduced owner's risk rates instead of at ordinary tariff or Railway risk-rates, I/we, the undersigned, in consideration of such consignments being charged for at the special reduced or owner's risk rates, do hereby agree and undertake to hold the G. I. P. Railway Administration and all other Railway Administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively over whose Railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from Amalner Station to Kurla Station harmless and free from all responsibility for any loss, destruction or deterioration of or any damage to all or any of such consignments

from any cause whatever (except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants transport agents or carriers employed by them) before during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for carriage of the whole or any part of the said consignments: provided the term 'wilful neglect' be not held to include fire, robbery from a running train or any unforeseen event or accident."

The note bore the signature of Tamboli Brothers which is the name under which the appellant carries on business, and was witnessed by Jamsetji Tamboli and another person.

On the hearing of the appeal before this Board, the finding of negligence, which had been concurred in by both the Courts in India, was not disputed, but it was argued that on several grounds the Risk Note did not protect the respondent company from liability.

First, it was said that the note did not comply with the requirements of s. 72 of the Indian Railways Act, 1890, which requires that an agreement purporting to limit the responsibility of a Railway Administration for the loss, destruction or deterioration of animals or goods shall in so far as it purports to effect such limitation be void unless it (a) is in writing signed by or on behalf of the person sending or delivering to the Railway Administration the animals or goods, and (b) is otherwise in a form approved by the Governor-General in Council. It appeared that the signature of Tamboli Brothers affixed to the Risk Note was in the handwriting, not of the appellant himself, but of his nephew, Jamsetji Tamboli, and it was argued that a signature in the name of the firm was ineffective unless it appeared on the face of the document that the signature was affixed either by the sender himself or by the hand of an agent whose agency was disclosed. In their Lordships' opinion this objection has no weight. It was plain on the evidence that Jamsetji had full authority to sign the name of the firm, and if so, it was unnecessary that he should

purport to sign it as agent. If authority for this proposition is required, it will be found in the case of *France v. Dutton* (1).

It was further argued that the Risk Note was void as not being in a form approved by the Governor-General in Council. It was admitted that the body of the note was in the Form H approved by order in Council; but the form so approved contains at the end of its space for the attestation of the execution of the document by two witnesses, and it was said that as Jamsetji Tamboli, the first witness attesting the Risk Note, was the person who executed the Risk Note in the name of the firm, he was not a suitable witness to its execution. If it were an essential part of the form approved by the Governor-General in Council that the note should be attested by two witnesses, it would, no doubt, be necessary to consider whether Jamsetji Tamboli could both execute and witness the document; but in their Lordships' opinion the attestation by two witnesses is not part of the document prescribed. Para. (a) of s. 72 (2) of the Act of 1890, which alone deals with the execution of an agreement of this nature, does not provide that the agreement shall be attested; and para. (b) of the same sub-section, while it requires that the form shall be approved by the Governor-General in Council, does not entrust that authority with the duty of providing for the attestation of the document. This being so it cannot be held that attestation by two witnesses, although contemplated in the form as approved, was an essential part of the form. This argument, therefore, falls to the ground.

But the principal argument put forward on behalf of the appellant was, that the Risk Note did not attach to the 74 bales in question at all. It was pointed out that the note, by the terms of the recital contained in it, applies to goods despatched by the sender and charged for by the Railway Administration at reduced rates, and it was said that until goods had been loaded on wagons for transport, or at all events until the Railway Company had given a receipt for the goods specifying that they were to be carried at the reduced rate, the Risk Note had no application to them, and the Railway Company were mere ordinary bailees of the goods. In their Lordships' opinion this

contention cannot be supported. The appellant, in his plaint, pleaded that the 280 bales were "given in the possession of the defendant at the Amalner Station on the 5th February, 1890 and 9th February, 1920 respectively, for being carried to Bombay," and that "the defendant took them in his charge on or about the aforesaid dates as for being carried to Bombay." This pleading is fully supported by the consignment-notes signed by the appellant on the dates of the delivery of the goods, namely, on the 5th and the 7th February; for by each of these consignment-notes he requested the Railway Company to receive the goods therein described and forward them by goods train to Kurla. Further, the conditions endorsed on each of the consignment-notes provided that, when articles were delivered for conveyance, the responsibility of the Railway for the loss, destruction or deterioration of the articles should be subject to the provisions of s. 72 of the Indian Railways Act, 1890. In these circumstances it appears to their Lordships that the goods were delivered to the Railway Company for carriage and were so accepted and that consequently the responsibility of the Railway Company for each parcel of goods accrued forthwith on the delivery of the goods and the acceptance of such delivery—that is to say, on the 5th and 7th February—and accordingly that the Risk Note attached to them immediately on such delivery and acceptance. Reliance was placed on the provision contained in the Risk Note which prevented the note from attaching if the sender "shall have entered into a special contract in relation to any particular consignment," and it was suggested that in view of this provision, which was referred to as an option to the sender to enter into a special contract, the note did not attach until the goods were actually despatched. The answer is that no such special contract had been entered into, or indeed proposed, as to these particular goods, and accordingly that they fell under the general provisions of the Risk Note. This contention, therefore, also fails.

Lastly, it was argued on behalf of the appellant that the loss of the 74 bales was due to the wilful neglect of the Railway Administration or its servants, and accordingly that the case fell within the express exception contained in the Risk Note. Upon this point their Lordships find themselves

(1) (1891) 2 Q. B. 203; 60 L. J. Q. B. 488; 64 L. T. 93; 29 W. R. 716.

in agreement with the opinion of Mr. Justice Madgavkar, which was expressed as follows:—

"The remaining question is whether any wilful neglect on the appellant's part was proved. It appears upon the evidence that the means of extinguishing fire were not as they ought to be in the case of a large cotton exporting station such as Amalner. One hydrant was certainly not working and the water was not at sufficient pressure. Probably, on the whole, this was neglect, but not, I think, wilful neglect within the meaning of Risk Note Form H, so that the Company should be made liable merely on this account."

In support of this view reference may be made to the cases of *R. v. Downes* (2) and *R. v. Senior* (3), in the latter of which cases Lord Russell interpreted the expression "wilful neglect" as meaning that the act is done deliberately and intentionally and not by accident or inadvertence, but so that the mind of the person who does the act goes with it. In the present case there was ample evidence of neglect, but no evidence or finding of wilful neglect; and accordingly it is unnecessary to consider the effect of the final proviso to the Risk Note which declares that "wilful neglect" shall not include fire.

For these reasons their Lordships agree with the decision of the High Court of Judicature at Bombay, and they will humbly advise His Majesty that this appeal fails and should be dismissed with costs.

K. J. R.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. Lattey & Dawe.

Solicitors for the Respondents:—Solicitor, India Office.

(2) (1876) 1 Q. B. D. 25; 45 L. J. M. O. 8; 33 L. T. 675; 25 W. R. 278; 13 Cox. C. O. 111.

(3) (1899) 1 Q. B. 283; 68 L. J. Q. B. 175; 63 J. P. 8; 47 W. R. 367; 79 L. T. 562; 15 T. L. R. 102; 19 Cox. C. O. 219.

Note.—1. The decision of the Calcutta High Court in 20 C. W. N. 685 (32 Ind. Cas. 393) that, "when

the law says 'signed' it means the writing of the name of the person who signs it either by his own hand or by the hand of an agent who must be disclosed and have authority", must now be taken to be overruled by the above pronouncement of the Judicial Committee.

2. Their Lordships left open the question whether the Risk Note (Form H) would protect the Railway Company from liability for loss of goods, where such loss was due to 'fire' caused through the 'wilful neglect' of the company's servants. A Division Bench of the Lahore High Court has recently answered the question in the affirmative; see 98 Ind. Cas. 329; 7 Lah. 319; A. I. R. 1926 Lah. 341; 27 P. L. R. 507.

3. In construing the expression 'wilful neglect' occurring in the Risk Note, their Lordships quote with approval from the judgment of Lord Russell in *R. v. Senior*, (1899) 1 Q. B. 283; 68 L. J. Q. B. 175; 63 J. P. 8; 47 W. R. 367; 79 L. T. 562; 15 T. L. R. 102; 19 Cox. C. O. 219 a decision on the Prevention of Cruelty to Children Act, which is obviously not a Statute in *pari materia* with the Railways Act. It has, however, been held in India by almost all the High Courts that "when Acts are in *pari materia* they may be treated as forming a Code and may be read together; but when this is not so the construction which has been put upon one cannot be relied upon as a guide to the construction of another"; (see *inter alia*, 4 B. 515 (F. B.) and 22 M. 494 at pp. 502, 503). See also Lord Halsbury's Laws of England, Vol. 27, pp. 138, 139.—[K. J. R.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1274 OF 1924.

April 26, 1927.

Present:—Mr. Justice Devadoss and
Mr. Justice Jackson.

KANDASAMI GOUNDAN, MINOR,

BY NEXT FRIEND AND MATERNAL

UNCLE LAKSHMANA GOUNDAN—

PLAINTIFF—APPELLANT

versus

MARUDACHALA GOUNDAN AND OTHERS

—DEFENDANTS—RESPONDENTS.

*Hindu Law—Joint family—Suit for partition—
Father's debt—Son's liability—Debts not immoral or
illegal—Institution of suit, effect of, on son's liability
to pay.*

Where, in a partition suit, a Hindu-son asks for a declaration that certain debts incurred by his father are not binding upon him, it is for him to show that those debts were incurred for illegal or immoral purposes and he can get relief only if he is able to show that. Otherwise the debts would be binding upon him.

In such a suit, the son cannot escape liability for a debt which is not illegal or immoral by the mere fact that he has filed a suit for partition, and a mortgagee-creditor who is able to obtain a personal decree against the father, after exhausting his remedy against the father's share, would be entitled to proceed against the son's share of the family property to the extent of the balance remaining due after executing the decree against the father's share.

Krishnasami Konan v. Ramasami Ayyar (1) and Devaguptapu Kameswaramman v. Vadaddi Venkata-subba Rao (2), distinguished.

Second appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in A. S. No. 56 of 1924 (A. S. No. 225 on the file of the District Court, Coimbatore, preferred against that of the Court of the District Munsif, Coimbatore, in O. S. No. 1418 of 1921.

Mr. S. Muthiah Mudaliar, for the Appellant.

Messrs. K. S. Desikan and S. Srinivasa Iyer, for the Respondents.

JUDGMENT.—The only point for consideration in second appeal is whether the direction as regards the mortgage evidenced by Ex. A is a proper direction. The contention of Mr. Muthiah Mudaliar is that after partition, a decree against the father cannot be executed against the son's share, and he relies on *Krishnasami Konan v. Ramasami Ayyar (1)* and *Devaguptapu Rameswaramma v. Vadaddi Venkata-*

subba Rao (2). Those cases have no application to the present. The present is one for partition. In the partition suit the plaintiff asks for a declaration that certain debts incurred by the father are not binding upon him. It is for him to show that those debts were incurred for illegal or immoral purposes and if he is able to show that, then he could get relief. Otherwise the debts would be binding upon him. There is a distinct finding by the learned Subordinate Judge that the debts were not incurred for illegal or immoral purposes and are binding on the son. The debt secured by the mortgage is also one incurred not for illegal or immoral purposes and is binding upon the son. That being so, we fail to see how the plaintiff could escape liability for the debt by the mere fact that he has filed the plaint asking for a declaration that the debts incurred by the father are not binding upon him. If the mortgagee is able to obtain a personal decree against the father after exhausting his remedy against the father's share, then he would be entitled to go against the plaintiff's share of the family property to the extent of the balance remaining due after executing the decree against the father's share. The direction of the lower Court is correct.

We, therefore, dismiss the second appeal with costs.

V. N. V.

Appeal dismissed.

(2) 24 Ind. Cas. 474; 38 M. 1120; 27 M. L. J. 112; (1914) M. W. N. 742.

MADRAS HIGH COURT.

CIVIL APPEAL No. 373 OF 1924.

March 21, 1927.

Present :—Justice Sir Kumaraswami Sastri, Kt., and Mr. Justice Ramesam.PARUCHURU SUDARSANA-
CHARYULU LEGAL REPRESENTATIVE OF
THE DECEASED PARUCHURU
VENKATACHARYULU—DEFENDANT
APPELLANT*versus*KOLLIMARLA SURYANARAYANA
AND ANOTHER—PLAINTIFFS—RESPONDENTS.*Civil Procedure Code (Act V of 1908), s. 93—Sanction order signed by sheristadar for Collector, whether valid—Omission to pray for relief sanctioned, effect of.*

Where an order granting sanction to institute a suit under s. 93, Civil Procedure Code, purporting to be passed by a Collector was signed by the *sheristadar* for the Collector and above the signature of the *sheristadar* the words "by order" appeared :

Held, that there was nothing illegal in the Collector delegating his power to sign to his *sheristadar*, that the official act of the *sheristadar* must be presumed to have been done properly until the contrary was proved, and that the order granting sanction was not invalid. [p. 131, col. 1.]

Somchand Bhikhabhai v. Chhagan Lal Khubchand (1), distinguished.

In dealing with cases where there is an omission as regards certain reliefs which are sanctioned by the Collector or Advocate-General the test is whether such omission is a material omission, one from which it can be said that it so alters the scope or character of the suit that if this matter was before the Collector or Advocate-General when the sanction was given, he would in all probability not have sanctioned the suit in the form in which it is ultimately brought. An omission which is immaterial and which would not affect the interests of the trust is not sufficient to vitiate the proceedings and the plaint filed in pursuance of the sanction. [p. 131, col. 2.]

The addition of a claim must be treated as a claim made without sanction and as such it is liable to be dismissed. [*ibid.*]

But the mere addition of a claim will not render the whole suit liable to be dismissed. [p. 131, col. 2; p. 132, col. 1.]

Appeal against a decree of the Court of the Subordinate Judge, Bapatla, in O. S. No. 64 of 1922.

Mr. K. Kameswara Rao, for the Appellant.

Sir K. V. Reddi and Mr. P. V. Rangaram, for the Respondents.

JUDGMENT.—This appeal arises out of a scheme which has been settled by the Subordinate Judge of Bapatla, with reference to the temple of Sree Venugopala-swami. There are several items of property mentioned in the plaint. The finding of the Subordinate Judge is that the temple owns only item No. 1 and that the income is

about Rs. 360 per annum and that items Nos. 2 to 10 are the separate properties of the *archakas*. The *archakas*' contention was that even item No. 1 was a gift to them burdened with the expenses of the temple. The Subordinate Judge found that it was a gift to the god and not to the *archakas* burdened with any trust. He framed a scheme appointing trustees. Against this decree the appellant, one of the *archakas*, raises certain contentions. His main grounds are that the suit is bad as the plaint, as at present filed, does not conform to the sanction given by the Collector; secondly, that there is no necessity for a scheme being framed; and thirdly, that the amount given for expenses is too small. A memorandum of objections has been filed by the respondents objecting to the judgment in so far as it declared that items Nos. 2 to 10 do not belong to the temple and also objecting to Rs. 25 a month for the *archakas*' service. So far as item No. 1 is concerned, it is clear from the *inam* statement and the register that the property was treated as the property of the god. There is no suggestion that it was a property given to the *archakas* burdened with any trust. We think that the Judge was right in holding that it was the property of the temple and not of the *archakas*.

The next contention is that the suit ought to have been dismissed as it did not conform to the sanction given. The sanction given is filed as Exs. B and B-1 and the petition for sanction is filed as Ex. IV. The petition states that the property item No. 1 which is 30 acres and 50 cents is in the possession of the *archaka* Paruchuru Sudarsanacharyulu, that the yearly income is Rs. 488, that Rs. 84-0 is paid to the Sircar every year towards cess; that the total balance of this amount is being saved by the *archaka* and he is using the same for purchasing *seri* lands, etc., on his private account and that he is not using the same for the temple purposes. The petition also refers to some nominal *dharmakarthis* of the temple, and states that they do not take any interest in the temple affairs. It also refers to the ruined nature of the temple premises and the prayer is that permission should be granted to them to file a scheme suit against the *dharmakarthis* nominally appointed for the temple and the *archaka*. The order, Ex. B, is that permission under s. 93, Civil Procedure Code, is granted to two indivi-

duals mentioned therein to file a scheme suit in respect of the *inam* lands attached to the temple of Sri Vengopalaswami Varu. Ex. B-1, is the supplemental order which says, "the petitioners are informed that all suit reliefs may be prayed for in their plaints and there is no necessity to include them in orders issued from this office."

This was in answer to the petition asking the Collector to specify the reliefs which should be asked for in the plaint. It is argued that Ex. B-1 is not a proper order, because it purports to be signed only by the *sheristadar* and not by the Collector. It is suggested that it was the *sheristadar* who made the order and not the Collector. If the order was really passed by the *sheristadar* there can be little doubt that such an order is invalid. *Somchand Bhikhabhai v. Chhagan Lal Khubchand* (1) will be a case in point. But Ex. B-1 purports to be an order passed by Mr. Rutherford. All that Ex. B-1 shows is that it was signed by the *sheristadar* for Collector and above the signature of the *sheristadar* appear the words "by order." There is no evidence to show, that the *sheristadar* passed the order without reference to the Collector. Having regard to the fact that Ex. B-1 mentions the name of the Collector, Mr. Rutherford, as the person who passed the order it is impossible to hold that the *sheristadar* passed the order *suo moto* without reference to the Collector. Exhibit B-1 shows that it is signed by the *sheristadar* under the orders of the Collector. The Collector is not bound to sign every order that is issued to third persons and there is nothing wrong in the Collector delegating his power of signing the order to the *sheristadar*, and such an official act of the *sheristadar* is presumed to have been done properly until the contrary is proved. The order, as it stands, is perfectly valid.

The more substantial objection is that the plaint does not strictly conform to the order granting sanction, that the lands comprised in the plaint do not cover those in the petition, and that the nominal trustees mentioned in the petition have been omitted in the plaint. So far as the properties added are concerned they are distinct properties and as regards those properties the Subordinate Judge has dismissed the suit holding that they are not properties which belong to the temple.

(1) 10 Ind. Cas. 803; 35 B. 243; 13 Bom. L. R. 207.

As regards the nominal trustees mentioned in the petition it does not appear who they are and the question is whether the omission of those trustees in the plaint, is fatal to the plaintiff's case. The contention of the appellant's Vakil is that any omission is sufficient to invalidate the suit filed in pursuance of the order and reliance is placed on *Srinivasa v. Venkata* (2) and *Allabaksh Mira Mohadeen v. Sethi Chinna Fakruddin Sahib* (3). It seems to us that in dealing with cases where there is an omission as regards certain reliefs which are sanctioned the test is to be whether such omission is a material omission, one from which it can be said that it so alters the scope or character of the suit that if this matter was before the Collector when the sanction was given he would in all probability not have sanctioned the suit in the form in which it is ultimately brought. For example there may be cases where some of the main reliefs for which sanction has been given were omitted, owing to collusion or fraud or other reasons and such an omission is not in the interest of the temple. In such cases, of course, there is ground for holding that a suit so framed which contains an omission so material that in all probability sanction would not have been given if a prayer had been made to the Collector or to the Advocate-General to frame a scheme with only the prayers ultimately stated in the plaint, would vitiate the proceedings as not being in substantial compliance with the sanction given. But it seems to us that there is no principle or reason in holding that any omission which is immaterial and which would not affect the interests of the temple would be sufficient to vitiate the proceedings and the plaint filed in pursuance of the sanction. If *Srinivasa v. Venkata* (2) or *Allabaksh Mira Mohadeen v. Sethi Chinna Fakruddin Sahib* (3) decided anything more than what we stated above, we would respectfully express our dissent.

As regards the addition of claims the position is different. The addition of claim may be treated as a claim made without sanction and as such it is liable to be dismissed. There is no reason why the mere addition of a claim should render

(2) 11 M. 148; 4 Ind. Dec. (N. S.) 103.

(3) 85 Ind. Cas. 1045; 21 L. W. 71; A. I. R. 1926 Mad 636.

the whole suit liable to be dismissed. It cannot be worse than a case of misjoinder where the parties will be confined to such portion of the claim as is not open to objection. In the present case there is no such omission as would render the whole proceedings invalid.

The third point is that the scheme is quite unnecessary. We think that such a scheme is necessary, especially when we look into the contentions of the *archakas* that the property is their own property burdened with a trust. In all these cases it is better to have a separate trustee who can supervise the work of the *archakas* and see that the temple affairs are properly conducted. There may be cases where the *archakas* have by a long custom acquired the position of trustees. But in the present case there is not such proof. Under these circumstances the appeal fails and is dismissed with costs.

As regards the memorandum of objections we do not think there is sufficient evidence to support the view that items Nos. 2 to 10 have been acquired out of the surplus income of the temple land of item No. 1. We have to note, that the *archakas* have to be remunerated for their services and the income of the temple is not shown to be such as to leave a surplus out of which lands could be purchased. We think that the Subordinate Judge was right in holding that items Nos. 2 to 10 are not the properties which belong to the temple especially when we find in the petition for sanction that item No. 1 alone is set out as the temple property.

It is next argued that Rs. 25 per month for the *archaka* is too high having regard to the income of the temple and also in view of the fact that the temple is to be repaired. The Subordinate Judge grants Rs. 25 a month on the footing that the income is Rs. 360 a year. If the income should be less in a particular year, the decree provides that there should be a proportionate reduction in the salary of the *archaka*. So this sum of Rs. 25 does not represent the permanent salary of the *archaka* burdened on the temple income which would prejudice the interest of the temple. If any repairs are to be done to the temple, we think there is nothing to prevent the trustees from applying to the public for donations and repair the same. We do not see any reason to interfere with the discretion of the Subordinate Judge as

regards Rs. 25 granted to the *archaka* as salary. The memorandum of objections fails and is dismissed with costs.

V. N. V.

A. N. A.

Appeal and memorandum of objections dismissed.

MADRAS HIGH COURT.

ORDINARY ORIGINAL CIVIL SUIT No. 632
OF 1926.

October 11, 1927.

Present :—Mr. Justice Venkatasubba Rao.
BALASUNDARACHARI BY NEXT FRIEND.
VEDAVALLI AMMAL—PLAINTIFF

versus

A. V. KANNIAPPACHARI AND OTHERS,
—DEFENDANTS.

Hindu Law—Joint family—Mortgage—Inquiries by alienee, sufficiency of—Release, if amounts to partition—Evidence—Non-production of accounts—Adverse inference—Hindu Law—Widow—Right of residence in family house sold in execution of decree for binding debts.

Where a member of a joint family executes a deed of release, the burden of proving that it was intended to be inoperative is upon the person who sets up such a case. [p. 135, col. 1.]

Where a transaction of release by a member of a joint family amounts to a partition, the minor sons of the person executing the release will be held to have been represented by the father although they were not parties to the deed. [ibid.]

The widow of a co-parcener has no right to reside in the family house, which has been sold in execution of a decree for family debts. [p. 135, col. 2.]

Ramanadan v. Ranganmal (6), followed.

Where a person lends money on mortgage to the manager of a joint Hindu family for discharging debts contracted for purposes of a family business, after making all reasonable inquiries and being honestly satisfied that the money was required, the mortgage is binding on all the members of the family. [p. 134, col. 2.]

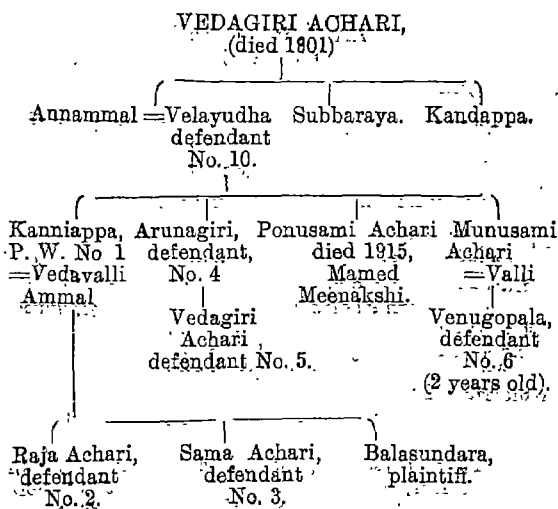
It is open to the Court to make an adverse inference against a party who wilfully suppresses accounts of a vital character and in his possession. [ibid.]

Suit by the plaintiff to set aside a sale held in pursuance of a decree of Court.

Messrs. S. Srinivasa Raghavan and T. Krishnasami Aiyar, for the Plaintiff.

Messrs. N. Panchanada Aiyar and M. Sundara Aiyar, for the Defendants.

JUDGMENT.—The following pedigree elucidates the facts of the case.



In this suit the plaintiff asks that a sale held in pursuance of a decree passed by this Court should be set aside so far as his interest in the property sold is concerned. The decree was obtained by the 8th defendant on the footing of a mortgage executed in his favour by Munusami Achari, Arunagiri Achari (4th defendant) and Vedagiri Achari (5th defendant). At the sale held the 9th defendant purchased the property in question. I must preface my judgment by saying that the only question which I am asked to try is, whether this sale is binding upon the plaintiff. The 9th defendant supported by the 8th defendant is contesting the suit. The other defendants either do not appear to defend the action or side with the plaintiff.

The principal point raised in the case is, that Kanniappa, the father of the plaintiff separated from the family after executing a release deed dated 12th February, 1912, and that the result of that transaction was that the entire branch of Kanni-

appa including his sons became severed from the rest of the family which continued to be joint. It follows from this contention that the plaintiff had no interest in the property mortgaged or subsequently sold. If I accept this argument the plaintiff is bound to fail.

It is urged for the plaintiff that the release deed was a sham and that his father nevertheless continued to be a member of the joint family. In the alternative, it is contended for him that in any event the release did not and could not affect the sons of Kanniappa and that the latter continued to be members of the joint family although their father severed his connection with it.

One of the questions raised, as I have said, is, was the release deed intended to be an effective document or was it a mere sham? I shall assume in favour of the plaintiff that it was a sham and shall first proceed to deal with the case on that footing. The case of the plaintiff is put in this way. Kanniappa was incurring debts and it was considered necessary to take a release from him only with the object of preventing third parties from lending him monies. The purpose of the deed was to deceive the public and not to separate Kanniappa. Whether this be a fact or not, let us look at the state of things as they existed in 1921. Kanniappa would in the usual course have been the manager, but he must be deemed to have renounced that right in favour of the next eldest member. Let me state the rule which I wish to apply, in the form of an illustration. If A has two younger brothers B and C, A certainly can renounce his right to manage in favour of B and A's minor sons will be bound by that act and they cannot be heard to say that B is not thereafter the manager. The purpose of the deed on the plaintiff's showing was to deceive the public into thinking that Kanniappa did not continue a member of the co-parcenary. He could not, consistent with the deed, profess to act as manager, for that would be to defeat the very object of the transaction. It, therefore, seems to me that the management in 1921 devolved upon the junior member Arunagiri and, as I have shown, he was one of the executants of the mortgage, which cannot, therefore, be impeached on the ground that the executants had no authority. Then remains

the question, was the mortgage executed for a purpose binding on the family? There can be no doubt on the evidence that the monies were borrowed for family necessity and benefit. The facts are these. The family was conducting a carriage factory and in 1919 some money was required for the business. Arunagiri and Munusami borrowed Rs. 1,000 from Raju Chetty and executed in his favour a promissory note and deposited with him title deeds of the suit property by way of an equitable mortgage. The family required further sums of money, Raju Chetty was unable to advance the same and a request was then made to the 8th defendant, a medical practitioner, to lend the sum. He thereupon lent Rs. 3,000 out of which Rs. 1,210 was paid off to Raju Chetty. The balance of Rs. 1,790 was required for the business. The 8th defendant has deposed that all the three executants represented to him that the concern was in urgent need of funds. They told him that there were old carriages and that if they were repaired they could be sold and money realised. It is significant that at that time these three executants were alone attending to the business. Kanniappa, the evidence has clearly shown, was then conducting a different business. His sons were taking no interest in the concern. The only members, therefore, who were in a position to make any representation were the three executants and it was they that stated to the 8th defendant that the money was urgently needed for the business. The account books of the business if produced would reveal whether the money was utilized for it or not. Some members of this family must be in possession of these account books. Why have they been withheld from the Court? Defendants Nos. 4 and 5 have not chosen to defend the action though in all probability they are behind the scenes helping the plaintiff. Why have they not gone into the witness-box? I am prepared to act on the evidence of the 8th defendant and have not the slightest doubt that the representation was made as stated by him. What further enquiry was then called for? Ordinarily it will be futile in the case of a trade to make enquiries regarding it of strangers. In the very nature of things such enquiries would yield no useful result. In my opinion, the 8th defendant made all reasonable enquiries and was honestly

satisfied that the money was required. Though this would be sufficient to support the mortgage, I am prepared to go further and hold that the money was actually required for a family purpose. The persons within whose knowledge these facts are, are defendants Nos. 4 and 5 and they have not been examined on the plaintiff's side. The books of the concern have been withheld. From these facts I must infer that the business really required the money and that it was even utilized for it. The 8th and the 9th defendants are strangers to the family and they have placed before the Court such evidence as is available. The best evidence has been withheld by the plaintiff and the other members of his family. In *Murugesam Pillai v. Manickavasaka Desika Gnana Sambanda Pandara Sannadhi* (1) the Judicial Committee made an inference in similar circumstances against the party who wilfully suppressed the accounts. Then there are two other sums that were borrowed; first, Rs. 1,000 on a promissory note dated 26th September, 1921. It is not denied that two marriages were at that time performed in the family and there is nothing to suggest that the amount borrowed was excessive. Secondly, on the 5th of July, 1922, another sum of Rs. 200 was borrowed on a promissory note and on the evidence that borrowing also was for a family necessity as some dowry had to be given to a girl of the family. These are the three debts (Rs. 3,000, Rs. 1,000 and Rs. 200), on which the previous suit was based which led to the passing of the mortgage decree and the sale. I am of the opinion that all the debts are wholly binding on the family. I have so far dealt with the case on the footing (most favourable to the plaintiff) that notwithstanding the release, Kanniappa and his sons continued to be members of the joint family. On this finding alone the plaintiff's suit may be dismissed.

But was the release deed a sham? The evidence of the 8th defendant and of Loganatha Mudaliar is clearly to the effect that subsequent to this deed, the 1st defendant was not living in the family house but at No. 5 Bungalow Street. The evidence also points to the fact that the 1st

(1) 39 Ind. Cas. 659; 40 M. 402; 21 M. L. T. 288; 32 M. L. J. 369; 15 A. L. J. 281; 1 P. L. W. 457; 5 L. W. 759; 21 C. W. N. 761; 19 Bom. L. R. 456; 25 C. L. J. 589; (1917) M. W. N. 487; 44 I. A. 98 (P. C.).

defendant was conducting an independent carriage factory while the old concern was being conducted by the other members of the family. It must then be remembered that Kanniappa was not in 1912 a young man who had just come of age but was an experienced and elderly man of the age of 43. The onus is upon the plaintiff to show that the release was intended to be inoperative and he has signally failed to do so. There is no doubt, therefore, that Kanniappa ceased after this transaction to be a member of the family.

It is a more difficult question to decide—Did Kanniappa alone separate from the family or did he in executing the deed represent also his sons who were then minors? In the view I am taking of the case, it is unnecessary to decide this question. It is true that what is termed a release deed may in effect be a partition deed. *Umed Babar v. Khushalbhai* (2) and *Ramdas v. Chabildas* (3). If the transaction amounts to a partition, it is equally true that although the minor sons may not be parties to the deed, they will be nevertheless represented by the father, whose act is ordinarily binding upon them. Turning to facts, there are indications to show that the parties at any rate believed that the entire branch became severed. It is said for the plaintiff that neither Kanniappa nor his adult sons took any part in the transaction. I have set forth above of 1919 and of 1921. The title deeds were allowed to be in the possession of the other members and on the plaintiff's own showing, no member of his branch took the slightest interest in the concerns of the family. Further more, the sons of Kanniappa were trained as silversmiths whereas every other member was attending to carriage factory. But, as I have said, I do not propose to decide the question whether Kanniappa's sons became separated or not. Granting then that they continued to be joint, they were fully represented in the transactions by their uncles Arunagiri and Munusami. The former, as I have said, was constituted the manager and every member would be bound by his acts done in that capacity. What, then, is there to show that the interest of Kanniappa's sons (granting they had an interest) was not intended to be bound by the acts of the manager. He was

competent to mortgage their interest, he purported to mortgage the whole property and there is nothing in the deed to repel the natural inference that what was intended to be conveyed was the entire property. *Sankaranarayanam Pillai v. Rajamani* (4) and *Unnamali Ammal v. Abhoy Chetty* (5) are directly in point. The recital in the mortgage-deed "there are no heirs to the aforesaid house other than ourselves" does not show that the right of the sons of Kanniappa was denied; even if it was, the statement may be treated, in the circumstances, as surplusage. In this connection, the question may be asked, if the 5th defendant executed the mortgage, why did not the 2nd defendant who was also an adult join in this execution. The answer is twofold. In the first place the 5th defendant might be older than the 2nd and no evidence on this point has been adduced by the plaintiff. Secondly the 5th defendant was actually conducting the carriage factory, whereas the 2nd did not interest himself in it at all. I have, therefore, come to the conclusion that even on the assumption that the plaintiff and his brothers continue to remain members of the family, the transactions are binding upon them.

On behalf of the 10th defendant, it is urged that she as a widow of a co-parcener has a right to reside in the house in question (the same being the family house) and that I must make a declaration to that effect. The debts which led to the Court sale are family debts and they are, therefore, binding upon her and I am unable to conceive how such a right can be claimed. If authority is needed, *Ramanadan v. Rangammal* (6) covers the point.

In the result, the plaintiff's suit is dismissed and I direct him to pay under O. XXXIII, r. 11, the costs of the Government. He shall also pay the costs of the 8th and the 9th defendants (one set.)

V. N. V.

Suit dismissed.

A. N. A.

(4) 83 Ind. Cas. 196; 47 M. 462; 46 M. L. J. 314; 34 M. L. T. 152; A. I. R. 1924 Mad. 550; 20 L. W. 357.

(5) 92 Ind. Cas. 524; 50 M. L. J. 172; 23 L. W. 168.

(6) 12 M. 260 4 Ind. Dec. (N. S.) 531 (F. B.).

(2) 2 Ind. Cas. 426; 11 Bom. L. R. 396.

(3) 7 Ind. Cas. 134; 12 Bom. L. R. 621.

MADRAS HIGH COURT.CIVIL MISCELLANEOUS APPEAL No. 183
OF 1925.CONVERTED AS APPEAL No. 225 OF 1927.
July 29, 1927.*Present:* — Mr. Justice Ramesam and
Mr. Justice Cornish.THE BOARD OF CONTROL
Sri THYAGARAJA SWAMI
DEVASTHANAM, TIRUVALUR
REPRESENTED BY ITS PRESIDENT

S. A. S. R. M. RAMANATHAM

CHETTIAR—PETITIONER—

PLAINTIFF—APPELLANT

versus

BALAJEE AMMAL AND OTHERS

—DEFENDANTS Nos. 6, 12, 15 AND 17

—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 47, 92—
Public trust—Scheme decree—Directions to defendant
to perform particular acts, whether executable—
Appellability of decree—Conversion of execution
application into suit.*

It cannot be laid down as a general rule that all scheme decrees under s. 92 of the Civil Procedure Code are always declaratory and can never be executable. The question whether a decree framing a scheme is executable or not depends on the language and on the scope of the decree or of that particular part of the decree in respect of which the question arises. Such a decree may in part be declaratory and in part directory. [p. 140, col. 2.]

Directions in such a decree to the defendant to perform some duty, such as the payment of money, either at a point of time or periodically, or to present a proper budget at specified times and make particular payments of money to the treasurer are matters intended to be enforced in execution. [p. 139, cols. 1 & 2.]

Where an application for enforcing the duties imposed by a scheme decree was disposed of by the trial Court in execution proceedings and one of the parties preferred an appeal from the order of the trial Court:

Held, that even assuming that the matter could not be disposed of on an application for execution, it was open to the High Court to treat the application as a suit under s. 47 (2), Civil Procedure Code, subject to any question of jurisdiction or limitation and to entertain the appeal as an appeal from a decree in such a suit. [p. 139, col. 2.]

Damodarbhat v. Bhogilal (7) and Prayag Doss Ji Varu v. Tirumala Srirangacharlavaru (10), relied on.

Sevak Jeranchood Bhogilal v. Dakore Temple Committee (1), explained.

Appeal against on order of the Court of the Subordinate Judge, Tiruvalur, dated the 10th October, 1924, and passed in E. P. R. No. 43 of 1924, in O. S. No. 125 of 1921, on the file of the Court of the Subordinate Judge of Negapatam.

Messrs. S. Varadachari and A. Swaminadha Aiyar, for the Appellant.

Messrs. P. N. Marthandam Pillai, K. S.

Champagesa Aiyangar and A. Ganesa Aiyar,
for the Respondents.

JUDGMENT.

Ramesam, J.—This is an appeal against the order of the Sub-Court of Tiruvalur passed on a petition by the President of the Board of Control of Sri Thyagaraja Swami Devasthanam of Tiruvalur. The Board of Control was appointed in pursuance of the scheme framed by this Court in A. S. No. 136 of 1920, on appeal from O. S. No. 52 of 1913, Temporary Sub-Court, Tanjore.

A preliminary objection has been taken by the respondents that no appeal lies. The scheme framed by the High Court contains a clause (cl. 27) that any of the parties or the Board of Control as a body or the Advocate-General are at liberty to apply to the Court for any modification of the scheme. But the present application is not an application for any modification of the scheme and does not come under this clause. In the present application the President of the Board of Control complains that some of the Kattalaiddars would not send complete budgets of their receipts and expenditure nor would deliver the cash in their hands to the treasurer as provided by cls. 8 and 13 of the scheme and the President applies to the Court for getting the clause enforced, by attachment of the properties or by detention of the recalcitrant defendants. The Subordinate Judge has not given the relief sought by the petitioner. Hence this appeal.

The respondents in support of their preliminary objection rely on the following cases; *Sevak Jeranchood Bhogilal v. Dakore Temple Committee (1)*, *Runganatha Thathachariar v. Krishnaswami Thathachariar (2)*, *Bava C. Vythalanga Mudaliar v. Mahadeva Iyer (3)*, *Sivan Pillai v. Venkateswara Iyer (4)*, *Abdul Hakim Baig v. Mahomed Burrammuddin (5)* and *Ryali Brahmayya v. Venkatasurya Narayanamurthy (6)*.

(1) 87 Ind. Cas. 313; 49 M. L. J. 25; 23 A. L. J. 555; A. I. R. 1925 P. C. 155; L. R. 6 A. (P. C.) 117; (1925) M. W. N. 474; 2 O. W. N. 535; 41 C. L. J. 628; 22 L. W. 246; 27 Bom. L. R. 872; 30 C. W. N. 459 (P. C.).

(2) 75 Ind. Cas. 189; 47 M. L. J. 237; (1923) M. W. N. 664; A. I. R. 1924 Mad. 369.

(3) 91 Ind. Cas. 794; A. I. R. 1926 Mad. 659.

(4) 92 Ind. Cas. 556; 22 L. W. 796; A. I. R. 1926 Mad. 130.

(5) 95 Ind. Cas. 720; 49 M. L. J. 580; (1926) M. W. N. 226; A. I. R. 1926 Mad. 559.

(6) 94 Ind. Cas. 554; 50 M. L. J. 409; A. I. R. 1926 Mad. 557.

Most of the decisions of the High Court rely on the first of the above decisions which is a decision of the Privy Council. Mr. Varadachariar who appears for the appellant while conceding that most of these other decisions are correctly decided attacked the correctness of the reasoning in the judgment, especially the inference sought to be drawn from the Privy Council decision. It becomes, therefore, necessary, to examine what was exactly decided by the Privy Council and how far the decision supports the inference sought to be drawn from it by Judges of this Court. In that case there was a scheme framed by the Privy Council. The scheme provided for the appointment of a temple committee and empowered the committee to make rules. There is also a provision for the rules being sanctioned or modified by the District Court. There is another clause for the alteration of the scheme by the High Court of Bombay. The committee made the rules and the rules were submitted to the District Court for sanction and the District Judge modified the rules. There was an appeal to the High Court under s. 47, Civil Procedure Code, against the order of the District Judge. There was also an independent application to the High Court for the alteration of the scheme. But no orders were passed on this application. The High Court, on appeal from the District Court, modified the order of the District Judge. But the Privy Council held that no appeal lay to the High Court under s. 47, Civil Procedure Code, and it should have been rejected. They pointed out that the High Court might have exercised the power conferred on it by the clause which enabled it to modify the scheme. The Privy Council did not say that if the High Court exercised such power that would not have been in execution and no appeal lay against it. They expressed no opinion on the matter. All that they decided was that the order of the District Judge modifying the rules made by the Committee was not an order in execution. So far as the alteration of the rules is concerned it cannot be said that anything was sought to be enforced by one party as judgment creditor against another part as judgment debtor who is under some obligation and it cannot be said that there was any question in execution between the two parties. Under the scheme of the Privy Council the rules

must be placed before the District Court for its sanction and the District Court has power *suo moto* to sanction or alter the rules. It is, therefore, doubtful whether the decision of the Privy Council applies to a case where one party who is conferred a certain right by the scheme seeks to enforce the right against some other who is under a corresponding obligation and for this purpose goes to Court. It cannot be said that the Privy Council decided that such a matter is not a matter in execution between the parties.

The next case in the order of the date is *Runganatha Thathachariar v. Krishnasami Thathachariar* (2). The learned Judges who decided that case seem to think that when a scheme was asked and the scheme was framed there was nothing more to be done in the suit and nothing to be executed; but it seems to me that, whatever might have been asked, where the decree gives something more and provides for the carrying out of the earlier part of the decree, it may be said to be executable. It is more a question of the interpretation of the terms of the decree and there cannot be any general rule. It is true that a scheme decree, in general, by its very nature is a declaratory decree. But it is possible that some particular provisions provide for enforcement of parts of the scheme. I do not see any reason why such portions of a scheme decree may not be regarded as executable. The decision in *Damodarbhat v. Bhogilal* (7) is such a case. The grounds on which that decision was to be distinguished by Oldfield, J., seem to me untenable. In that case there was a prayer to take *past* accounts, but in the final decree there was a direction to keep accounts for the *future*, that is from the date of the decree and to submit them annually to the District Court and it was this provision that was sought to be enforced in Court. The High Court held that an appeal lay and that it was a question in execution. Oldfield, J., observed that as the taking of accounts was a relief asked for specially in the suit and granted independently of the framing of the scheme, that decision may be distinguished on this ground; but the taking of accounts prayed for in the plaint related to past accounts whereas the decree related to the keeping of future accounts—accounts after the

(7) 24 B. 45; 1 Bom. L. R. 509; 12 Ind. Dec. (N. S.) 567.

date of the decree. Again Oldfield, J., seems to think that if there was a provision in the scheme for the enforcement of its other provisions, then it may be enforced in execution. It is not always that decrees of Courts, even where executable actually provide for their being enforced in execution. Where a decree directs the defendant to pay some money to the plaintiff, it is executable from its very nature and one does not expect a provision in the decree that it shall be enforced in execution. That may be so in a plain case, and it may be that in ambiguous cases a provision of the kind removes the ambiguity and solves the difficulty. When there is no such provision it is a difficult matter to decide whether a particular clause in a scheme is executable or not. Anyhow it is not clear to me that the decision in *Damodarbhat v. Bhogilal* (7), is wrongly decided, nor does it seem to me that the consideration that the decree will have to be kept up in perpetuity for the purpose of execution has much bearing on the matter. A decree awarding maintenance to widow annually may be executable for nearly 100 years. A decree giving an injunction in respect of a lease for 999 years may be executable for a very long period. The other alternative remedy which is suggested in most of the decisions is that a party seeking relief must seek his relief by way of a suit. Some cases say that it is a suit under s. 92, Civil Procedure Code. But where a suit under s. 92 has already been filed and a scheme framed and the only object is to carry out the provisions of the scheme, it does not seem to me that this new suit should be a suit under s. 92 unless it is said that the new suit must always be for the removal of a trustee for disobedience and cannot seek for the enforcement of the provisions of the scheme in any way. I do not understand the defendants to contend for this. The inconvenience of driving a party like the Board of Control in this case to a suit for every breach on the part of the trustees is obvious. But the whole matter is not free from difficulty. Probably, if the question of principle is once decided further trouble on the part of the Kattalaidars need not be apprehended.

The next case is *Bava C. Vythelinga Mudaliar v. Mahadeva Iyer* (3). This was in connection with the same temple. The petition there was to cancel the appoint-

ment of a superintendent by the trustees and for the appointment of a new person by the Court. In that case there was nothing to execute. In fact it was found by the High Court that the scheme did not authorise the action of the Subordinate Judge and no appeal lay to this Court. The High Court set aside the order of the Subordinate Judge exercising their power of revision. There was a contention in that case that an appeal lay. The learned Judges relied on *Runganatha Thathachariar v. Krishnaswami Thathachariar* (2). It seems to me that that was a case in which there was nothing in execution and I agree with the decision that no appeal lay. It was unnecessary to rely on *Runganatha Thathachariar v. Krishnaswami Thathachariar* (2).

The next case is *Sivan Pillai v. Venkateswara Iyer* (4). In that case the remedy sought was the removal of a trustee. It may be that so far as the removal of a trustee is concerned, the only remedy is a regular suit and cannot be done under the scheme. Anyhow, certainly it is not a matter for execution because it cannot be said that any provision of the scheme was being executed. I entirely agree with the decision that no appeal lay, but I am not able to agree with the remark at page 798* of Spencer, J:

"In the light of the recent Privy Council decision in *Sevak Jeranchod Bhogilal v. Dakore Temple Committee* (1) and the decisions of this High Court in *Loka Sikhamani Mudaliar v. Thiagaraya Chettiar* (8) and *Runganatha Thathachariar v. Krishnaswami Thathachariar* (2), I am of opinion that an appeal will not lie against the order made by a Court exercising a power given to it by a provision in the scheme and that such an order is not an order made in execution."

As I have already observed there is no general decision by the Privy Council that an order made under the scheme is not an order in execution. It is unnecessary in that case to rely on the decision of the Privy Council or *Runganatha Thathachariar v. Krishnaswami Thathachariar* (2).

The next decision is *Majeti Antayya v. Lingambhotla Venkataramayya* (9). In that case there was an application by the Archakas to get their salaries and also a

(8) 95 Ind. Cas. 5; (1926) M. W. N. 233; A. I. R. 1926 Mad. 655.

(9) 38 Ind. Cas. 415; 5 L. W. 596 (1917) M. W. N. 420.

*Page of 22 L. W.—[Ed.]

sum of money. Neither the judgment nor the printed papers show what the exact terms of the scheme were. We agree with the observation in the case that a scheme suit generally may be regarded as declaratory. But it does not follow that there may not be some particular provisions in the decree framing the scheme which are capable of execution. That case certainly is rightly decided, but I do not see how it helps us. An Archaka is entitled to his salary by reason of his position as Archaka and a suit for his salary is like any other suit where some money is due from one person to another and it cannot be said that such a suit is for carrying out of provisions of the scheme. That suit was not obviously for the carrying out of any provision in the scheme and, therefore, there was no appeal and the order of the lower Court was set aside in revision. In *Ryali Brahmayya v. Venkatasurya Narayanamurthy* (6) also the suit was for the salaries of the Archakas. I entirely agree with the decision. But I cannot agree with the remark in the judgment that a general clause in the scheme providing for application to the Court with regard to the scheme is *ultra vires*. A different view was taken by Oldfield, and Venkatasubba Rao, JJ., in *Runganatha Thathachariar v. Krishnaswami Thathachariar* (2) already mentioned. If the relief sought for is the removal of a trustee it may be *ultra vires* but if it is for the carrying out of the details of the scheme, it cannot be opposed to s. 92 and I do not see any reason why such a thing should not be enforced in execution. The case itself is, of course correctly decided, but I doubt if the remark that there can be no provision in the scheme providing for execution of some clause is correct.

The next decision is *Abdul Hakin Baig v. Mahomed Burrammuddin* (5). This also relates to the removal of a trustee and it may be, that the clause in the scheme providing for the removal of a trustee by way of execution is *ultra vires*. It is unnecessary to discuss this case any further.

The result of the above discussion is that, while I think that all the cases have been correctly decided on the actual facts, I am unable to agree with some of the observations made in them. I do not see any reason why there may not be some clause in the scheme which amounts to a direction to the defendants to perform

some duty, such as the payment of money either at a point of time or periodically, and why such a direction should not be executable. Whether it is executable or not depends on the intention of the decree. While generally a scheme decree may be declaratory specific parts thereof may contemplate execution. It is unnecessary to expressly provide for the enforcement of such a clause by execution. Though where there is an express provision to that effect it makes matters clear, and such a provision except as to the removal of a trustee is not *ultra vires*. In the case of the removal of a trustee it may be that the only remedy is by a suit under s. 92. In the present case it may be said that the presentation of a proper budget and payment of the monies to the treasurer are matters intended to be enforced in execution. I do not see how the payment of monies to the treasurer is different from a maintenance decree.

But assuming that there is some doubt as to the intention of the scheme and that a suit is the proper remedy, it is clear that the suit is not a suit under s. 92 and does not require any sanction. The second clause of s. 47, Civil Procedure Code, provides that the Court can convert a petition into a suit and a suit into a petition subject to any question of jurisdiction or limitation. In this case there is no question of jurisdiction or limitation. The policy of the Legislature in enacting that clause was to avoid all technicalities and to enable Courts to get at the root of the matter in dispute between the parties. In none of the cases cited was reliance placed on this s. 47. Nor could it be on the facts of these cases. In the present case I think that the petition of the President of the Board of Control may be converted into a suit under the said clause and as the matter is incapable of valuation the petitioner will pay a Court-fee of Rs. 100 in the Court below and in the appeal before us. If the petition is regarded as a suit there is no objection to the appeal before us. I, therefore, proceed to consider the merits of the case.

On the merits the respondents contend that all that was intended by the scheme as to the Kattalaidars was that their budget should deal only with such portions of their duties as related to the temple proper or what is called *pagoda service*, and that, as to the other duties they need not submit the budget to the Board of Control, nor need they pay the monies relating to such other

duties to the treasurer. I have not the smallest hesitation in rejecting this contention. The judgment in the main appeal is now reported as *Manicka Vachaka Desika Gyana Sambanda Pandara Sannadhi v. Vaithilinga Mudaliar* (10). While in the judgment, Spencer, J., and myself were anxious to support the independence of the Kattalaidars and not destroy their individuality as the Subordinate Judge did, we were also anxious to point out that all the duties of the Kattalaidars were duties either directly or indirectly connected with the temple for instance in the case of Annadanam Kattalai though the 5th duty namely *pagoda* service relates to the temple and others such as sheltering the travellers, distribution of food and keeping of water pandals, lights, etc., do not directly relate to the temple, in theory all these duties are also indirectly connected with the temple. The person who endowed the property to the Kattalai was thinking of providing for the charities to be carried on in the name of Thiagarajaswami so that the particular idol may be glorified. The recipients of the shelter for travellers and the supply of food and water extol the charity as one of Thiagarajaswami and in that way they are all charities of Thiagarajaswami. It is true that we said that the income of the Kattalais did not belong to the idol. But in their expenditure the idol was interested and in that way they are all endowments connected with the temple and in that sense all the incomes of all of the Kattalais are funds of the Devasthanam, and this was all that was meant by the use of the words 'funds of the Devasthanam' in the other clauses of the scheme, such as for example cl. 16. That this is our intention is clear from para. 13 which provides that the trustees of the respective Kattalais shall hand over all the *cash proceeds* to the Treasurer. Similarly, budgets that relate to the expenditure and income of Kattalais must show details of all the expenditure whether directly connected with the temple or not but in theory redounding to the glory of the Swami. I am, therefore, of opinion that the order of the Subordinate Judge is incorrect and that the respondents should submit complete budgets relating to all the expenses and pay all the monies to the Treasurer and get back the amounts form the Treasurer as expenses are being incurred.

(10) 74 Ind. Cas. 115; 18 L.W. 247; A. I. R. 1924 Mad 168.

It is said that in the case of the Palayee Kattalai which related to the feeding of Brahmins every day it is inconvenient to get money every day. We never said that the money should be taken every day. Money may be drawn from the Treasurer once a fortnight or a month or in some other way as the Board of Control and the Kattalaidar may agree. There is nothing in the scheme precluding such an arrangement between the parties, but it is clear that all the income must be handed over to the Treasurer and afterwards taken back as occasions arise. The contention raised on behalf of the Ardhajama Kattalai that subject to certain duties in connection with the temple the endowments are to be treated as the property of the Kattalaidar comes too late. The whole suit proceeded on the footing that all the Kattalais are appendages to the temple. They are independent only in the sense that the individuality of the trustees should be kept up and each Kattalaidar is a separate trustee, but there is no question of private ownership. It was never argued in the main case and the Subordinate Judge who tried the suit decided against the Ardhajama Kattalaidar. It is too late to repeat it now.

We allow the appeal and reversing the order of the Subordinate Judge direct that the respondents should submit complete budgets of their receipts and expenditure and also deliver all the income to the Treasurer. The respondents will pay the costs of the appellant both here and in the Court below including the Court-fees now directed to be paid by the appellant.

The appellant will pay the Court-fees within a fortnight.

Cornish, J.—I agree, and will add a few words only on the point whether the decree is executable.

It appears to me that the question whether a decree framing a scheme for a charitable trust is executable or not must depend on the language and on the scope of the decree or of that particular part of the decree in respect of which the question arises. From the nature of the case such a decree may in part be declaratory and in part directory. It may provide a specific procedure for carrying out particular provisions of the scheme, and yet leave other provisions of the scheme enforceable by execution. See *Damodarbhut v. Bhogilal* (7). The view expressed in *Ranganatha*

Thathachariar v. Krishnaswami Thathachariar (2) that when once the Court has passed a decree framing a scheme the decree becomes non-executable must, I think, be taken as intended to refer to the particular question which arose out of the scheme which the Court had to consider in that case. There certainly appears to be no justification for accepting that view as a rule of general application. In the case which is now before us the question is whether cls. 8 and 13 of the scheme decree are executable. I think it clear as a matter of construction that these clauses are not merely declaratory. They are directory. They direct particular acts to be done by the Kattailaidar and these directions obviously involve the consequential right on the part of the Board of Control to have the performance of the particular acts enforced. Then, does the scheme, either in terms or by implication exclude the right of the Board of Control to enforce these directions by execution of the decree. The only provision in the scheme which bears on this question is cl. 27 which enables any of the parties or the Board of Control to apply to the Court for modification of the scheme. But cl. 27 has no application to the particular question before us. A modification of the scheme which means an alteration of the rules or directions would certainly not be an appropriate or an effective remedy for the non-compliance with the directions in cls. 8 and 13. It appears to me that execution of the scheme decree is the proper remedy. Authority for this conclusion is to be found in *Damodarbhat v. Bhogilal* (7) and *Prayag Dass Ji Varu v. Tirumala Sriranga Charlavaru* (11).

But then it has been said that since the Privy Council decision in the Dakore Temple case *Sevak Jeranchood Bhogilal v. Dakore Temple Committee* (1) the rulings in *Damodarbhat v. Bhogilal* (7) and *Prayag Das Ji Varu v. Tirumala Srirangacharlavaru* (11) can no longer be considered as good law [See *Sivan Pillai v. Venkateswara Iyer* (4), *Ryali Brahmayya v. Venkataswarya Narayanamurthy* (6) and *Majeti Antayya v. Lingambhotla Venkataramayya* (9)]. I am unable to find in the Privy Council judgment any ground for that conclusion. The Privy Council as I read the judgment decided no more than the question which was before

it, namely, that, cl. 20 of the particular scheme having defined the procedure for modifying or altering the scheme the Court had no jurisdiction to modify or alter the scheme except by the prescribed procedure. Their Lordships confined themselves to that question and nowhere in the judgment is there any discussion of the proposition that directions in a scheme decree are in no circumstances executable.

It is not however, necessary to dispose of the case on this ground. I think that having regard to the contention that has been raised by the Kattalaidars on the constructions of the scheme, a more satisfactory way is to proceed under s. 47 (1) of the Civil Procedure Code. I agree with the order proposed by my brother.

V. N. V.

A. N. A.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL SUIT No. 257 OF 1921.

October 12, 1926.

Present:—Sir Victor Murray Coutts Trotter, Kt., Chief Justice, and Mr. Justice Ramiesam.

KRUTTIVENTI SURAPPA (DEAD) AND

OTHERS—PLAINTIFFS—APPELLANTS

versus

KRUTTIVENTI SUNDARAMMA AND

OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Deed of affiliation—Construction—Practice—Suit to declare adoption void and alienations not binding—Consideration partly used for discharge of binding debts—Equitable relief for refund of binding portion of consideration, whether can be granted.

A person purporting to affiliate a son executed in his favour a document which provided: "further you, becoming a son to me, will be such an owner of all my properties as a son is," and there were no other words of disposition to make a deed of gift or Will. A reversioner sued after the death of the executant for a declaration that the said affiliated son was not entitled to the rights of an adopted son and that alienations made by him were not binding beyond the lifetime of the widow:

Held, (1) that the document, not being a Will or gift did not operate to transfer any interest in favour of the affiliated son; [p. 142, col. 2.]

(2) that having regard to the frame of the suit and the relief prayed for, no directions could be given to the plaintiff to pay the binding portion of the considerations for the alienations since it was impossible to determine in the suit what the equities were between the parties. [p. 144, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Masulipatam, dated the 15th November, 1920, in O. S. No. 28 of 1919 (O. S. No. 8 of 1919 on the file of the District Court, Kistna).

Mr. S. Srinivasa Iyer, for the Appellants.
Mr. P. Somasundarama, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by a reversioner for declaring that the alleged adoption of the 2nd defendant is not true and valid and that his alienations are not binding on him beyond the lifetime of the 1st defendant. The last male owner Krishna Rao, died on 20th April, 1913. The 1st defendant is his widow. Before Krishna Rao's death, he executed Ex. I (dated 16th December, 1912) described in the Court below as an affiliation deed. The Subordinate Judge held that Ex. I operates as an affiliation deed and dismissed the suit. The plaintiff appeals.

If the 2nd defendant had not been validly adopted, he can succeed only on the footing that Ex. I was a gift or settlement or a Will. The Subordinate Judge says "a Hindu can affiliate a son instead of actually adopting him, and give him his properties. It is, no doubt, true that unlike an adoption, mere affiliation will not create a right in the person affiliated to the properties of the person who affiliates. But in Ex. I we see words distinctly indicating the transfer of Krishnan's properties to the 2nd defendant."

We have, therefore, to see if it purports to be a transfer of the property *inter vivos* (by way of gift or settlement). The last sentence of the document (which is in Telugu), if properly translated, runs thus:—"further, you, becoming a son to me, will be such an owner of all my properties as a son is." This certainly cannot amount to a gift or transfer of all Krishna Rao's properties. At best, it contemplates that the 2nd defendant should be associated with him as a joint owner on the footing that both are members of a joint family. In the absence of an adoption, they cannot be members of a joint family but may become tenants in common, i. e., the document might be a gift of an undivided half of the properties of Krishna Rao if there are appropriate words indicating gift. It is clearly not a Will of the whole or half of his properties. There is no reference of any kind to Krishna Rao's death. In this respect, this case is a stronger case than that in *Tirugnanapal v. Ponnammal Nadathi* (1), where the document was styled a Will, and referred to the executant's death. These circumstances are absent in this docu-

ment which was also stamped with a ten-rupee stamp. It was not stamped as a gift-deed. It was registered in Book IV and not in Book I. There are no words of gift or transfer in it. The executant was merely stating the legal consequences of adoption and what the rights of the 2nd defendant as adopted son, as he believed him to be, were. The document is merely an adoption deed. This is the view of the Subordinate Judge. In this view, viz., that it is neither a Will nor a document, transferring the property it seems to me to be unnecessary to discuss the cases relied on by the respondent. They are cases of Wills which operate to transfer the properties of the testator after his death—the only point discussed being whether the legatee takes as *persona designata* or whether he should fill the character of an adopted or *aurasa* son, as a condition precedent to his taking as a legatee [see *Nidhoomoni Debya v. Saroda Pershad Mookerjee* (2), *Subbarayar v. Subbammal* (3), *Rama Krishna Rao v. Court of Wards* (4), *Khub Singh v. Ramji Lal* (5) case of gift and Will, and *Bai Dhondubai v. Laxmanrao Trimbakrao Javodekar* (6)]. We have, in this case, neither a Will nor a transfer *inter vivos*. In this view, it is unnecessary to discuss the cases relating to the validity or effect of a document where it is wrongly registered in one book instead of another. In this case, there is no such question. It was an adoption deed and it was correctly registered in Book IV. I do not mean to say that registration throws light either on the intention of Krishna Rao or on the construction of the document.

It follows that Ex. I cannot help the 2nd defendant. The only other ground on which the 2nd defendant can succeed is that he was adopted. This was the subject of issue No. 4. The Subordinate Judge states that no evidence was adduced by the defendants on this issue. Paragraph 5 of the 2nd defendant's written statement seems to disclose a suspicious consciousness that the adoption is not valid for some reason not disclosed. Lest the Subordinate Judge by

(2) 3 I. A. 253; 26 W. R. 91; 3 Sar. P. C. J. 653; 3 Suth. P. O. J. 338; Bald. 78.

(3) 24 M. 214; 27 I. A. 162; 4 O. W. N. 805; 2 Bom. L. R. 982; 7 Sar. P. C. J. 782 (P. C.).

(4) 22 M. 383; 1 Bom. L. R. 277; 3 O. W. N. 415; 26 I. A. 83; 7 Sar. P. O. J. 481; 9 M. L. J. Sup. 1; 8 Ind. Dec. (N. S.) 276 (P. O.).

(5) 52 Ind. Cas. 311; 41 A. 666; 17 A. L. J. 853.

(6) 68 Ind. Cas. 504; 47 B. 65; 24 Bom. L. R. 794; 4, I. R. 1922 Bom. 352.

(1) 58 Ind. Cas. 228; 12 L. W. 660; (1920) M. W. N. 359; 28 M. L. T. 190; 25 O. W. N. 511 (P. O.).

a too favourable view on issue No. 6 induce the defendants not to call their witnesses on issue No. 4, we have given an opportunity to the 2nd defendant to state on affidavits what happened at the trial but, after taking time, he found himself unable to use the opportunity so given. The result is we are unable to help the 2nd defendant by allowing a further inquiry on issue No. 4.

The result is that the plaintiff must have the declaration he seeks as to the 2nd defendant's adoption or right to properties. Before the case can be finally disposed of, we have to call for findings, on 7th and 8th issues, which have not been disposed of. Time two months and one week for objections. Fresh evidence may be taken.

In compliance with the order contained in the above judgment the Subordinate Judge of Masulipatam submitted the following

FINDINGS.

Issue No. 7.—(1). Whether the plaintiff mentioned alienations are valid and binding on plaintiffs. No counter-evidence has been adduced on behalf of plaintiff to show that the debts were not real or were not binding on the estate of Krishna Rao. However, as the 2nd defendant had no manner of right of the properties, his alienations cannot be upheld.

Issue No. 8.—Whether the alienees or any of them are entitled to get any compensation for the improvements alleged to have been effected by them. The decisions quoted above also lay down that the alienees cannot claim the money paid by them for the alienations. Much less can they claim the value of the improvements effected by them. I find accordingly.

After receipt of the findings their Lordships delivered the following

JUDGMENT.—The Subordinate Judge has now returned findings on issues Nos. 7 and 8. On the 7th issue he finds that the alienations now in question, namely, the sale under Ex. 13, dated 26th April, 1924, the sale under Ex. 4, dated 8th September, 1914, and the mortgage under Ex. 12, dated the 26th April, 1916, are not valid and cannot bind the reversionary interest of the plaintiff. He found that they were all effected to discharge the debts contracted by the late Krishna Rao, but as they were effected by the 2nd defendant who has been found by us not to be the adopted son of Krishna Rao and, therefore, not entitled

to the properties of the late Krishna Rao, he held that the alienations are not binding on the plaintiff or other reversioners. On the 8th issue he found that they are not entitled to any improvements effected by them. The only point raised in appeal by the learned Vakil for the alienees is that though the alienations as alienations may not be binding on the plaintiff, still as the consideration was utilised for the purpose of discharging the debts of the late Krishna Rao the alienees are entitled to the return of the purchase-money on equitable grounds. Assuming that the defendants are entitled in equity to a return of the money paid by the alienees and utilised for the discharge of Krishna Rao's debts there are in this case great difficulties in the way of the application of any equitable doctrine in favour of the defendants' alienees. In the first place, the question arises, when are they entitled to the return of the purchase-money. If this suit is a suit for the recovery of the lands themselves one can understand that the refund of the amounts paid by the defendants' alienees and utilised for the discharge of Krishna Rao's debts should be made a condition precedent before the plaintiff can get a decree for the suit lands. But the suit is not for the recovery of possession. It is a suit merely for declaration that the alienations are not binding on the plaintiff after the death of Krishna Rao's widow, the first defendant. Neither the plaintiff nor the first defendant nor the 2nd defendant seeks to question the operation of the alienations during the lifetime of the 1st defendant. There is nothing to prevent the two sales under Exs. 13 and 4 from being given effect to during the lifetime of the 1st defendant and there is nothing to prevent the vendees under these sale-deeds from enjoying the properties sold until the 1st defendant's death; and if the vendees choose to continue in possession until the 1st defendant's death it cannot be said that there is a total failure of consideration for these sale-deeds. Any question of partial failure of consideration will arise only after the death of the 1st defendant. It may be that so far as any debts of Krishna Rao that were paid off by means of the amounts obtained by the sales under Exs. 13 and 4 are mortgage-debts, one might take the view that the alienees under Exs. 13 and 4 are subrogated to the rights of the mortgagees so paid off. For instance,

in the case of Ex. 13 out of the several debts of Krishna Rao for the payment for which the sale was effected the following, namely, (1) the debt payable to Gajjala Sree Rama Murthi Garu of Masulipatam and (2) the debt payable to Bhagavathula Achamma Garu, another resident of Masulipatam seem to be mortgage-debts, and it is possible to hold that the vendee, under Ex. 13 is subrogated to the rights of the mortgagees and assuming that the produce of the land he enjoys upto the death of the 1st defendant may be set off towards the interest due on the bonds he may be entitled to a refund of the principal amount and interest from the death of the 1st defendant before the reversioners can obtain possession. But where the debts are not charged debts the alienees have no right by way of subrogation to the amount of such debts. *Vide Ammani Ammal v. Ramaswami Naidu* (7), *Nathu v. Balwantrao* (8), *Tangya Fala v. Trimbak Daga* (9) and *Limaji Ravji Hajare v. Rahi Ravji Hajare* (10). It may be, he is entitled to recover the amounts from the 1st defendant, but it is difficult to see how he is entitled to any charge. Similarly in the case of Ex. 4 one of the items of consideration is the payment of a mortgage-debt dated 16th December, 1912, in favour of Chinna Achutharama Raju and others and similar remarks may apply to the vendee under Ex. 4 in respect of that mortgage. But as to the mortgagee under Ex. 12 no prior mortgage-debt was mentioned in Ex. 12. I do not see how the mortgagee is entitled to any rights by way of subrogation. It may be that there is another course open to the alienee under these three documents. Seeing that two of the documents are partially inoperative and the third perhaps wholly inoperative the alienees may sue the 2nd defendant for return of the amounts paid by them as on a failure of consideration, and it may be they will get effective decrees against the 2nd defendant or the 1st defendant or both of them in which case there can be no rights of subrogation to be worked

out after the death of the 1st defendant. Seeing that the 1st defendant's sympathies are with the 2nd defendant and that she herself recognises that the debts were such as she would have been bound to pay off, it may be that the alienees may be able to obtain fresh sale-deeds or mortgage deeds from the 1st defendant herself. We do not know what course the alienees may be advised to take and we do not know what they may succeed in obtaining from the 1st defendant during her lifetime, and from the 2nd defendant. Under these circumstances, it is impossible for us to attach any equitable conditions to the declaration granted to the plaintiff so as to provide for the situation that may arise hereafter on the 1st defendant's death. Any equities that may arise on the 1st defendant's death and that may remain undecided prior to that point of time will have to be dealt with when the plaintiff attempts to obtain possession of the properties from the vendees after the 1st defendant's death. So far as the mortgagee is concerned, we are not able to see that any such equities will exist. Under these circumstances, the finding of the Subordinate Judge must be accepted. The appeal will be allowed and there will be a decree in favour of the plaintiff declaring that the adoption of the 2nd defendant is not true, and valid, that the alienations under Exs. 12, 13 and 4 are not binding on the plaintiff and the question of any equities that may arise when the plaintiff seeks to obtain possession of the lands sold under Exs. 13 and 4 is left open. The plaintiff will have costs throughout.

V. N. V.

A. N. A.

Appeal allowed.

(7) 51 Ind. Cas. 57; 37 M. L. J. 113; 10 L. W. 75; (1919) M. W. N. 866.

(8) 27 B. 390; 5 Bom. L. R. 301.

(9) 35 Ind. Cas. 794; 40 B. 646; 18 Bom. L. R. 700.

(10) 88 Ind. Cas. 643; 49 B. 576; 27 Bom. L. R. 621; A. I. R. 1925 Bom. 499.

PATNA HIGH COURT.APPEAL FROM APPELLATE ORDER NO. 126
OF 1927.

November 22, 1927.

Present:—Mr. Justice Kulwant Sahay and
Mr. Justice Macpherson.RUP NATH MANDAL—JUDGMENT-DEBTOR
—APPELLANT

versus

JAGANNATH MANDAL—DECREE-HOLDER
—RESPONDENT.*Chota Nagpur Tenancy Act (VI of 1908 B. C.), s. 47*
—Raiyati holding—Exemption from sale—Mortgage-decree directing sale, effect of—Executing Court, whether can go behind decree—Public policy.The right of a *raiya*t in his holding cannot be sold in execution even though the decree under execution is a mortgage-decree directing the sale of the land in question. [p. 145, col. 2.]Although the general rule is that a Court executing a decree cannot go behind the decree and examine the correctness or legality thereof, yet it is bound to give effect to a provision of law, such as s. 47 of the Chota Nagpur Tenancy Act, which goes clearly to show that even if there is a decree such a decree cannot be executed. [*ibid.*]*Jadhu Mahto v. Kali Prasonno Bhattacharjee* (2), distinguished and doubted.Once it is found that the lands sought to be sold form a *raiya*t holding, whether the judgment-debtor took the objection or not, the sale of such a holding cannot take place in the face of the clear provisions of s. 47 of the Chota Nagpur Tenancy Act. [p. 146, col. 2; p. 147, col. 1.]Per Macpherson, J.—The provision prohibiting the sale of the right of a *raiya*t in his holding in execution of a decree or order is eminently one of public policy, and it has consistently been held not only that the objection that land sought to be sold was a *raiya*t holding, or part thereof, could be taken in execution proceedings, but that the provision imposed upon the Executing Court itself the duty of seeing that no sale contravening it takes place. [p. 147, col. 2.]

Appeal from an order of the Subordinate Judge, Manbhum, dated the 14th of March, 1927, reversing that of the Munsif, Dhanbad, dated the 14th July, 1926.

Mr. Narendra Nath Roy, for the Appellant.

Mr. S. C. Mazumdar, for the Respondent.

JUDGMENT.—This is an appeal by the judgment-debtor whose objection to the execution of a mortgage decree by sale of the mortgaged property was allowed by the Munsif but has been disallowed on appeal by the Subordinate Judge. The respondent obtained the decree under execution which directed the sale of the lands as being in possession of the appellant within the *mauza* in which he was a co-sharer in 4-annas *mokarrari* interest. The objection of the appellant was that thelands sought to be sold were his *raiya*t lands and the sale of the right of a *raiya*t in his holding was expressly prohibited by s. 47 of the Chota Nagpur Tenancy Act.The learned Munsif found that the status of the appellant was that of a *raiya*t. The survey *khatian* supported the appellant's contention, and no evidence was adduced by the decree-holder-respondent to show that the Record of Rights was incorrect. Upon the finding that the land sought to be sold was the *raiya*t holding of the appellant the learned Munsif held that the appellant's right as a *raiya*t could not be sold in execution of the decree. The learned Subordinate Judge on appeal has not displaced the finding of the Munsif that the land was really the *raiya*t holding of the appellant, but he has held that the decree under execution being a mortgage decree directing the sale of the land in question the Executing Court could not go behind the said decree and refuse to execute the same.In this, I am of opinion, that the learned Subordinate Judge was clearly wrong. Section 47 of the Chota Nagpur Tenancy Act provides that no decree or order shall be passed by any Court for the sale of the right of a *raiya*t in his holding, nor shall any such right be sold in execution of any decree or order. Then follow certain exceptions which do not apply to the present case. The second part of s. 47 expressly forbids the sale of the right of a *raiya*t in his holding in execution of any decree, and the fact that the decree under execution is a mortgage decree directing the sale of the land in question does not in any way affect the provisions of s. 47 of the Act. The learned Subordinate Judge relied upon the observations of Mullick, J., in *Amrit Lal Seal v. Jagat Chandra Thakur* (1) but that was a case under the Sonthal Parganas Settlement Regulation (III of 1872), and the provisions of s. 27 of that Regulation are quite different from the provisions of s. 47 of the Chota Nagpur Tenancy Act. It is true that there are certain observations in the judgment in that case which would go to support the contention of the respondent that once a decree has been passed by a Court of competent jurisdiction, although the decree

• (1) 93 Ind. Cas. 935; 7 P. L. T. 462; 4 Pat. 696; A. I. R. 1926 Pat. 202.

itself might be erroneous in law, the Court executing the decree has no power to go behind the decree and refuse to execute it. There are, however, observations in the same judgment to the effect that if there is a statutory bar to the execution of the decree the decree cannot be executed. It is no doubt the general rule that a Court executing a decree cannot go behind the decree and examine the correctness or the legality thereof but the provisions of s. 47 of the Chota Nagpur Tenancy Act go clearly to show that even if there is a decree for sale of the right of a *raiya* in his holding such a decree cannot be executed. There is nothing in s. 47 which would make an exception in the case of a mortgage decree directing the sale of the property. The section clearly provides that the right of a *raiya* cannot be sold in execution of any decree. The point was directly raised in this Court in *Jadhu Mahto v. Kali Prasonno Bhattacharjee* (2). There also a mortgage decree had been passed directing the sale of a *raiya* holding and the objection was taken by the judgment-debtor to the execution of the decree on the ground that the sale was prohibited by s. 47 of the Act, and this Court held that the second portion of the provisions of s. 47 applied to the case and that it was the duty of the Court executing the decree to consider whether the sale of the property was forbidden by that section. Reference was made in that case to the decision of the Calcutta High Court in *Lakshmi Bibi Kujrani v. Atal Behari Haldar* (3), where it was held that the sale of a *raiya* holding was indirect contravention of the provisions of s. 47 of the Chota Nagpur Tenancy Act. In that case the preliminary decree in the mortgage suit was passed before the Chota Nagpur Tenancy Act was extended to Manbhumi where the mortgage property was situate and it is contended that the learned Judges were wrong in holding that although the mortgage was created and the decree was passed before the Chota Nagpur Tenancy Act was extended to Manbhumi still s. 47 of the Act operated as a bar. That is a point which does not arise here, but the decision that s. 47 applies and prohibits

the sale of a *raiya* holding in execution of a mortgage decree was, in my opinion, correct and was accepted as such by this Court in the case of *Jadhu Mahto v. Kali Prasonno Bhattacharjee* (2). I am, therefore, of opinion that the lands in dispute being a *raiya* holding cannot be sold in execution of the decree in question.

It is next contended on behalf of the respondent that the decree directed the lands to be sold as the 4 annas *mokarrari* interest of the judgment-debtor and that it was not open to the judgment-debtor to raise the question in the execution proceedings that the lands in question formed his *raiya* holding and were not his *mokarrari* lands. The decree, however, does not describe the lands as *mokarrari* lands of the judgment-debtor but as being in possession of the judgment-debtor who was a co-sharer in 4 annas *mokarrari* interest in that village, and it was, therefore, open to the judgment-debtor to show in the present proceedings that the lands were his *raiya* holding. It is further contended on behalf of the respondent that the objection as regards the nature of the lands, viz., whether they formed the *raiya* holding or the *mokarrari* interest of the defendant might and ought to have been raised in the mortgage suit, and the decree in the mortgage suit must be taken to have decided that the lands did not form the *raiya* holding and were, therefore, saleable. In the first place, a copy of the judgment passed in the mortgage suit has not been produced and we are not in a position to say whether the question was raised and decided or not. In the next place, there is nothing in the decree which is on the record to show that the Court held the lands in dispute to be the *mokarrari* interest of the judgment-debtor. As I have said above, the description of the mortgaged property does not go to show that it was the *mokarrari* land, it simply says that the land was comprised within the 4-annas *mokarrari* interest in which the judgment-debtor was a co-sharer. The fact that the judgment-debtor did not raise the question in the mortgage suit which he might and ought to have raised does not, in my opinion, operate as an estoppel in the present case inasmuch as there can be no estoppel against the Statute. The law prohibits the sale of a *raiya* holding, and once it is found that the lands in dispute do form the *raiya* holding, whether the judgment-debtor took

(2) 34 Ind. Cas. 733; 1 P. L. J. 33; 3 P. L. W. 390.

(3) 21 Ind. Cas. 117; 40 C. 534.

the objection or not, the sale of such a holding cannot take place in the face of the clear provisions of s. 47 of the Chota Nagpur Tenancy Act.

I am, therefore, of opinion that the objection of the judgment-debtor-appellant must prevail. The order of the learned Subordinate Judge must be set aside and that of the Munsif restored. The appeal is, therefore, decreed with costs throughout.

Macpherson, J.—I agree. The question is whether when a mortgage decree directs certain lands to be sold, the objection can be taken in the execution proceedings that the lands are *raiya*ti and, therefore, by reason of the provisions of s. 47 of the Chota Nagpur Tenancy Act, 1903, must not be sold in execution of the decree.

The Munsif answered the question in the affirmative but in appeal the Subordinate Judge relying on certain observations in *Amrit Lal Seal v. Jagat Chandra Thakur* (1) disallowed the objection of the *raiya*ti on the ground that the Executing Court cannot go behind the decree, especially as that decree does not describe the four plots in controversy as *raiya*ti and, therefore, does not appear to be illegal on the face of it.

Both on precedent and on principle the question must be answered in the affirmative. There is ample direct authority on the point, while the ruling cited by the lower Appellate Court which relates to s. 27 of the Santhal Parganas Settlement Regulation, 1872, is at best remotely relevant. No doubt s. 46 (1) of the Chota Nagpur Tenancy Act is based on cl. (1) of that provision, s. 46 (3) is s. 27 (2) and s. 46 (4) is a modified form of s. 27 (4). But in the Chota Nagpur Tenancy Act the Legislature went further and enacted in s. 47 (with provisos not here relevant) that "no decree or order shall be passed by any Court for the sale of the right of a *raiya*ti in his holding, nor shall any such right be sold in execution of any decree or order."

Section 47 has no counterpart in the Regulation of 1872, and accordingly the decision cited does not bear on the provision now under consideration or on anything similar. Apart from that, the decision itself, in my opinion, may, when an appropriate case arises, require further examination. *Inter alia*, the observations in respect of the words "any Court" in cl. (2) seem

to be of doubtful correctness having regard to the wide terms of that provision and the manifest public policy underlying the whole provision.

The provision prohibiting the sale of the right of a *raiya*ti in his holding in execution of a decree or order is eminently one of public policy, and from the time when in 1903 it was first introduced into Bengal Act I of 1879 as s. 10-A, it has consistently been held not only that the objection that land sought to be sold was a *raiya*ti holding or part thereof, could be taken in execution proceedings, but that the provision imposed upon the Executing Court itself the duty of seeing that no sale contravening it takes place. Section 47 was in several aspects the subject of controversy in Manbhum (in which this litigation arose) after the extension of Act VI of 1908, to that District in 1909. In *Babulal Chaudhury v. Ganesh Mandal* it was held by the District Judge in appeal that a mortgage decree could not be passed on a mortgage of *raiya*ti land in 1904, as s. 47 was a prohibition on the Court imposed by the Legislature on the ground of public policy. The Second Appeal No. 1859 of 1912 against that decision was summarily dismissed by Chitty and Teunon, JJ., on the 29th November, 1912. In January, 1913, the same learned Judges decided in *Lakshmi Bibi Kujrani v. Atal Behari Haldar* (3) which had been admitted prior to the presentation of Second Appeal No. 1859 of 1912, that a sale in execution of a mortgage decree directing the mortgaged *raiya*ti holding to be sold was in direct contravention of s. 47. In that case the preliminary decree for the sale of the *raiya*ti holding was passed before and the final decree after the extension of the Act. In execution proceedings the judgment-debtor relied upon s. 47 but his objection was rejected, the local Courts being of opinion that s. 47 did not govern sales on mortgages of date prior to the extension of the Act to Manbhum, and the judgment-debtor preferred a second appeal. The sale in execution was held during the pendency of the first appeal and confirmed while the second appeal was pending. The High Court held:—

"The provisions of s. 47 of the Chota Nagpur Tenancy Act put the matter beyond doubt. That section provides, subject to the three provisos which do not affect the present case, that no decree or

order shall be passed by any Court for the sale of the right of a *raiyat* in his holding, nor shall any such right be sold in execution of any decree or order. The final decree which was passed on the extension of the Act ought not to have been passed; but, putting that aside, it is clear that the second portion of the section applies to this case, and prevents any such right being sold in execution of any decree or order."

In that case the learned Judges manifestly went beyond what is necessary for the purposes of this litigation, in which the question of retrospective operation does not arise.

They held further that the sale being in direct contravention of the provisions of s. 47 all the proceedings including the sale which had taken place in consequence of the orders of the Subordinate Courts, should be set aside.

The matter was considered in the Patna High Court in the case of *Jadhu Mahto v. Kali Prasonno Bhattacharjee* (2). In that case the defendant objected in execution that the mortgaged properties were *raiyati* holdings and could not be sold. The learned Judges observed as follows:

"It was contended before us that the objection to the sale had been taken too late and that if the appellant desired to raise this objection he should have done so before the decree was passed. In the case of *Lakshmi Bibi Kujrani v. Atal Behari Halder* (3), it was decided that an objection of this kind might be taken after the passing of the decree for sale on a mortgage. We are of the same opinion. Section 47 of the Chota Nagpur Tenancy Act provides that no decree or order shall be passed by any Court for the sale of the right of a *raiyat* in his holding, nor shall any such right be sold in execution of any decree or order. It appears to us that the second portion of this provision applies to the present case and that it was the duty of the Court executing the decree to consider whether the sale of the property was forbidden by the section".

Certainly s. 47 of Act VI of 1908 is itself clear and emphatic in its terms. The Legislature is insistent that no *raiyati* holding shall be sold. It may well be that the statutory prohibition on every Court contained in the first sentence of s. 47 against decreeing or ordering the sale of a *raiyat's* right in his holding, may alone be sufficient

prohibition on a Court to sell such a right in execution of such a decree or order but the Legislature was taking no risks. It, therefore, imposed a double guard: not only may any Court not pass a decree or order for the sale of a *raiyati* right, but no such right shall be sold in execution of any decree or order. In short the Legislature modified the ordinary principle that an Executing Court should not go behind the decree. To avoid what it judged to be the greater evil of selling a *raiyati* holding in Chota Nagpur in execution of a decree or order passed, perhaps *per incuriam* or, perhaps as so often happens, through collusion of parties (the Munsif in this case states "It is common knowledge that in these parts transfers are frequently effected by false recitals in deeds of conveyance to the knowledge of both parties") or as in mortgage decrees, under the principle of estoppel; the Legislature was prepared to face the not inconsiderable but still far less evil of interference with the ordinary legal principle that an Executing Court should not go behind the decree.

Accordingly it is altogether illegal to sell a *raiyati* right in land even in execution of a decree or order directing such sale. Not only may an objection be taken in execution that the land sought to be sold is not saleable, but it is incumbent on the Court itself to use every endeavour to prevent abuse of its process in covert attempts to defeat or contravene the law prohibiting the sale of holdings in Chota Nagpur.

B. K. P.

A. N. A.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 335 of 1925.

November 2, 1927.

Present :—Mr. Justice Das and

Mr. Justice Wort.

SHOUKHI SAO—PLAINTIFF

—APPELLANT

versus

GAIBI SAO AND OTHERS—DEFENDANTS—**RESPONDENTS.**

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Code not exhaustive—Court trying former suit incompetent to try later suit—Doctrine, whether applicable—Transfer of Property Act (IV of 1882), s. 45—Joint purchase—Presumption of equality of shares.

Although the principle of *res judicata* is of general application and is not limited by the specific words of the Civil Procedure Code, the doctrine cannot be applied where the Court which decided the earlier proceeding was not competent to try the later proceeding. [p. 149, col. 2.]

George Henry Hook v. Administrator-General of Bengal (1) and *Ramachandra Rao v. Ramachandra Rao* (2), referred to and discussed.

In the case of a joint purchase by two or more persons there is a presumption, in the absence of specification of the shares, that the purchasers had equal shares. [*ibid.*]

Appeal from a decision of the District Judge, Monghyr, dated the 22nd December, 1924, confirming that of the Subordinate Judge, Monghyr, dated the 19th June, 1924.

Messrs. A. B. Mukharji and Upendra Nath Banarji, for the Appellant.

Mr. Sambhu Saran, for the Respondents.

JUDGMENT.

Das, J.—This appeal arises out of a suit for partition and the only question is what is the share of the plaintiff in the disputed properties. It is the common case that the properties in question were purchased by the plaintiff and the defendant jointly and that the *kabala* by which they made the purchase does not contain any specification of shares. It appears that the plaintiff subsequently demised his share of the properties to the defendant. A suit for rent was brought by the plaintiff against the defendant, and in that suit an issue was raised as to what were the shares of the parties in the disputed properties. The plaintiff claimed that he had a 12 anna interest in the properties and the Court in seisin of the rent suit decided the issue in favour of the plaintiff. The plaintiff in this litigation relies upon that decision and contends that he is entitled to a 12-anna share in the disputed properties. The learned

District Judge has held that the decision in the rent suit does not operate as *res judicata* between the parties. Examining the evidence he finds that there is no sufficient evidence either on the side of the plaintiff or on that of the defendant to establish what were the shares of the parties. He has come to the conclusion that in the absence of a specification of shares in the *kabala*, it must be assumed that each of the parties had a half share in the properties. In that view he has given the plaintiff a decree for 8 annas share of the properties.

The learned Government Pleader appearing on behalf of the appellant contends that the decision of the learned Munsif in the rent suit operates as *res judicata*. He concedes, however, that the learned Munsif had no pecuniary jurisdiction to decide the present suit. It is not disputed that if we were to decide this case on the terms of s. 11 of the Civil Procedure Code we must overrule the contention of the learned Government Pleader. But it is contended that the principle of *res judicata* is of general application and is not limited by the specific words of the Code in this respect. I entirely agree with this contention, but, in my opinion, in order to succeed it must be established by the appellant that the learned Munsif in seisin of the rent suit had jurisdiction to try the present suit between the parties.

Mr. Abani Bhusan Mukharji has referred us to three cases. The first is the case of *George Henry Hook v. Administrator General of Bengal* (1). The question in that case arose out of an administration suit which had been instituted in the Calcutta High Court. A certain issue was raised in that suit and it was decided by Chowdhury, J., in a particular way. The proceedings in which the decision now relied upon by Mr. Abani Bhusan Mukharji was pronounced were commenced later on by a petition in that very suit, and it was contended that that issue was wrongly decided and should have been decided in another way. Chowdhury, J., dealt with the matter and came to the conclusion that his former decision was perfectly correct. The case was carried to the Court of Appeal, and it was contended

(1) 60 Ind. Cas. 631; 48 C. 499; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 25 C. W. N. 915; 14 L. W. 221; 48 I. A. 187 (P. C.).

on behalf of the respondents that the decision of Chowdhury, J., in the suit operated as *res judicata* and that it was not competent to the appellant to reagitate the matter by another proceeding before him. The contention was disallowed and the matter was carried to the Privy Council.

Now the objection as to *res judicata* was based on the view that there were not two suits before the Court, and reliance was placed upon the terms of s. 11 of the Civil Procedure Code. It was pointed out by the Judicial Committee that the plea of *res judicata* remained apart from the limited provisions of the Code and that the binding force of such judgment in such a case depends not upon s. 11 of the Code but upon general principles of law. But it is to be pointed out that the learned Judge who decided the matter in the first instance was perfectly competent to deal with the question in the form in which it was raised subsequently before him. The other decision of the Judicial Committee to which we have been referred is that of *Ramachandra Rao v. Ramachandra Rao* (2). In that case there were certain Land Acquisition proceedings and a question arose as to who was entitled to withdraw the money. The Land Acquisition Deputy Collector being unable to decide the question of title referred it to the principal Civil Court, that is to say to the Court of the District Judge. The District Judge decided the question of title. The matter went to the Madras High Court and the question was again decided by the Madras High Court. Thereupon a civil suit was instituted which raised the very question which had once been decided by the Madras High Court and it was contended that the decision in the first mentioned suit did not operate as *res judicata* inasmuch as that decision was pronounced not in a suit but in a proceeding under the Land Acquisition Act. It is important to remember that the contention was again founded upon the terms of s. 11 of the Civil Procedure Code, and the Judicial Committee had no difficulty in pointing out that that contention could not prevail. But in giving effect to the plea, of *res judicata* Lord Buckmaster was careful

to point out that the Court in seisin of the earlier proceeding had complete jurisdiction to try the second case. That appears to me to be the foundation of the principle upon which the doctrine of *res judicata* rests. In order to succeed it has to be established that the decision claimed to operate as *res judicata* was pronounced by a Court competent to try the later proceeding. Now in this case it is admitted that the learned Munsif was not competent to try the present suit. That being the position the learned District Judge was right in overruling the plea of *res judicata*.

It was next contended that although the decision in the earlier suit does not operate as *res judicata*, still it is a strong piece of evidence and the learned District Judge should have called upon the plaintiff to give evidence in support of his case. But the learned District Judge has actually dealt with the decision in the rent suit. He points out that that decision was based entirely on a particular *vakalatnamah* which was produced and on the evidence of a Pleader. He dealt with the *vakalatnamah* and the evidence of the Pleader exhaustively in his judgment and came to the conclusion that those two items of evidence are not sufficient to turn the scale in favour of the plaintiff.

The only other point that was urged before us is that there is no specification of shares in the *kabala* and that there is no presumption that the parties had equal shares. I am unable to agree with this contention. The authorities are unanimous on this point and I entirely agree with the view of the learned District Judge.

This appeal must be dismissed with costs.

Wort, J.—I agree.

P. K. P.

A. N. A.

Appeal dismissed.

(2) 67 Ind. Cas. 408; 45 M. 320; 30 M. L. T. 154; 26 O. W. N. 713; 35 O. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; 20 A. L. J. 684; 43 M. L. J. 78; 24 Bom. L. R. 963; A. I. R. 1922 P. C. 80; 49 I. A. 129 (P. C.).

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 952
OF 1924.

November 17, 1927.

Present:—Mr. Justice Kulwant Sahay and
Mr. Justice Macpherson.

SURAJ BALLI SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS.

versus

TILAKDHARI SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Adverse possession—Property acquired, whether stridhan.

The interest acquired by a Hindu widow by adverse possession would be her *stridhan* and would not be an accretion to her husband's estate, unless it is shown that she took adverse possession as representing her husband's estate. [p. 152, col. 1.]

Jagmohan Singh v. Prayag Narayan Singh (2), followed.

Lajwanti v. Safa Chand (1), explained and distinguished.

Appeal from a decision of the Subordinate Judge, First Court, Muzafferpur, dated the 15th April, 1924, confirming that of the Munsif, Second Court, Muzafferpur, dated the 31st July, 1923.

Mr. S. K. Mitra, for the Appellant.

Messrs. N. N. Singh and B. P. Singh, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the plaintiffs who claim possession of certain properties as the reversionary heirs of one Ishar Dayal. The defendants first party took a conveyance of the property in dispute from *Musammam Hulasbati Kuer*, the widow of Ishar Dayal. It is contended on behalf of the plaintiffs that the property in dispute formed a part of the estate of Ishar Dayal, and as the conveyance was without any legal necessity, it was not binding on them and they are entitled to possession.

The defence was that the plaintiffs were not the reversionary heirs of Ishar Dayal, that the property in dispute did not belong to the estate of Ishar Dayal, that Ishar Dayal left a brother Gobind Singh who was joint with him, and that on the death of Ishar Dayal, Gobind took the entire share by survivorship, that on the death of Gobind, the widow of Ishar Dayal, took possession of the property although she had no right to do so, that the right of the reversioners arose immediately on the death of Gobind to take possession of the property, and as Gobind died more than 12 years before the date of the suit, the possession of the widow became adverse to the reversioners and

they could not claim possession of the property.

The trial Court found that the deed of sale by the widow of the defendants first party was for legal necessity and that the plaintiffs were estopped from disputing the validity of the sale. It accordingly dismissed the suit.

On appeal the learned Subordinate Judge was of opinion that it was not necessary to inquire as to whether the sale was for any legal and valid necessity. He referred to the fact that admittedly Gobind, who was according to the case of the plaintiffs, separate from Ishar Dayal, had an eight annas share in the property. He found that Gobind died sometime before 1894 and immediately on his death, *Musammam Hulasbati Kuer* took possession of Gobind's eight annas share and she got herself registered in the Land Registration Department. Her possession of Gobind's share became adverse to the rightful heirs of Gobind and such possession lasted for more than 12 years before the suit, and, therefore, Hulasbati had acquired a valid title by adverse possession so far as the eight annas share of Gobind was concerned. Therefore, as Hulasbati Kuer had an absolute interest and not merely a widow's estate in the eight annas which belonged to Gobind, the sale to the defendants first party of 1-anna 15-gundas was a valid sale because she had more than 1-anna 15-gundas in her absolute right in the village and it did not necessarily follow that this 1-anna 15-gundas came out of the estate of Ishar Dayal. The learned Subordinate Judge accordingly dismissed the appeal.

In this second appeal it is contended that, assuming that Hulasbati Kuer took the eight annas of Gobind by adverse possession and acquired an absolute estate, such acquisition of an absolute estate must be treated to be an accretion to her husband's estate, because it is contended that as a widow she could not, by adverse possession acquire any property for herself and whatever property she did acquire by adverse possession would be an acquisition to her husband's estate. Reference has, in this connection, been made to the decision of the Privy Council in *Lajwanti v. Safa Chand* (1). What was decided in that case

(1) 80 Ind. Cas. 788; 6 P. L. T. 1; 22 A. L. J. 304; A. I. R. 1924 P. C. 121; 5 Lah. 192; (1924) M. W. N. 442; 20 L. W. 10; 2 Pat. L. R. 245; 28 C. W. N. 960; 26 Bom. L. R. 1117; 47 M. L. J. 935; 51 I. A. 171; L. R. 5 A. (P. C.) 91 (P. C.).

was that "the Hindu widow is not a life-renter but has a widow's estate—that is to say a widow's estate in her deceased husband's estate. If possessing as a widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as *stridhan* but she makes them good to her husband's estate."

Now what their Lordships meant by this passage was that if the widow as representing her husband's estate, and she for certain purposes fully represents her husband's estates encroaches on certain property in her capacity of a widow and as representing her husband's estate, then the interest that she would acquire by adverse possession of such parcel of land would be an accretion to her husband's estate. Their Lordships did not say that the widow could not under any circumstance acquire any property for herself while holding her husband's estate. The decision of the Privy Council in *Lajwanti v. Safa Chand* (1) above cited was considered by a Division Bench of this Court in *Jagmohan Singh v. Prayag Narayan Singh* (2) and their Lordships there held that when a Hindu widow is in possession of any property by adverse possession, then the property would become her *stridhan*, and it was only if the property is held in possession by a Hindu widow claiming as the widow of her deceased husband, then the property becomes an accretion to her husband's estate. It is clear, therefore, that, unless it is shown that she took adverse possession of Gobind's share as representing her husband's estate, the interest she acquired by adverse possession would be her *stridhan* and would not be an accretion to her husband's estate. Here there is absolutely nothing to show that she took adverse possession of Gobind's share as representing her husband's estate. The learned Subordinate Judge was clearly right in holding that at the date of the conveyance to the defendants first party the widow had an absolute interest in an eight annas share and the sale of 1 anna 15 *gundas* to the defendants first party was a valid sale.

This appeal is dismissed with costs.

Macpherson, J.—I agree.

B. K. P.

A. N. A.

Appeal dismissed.

(2) 87 Ind. Cas. 473; 6 P. L. T. 206; (1925) Pat. 140;
3 Pat. L. R. 251; A. I. R. 1925 Pat. 523.

PATNA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 207
AND 237 OF 1926.

November 2, 1927.

Present :—Mr. Justice Kulwant Sahay and
Mr. Justice Macpherson.

Saiyid MUHAMMAD FARIDUDDIN

AHMAD—PLAINTIFF—APPELLANT

versus

Saiyid AHMAD ABDUL WAHAB—

DEFENDANT—RESPONDENT.

Guardians and Wards Act (VIII of 1890); ss. 34, 45 (1)
—*Jurisdiction of Court, whether limited to accounts*
exhibited—Power of Court to call upon guardian to
pay balance due on true account.

The power of a Court in dealing with accounts exhibited by a guardian, under s. 34 of the Guardians and Wards Act, is not limited to such balance as the guardian chooses to show therein. The Court has jurisdiction to call upon a guardian to pay into Court such sum as the Court may find to be due after a scrutiny of the accounts exhibited by him; and, if he fails to pay the balance due upon a true account, to deal with him under s. 45 of the Act. [p. 155, col. 1.]

Sita Ram v. Gobindi (2), followed.

Jagannath, Panja v. Mahesh Chandra Pal (1), dissented from.

Appeals from the orders of the District Judge, Patna, dated the 5th July and 26th August, 1926.

Messrs. L. N. Singh and Sarjoo Prasad,
for the Appellant.

Mr. Hasan Jan and Saiyid Izhar
Hussain, for the Respondent.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal on behalf of Saiyid Muhammad Fariduddin who was appointed by the District Judge of Patna to act as guardian of his minor children Azizuddin and Musammam Umatul Rasul under the Guardians and Wards Act. Musammam Umatul Rasul was married to the respondent Saiyid Ahmad Abdul Wahab in February, 1925, and in July, 1925, he made an application before the District Judge for removal of Fariduddin and for his own appointment as guardian of his wife and for examination of the accounts of Fariduddin. The learned District Judge appointed a Pleader Commissioner to examine and audit the accounts of the guardian for the period from 1918 up to 1925. The learned Commissioner examined the accounts in great detail and he reported that a sum of Rs. 2,326-11-2 ought to be the balance in the hand of the guardian on account of the minor Umatul Rasul. According to the account submitted by the guardian nothing was due to the estate of the minor.

Objections were taken to the report by the guardian as well as by Abdul Wahab and the learned District Judge, after consideration of the objections on both sides and after scrutiny of the accounts, has held that a sum of Rs. 4,434-4-7 is due to the estate of the minor Umatul Rasul from the guardian and he ordered that the guardian Fariduddin do deposit in Court the sum of Rs. 4,434-4-7 within one month to be placed in deposit in a Bank to the credit of the minor. Appeal No. 207 of 1926 is directed against this order of the District Judge which is dated the 5th July, 1926.

The guardian failed to deposit the amount in Court as directed and the learned District Judge by his order dated the 26th August, 1926, imposed a fine of Rs. 100 upon the guardian and observed that if the fine and the balance found due be not deposited within ten days the question of a daily fine will be considered. Appeal No. 237 of 1926 is directed against this order of the District Judge imposing the fine.

Mr. Lakshmi Narayan Singh on behalf of the appellant has taken us through the whole of the accounts and we have been referred to the report of the Commissioner on most of the items attacked by him.

The first item consists of the marriage expenses of the minor. The learned District Judge has wholly disallowed the marriage expenses. The Commissioner was also of opinion that nothing should be allowed to the guardian on account of the marriage expenses. The case of the appellant is that he spent a sum of Rs. 5,766 and odd over the marriage of his minor girl. The learned District Judge points out that the proper course which ought to have been taken by the guardian was to have applied to the Court for sanction before incurring the expenses relating to the marriage. That would no doubt have been the proper course. The Commissioner although he disallowed the item relating to the marriage expenses, found that the account as given by the guardian relating to the marriage expenses was correct so far as the amount of expenditure incurred was concerned. The amount, however, is certainly very excessive. In my opinion a reasonable amount ought to be allowed as the marriage expenses of the minor. Mr. Haasan Jan with his usual fairness has conceded that Rs. 750 would be a reasonable sum to allow for marriage expenses. It appears, however, from the ac-

counts that a sum of Rs. 245-12-0 had been received by the guardian as *salami* or presents at the time of the marriage and the Commissioner observes that this was by way of an aid as was the custom among Muhammadans towards the expenses of the marriage. The Commissioner did not allow the sum of Rs. 245-12-0 to be credited to the account of the minor as he had disallowed the entire marriage expenses. When it is found that Rs. 245-12-0 had been received by the guardian towards the expenses of the marriage this sum ought to be deducted from the sum of Rs. 750 which we consider to be a reasonable sum to allow for marriage expenses. The result is that a sum of Rs. 504 4 0 will be allowed for marriage expenses after deducting the money received as *salami*.

The next item relates to the items covered by certain mortgages. It appears that the guardian raised a certain sum of money by mortgaging the property of the minor. The mortgages were effected without the sanction of the Court, and in one case in spite of the express order of the Court refusing sanction. The Commissioner refused to credit the estate of the minor with the sum raised by the guardian on mortgage of the minor's property. The learned District Judge, however, although he found that the mortgages were invalid inasmuch as they had been effected without the sanction of the Court yet directed that the money that was received by the mortgage ought to be credited to the minor. He, therefore, directed that a sum of Rs. 1,100 which was the share of the minor be credited to the minor. Both parties here agree that this sum ought not to be credited to the minor. The mortgages are invalid so far as the minor was concerned. I do not see how the money raised under the mortgages could be credited to the minor without the minor being made liable for it. The proposal of both parties is that this sum should be excluded. I would, therefore, direct that the sum of Rs. 1,100 be excluded altogether.

The next item is the salary of a cook employed in the family. Expenditure on account of the cook for the years under account comes up to Rs. 604-11-9. The Commissioner allowed a sum representing the salary of the cook at the rate of Rs. 24 a year and a certain sum on account of the food expenses. The learned District Judge has disallowed the whole amount. It is conceded on behalf of the respondent

that a quarter of the amount ought to be allowed to the guardian. Credit will, therefore, be given to the guardian for one-fourth of Rs. 604-11-9 on account of the cook.

The next item relates to the expenses for clothes and shoes supplied to the minor during the years under account. The Commissioner allowed Rs. 375 on this account. In his petition of objection before the District Judge the respondent objected to an item of Rs. 151-9-6 and the learned District Judge has disallowed this amount. The Commissioner went into the matter very carefully and if an extra piece of cloth or a fancy *sari* was supplied to the minor during the period under account there is no reason why this amount should not be allowed to the guardian. In my opinion the entire amount of Rs. 151-9-6 deducted on account of the expenses for clothes and shoes should be allowed to the guardian.

The next item relates to the expenses of the *nikah* ceremony. The Commissioner allowed a sum of Rs. 373 on this account. The learned District Judge has disallowed this amount wholly. Mr. Hasan Jan concedes that a reasonable amount ought to be allowed for the *nikah* ceremony and we fix a sum of Rs. 50 as the proper amount which ought to be allowed for the *nikah*.

It appears that a *Moghani* was engaged as a tutoress to the girl and the Commissioner allowed Rs. 120 as her salary. The learned District Judge had disallowed this amount but has given no reasons for disallowing it. It is not stated that the *Moghani* was not engaged at all. It is found that the girl was an accomplished girl and a tutoress must have been engaged for her. I am of opinion that the amount should be allowed.

The other items relate to the repair of houses, village expenses, cost of foodstuffs, tailoring charges and medicine. No objection appears to have been taken on this account before the District Judge. The learned Commissioner very carefully considered these items and we are not inclined to interfere with the report of the Commissioner on these items.

Mr. Hasan Jan objects to an item of Rs. 80 which has been allowed by the District Judge on account of Municipal taxes. He contends that the total amount of taxes paid during the years in suit amounts to Rs. 191-12-6 and the whole of this was disallowed by the Commissioner

on the ground that it was not shown that house for which the tax was paid did belong to the minor. The learned District Judge was of opinion that the house, though entered in the Municipal registers in the name of the guardian, was really in part the property of the minor and he allowed a sum of Rs. 80 to be credited to the guardian for Municipal taxes. Mr. Hasan Jan argues that the learned Judge was wrong in any event in allowing a sum of Rs. 80 and he ought not to have allowed anything in excess of one-fourth of Rs. 191-12-6 which represented the minor's share in the property. We are not in a position to say upon what material the District Judge found the sum of Rs. 80 to be the amount payable on account the minor's share. No cross-objection was taken on behalf of the respondent, and we are not inclined to interfere with the learned District Judge's order.

The result is that Appeal No. 207 is allowed in part and the sums specified above will be credited to the guardian and the balance of the amount will be deposited in Court. Each party will bear his own costs.

The question raised in Appeal No. 237 is that under s. 45, sub-s (1) cl. (b) the learned District Judge had no jurisdiction to impose the fine. The contention is that under s. 34, cl. (d) the Court can call upon the guardian to pay into Court the balance due from the guardian on the accounts exhibited by him under cl. (c) of s. 34 and that no sum other than the amount shown as due in the account exhibited by the guardian can be demanded from the guardian by the District Judge under the Guardians and Wards Act and no fine can be imposed upon him for his failure to deposit any sum in excess of the amount shown by him in his account exhibited under s. 34 (c).

Reference has been made to the decision of the Calcutta High Court in *Jagannath Punja v. Mahesh Chandra Pal* (1). This case no doubt supports the contention of the learned Advocate for the appellant but with very great respect to the learned Judges I am unable to agree with the opinion expressed by them in that case.

Section 34 of the Guardians and Wards Act provides that where a guardian of the property of a ward has been appointed or

declared by the Court, and such guardian is not the Collector, he shall (c) "if so required by the Court, exhibit his accounts in the Court at such times and in such form as the Court from time to time directs." Clause (d) of the section then says "if so required by the Court, pay into the Court, at such time as the Court directs the balance due from him on those accounts, or so much thereof as the Court directs."

Mr. Justice Mookerjee in the case of *Jagannath Panja v. Mahesh Chandra Pal* (1) was of opinion that the words "those accounts" in cl. (d) of s. 34 refer to the account exhibited by the guardian under cl. (c) of the section and the Court can require the guardian to pay into Court only such amount as is shown by the guardian to be the balance in his hand in the account exhibited by him under cl. (c) and that the Court has no jurisdiction to call upon the guardian to pay any extra sum which it may find to be due from the guardian on a scrutiny of the account exhibited by him. In my opinion this is not the correct interpretation of s. 34 of the Act.

In *Sita Ram v. Gobindi* (2) Walsh, A. C. J., considered the decision of Mookerjee, J., in *Jagannath Panja v. Mahesh Chandra Pal* (1) and refused to follow it and held that the power of a Court in dealing with accounts exhibited by a guardian is not limited by such balance as the guardian chooses to show therein, and that the Court has jurisdiction to investigate the accounts exhibited, to amend them by striking out objectionable items, and to direct the guardian to pay the balance due on a true and just account, and if he fails to pay the balance as found by the Court, he can be dealt with under s. 45 of the Act. I am inclined to agree with the view taken by Walsh, A. C. J., and I am of opinion that the Court has jurisdiction to call upon a guardian to pay into Court such sum as he may find to be due after a scrutiny of the account exhibited by him. If no such power had been given to the District Judge the result would be that a scrutiny of the account submitted by the guardian would be of no use whatsoever. If the Court was bound to accept the sum as shown in the account to be actually due from the guardian and if the Court was not entitled to call upon the guardian

to pay any sum in excess of what is shown in the account, it would be a mere waste of time to check and audit the account as submitted by the guardian. It is conceded that the Court had jurisdiction to check the account and if that is so, I think that it follows that the Court has also the jurisdiction to direct the guardian to pay the sums found due on such checking of the account and to act under s. 45 on his failure to do so.

The rules framed by the Calcutta High Court under the Guardians and Wards Act provided that unless otherwise directed a guardian shall not be discharged from his liabilities until he has filed and passed his accounts, and has paid into Court or as otherwise ordered, any balance which may be found to be due from him. The interpretation placed by Mookerjee, J., on s. 34 was not in accord with the previous interpretation placed upon that section by the Calcutta High Court and by the rules framed by that Court under the Guardians and Wards Act.

A similar question was raised in this Court in *Abbasi Begam v. Yaquiti Begum* (3). No doubt the question raised there was one under s. 41, sub-s. (3) of the Act; but the principle involved in that decision applies to the facts of the present case. There it was held that in order to enable the Court to impose a fine under s. 45 of the Guardians and Wards Act for non-compliance with an order under s. 41 (3), it must be shown that the sum for the non-payment of which the fine had been imposed was actually due from the guardian, and if the guardian represents that the sum is not due, no fine can be imposed unless it is first ascertained whether the sum which he has been ordered to pay was really due from him. It was there held that it was open to the District Judge to examine the account and to ascertain the sum actually due.

In *Harikrishna Chettiar v. Govindarajulu Naicker* (4), the question was considered and the learned Judges appear to be inclined not to agree with the view taken by Walsh, A. C. J. in *Sita Ram v. Gobindi* (2), and to agree with the view taken by Mookerji, J., in *Jagannath Panja's case* (1), but the question was not decided and the observations were *obiter dicta*.

(3) 93 Ind. Cas. 628; 4 Pat. 264; A. I. R. 1925 Pat. 477; 7 P. L. T. 475.

(4) 98 Ind. Cas. 332; 50 M. L. J. 273; 23 L. W. 420; (1926) M. W. N. 359; A. I. R. 1926 Mad. 478.

(2) 60 Ind. Cas. 592; 46 A. 458; 22 A. L. J. 585; A. I. R. 1924 All. 593.

Mr. Hasan Jan on behalf of the respondent has contended that the word "exhibit" in cl. (c) of s. 34 indicates that the guardian is bound to prove the items contained in the account. He refers to the wording in s. 41, sub-ss. (3) and (4) where the word used is "deliver" and to the wording of s. 34, cl. (b) where also the word "deliver" is used. There may be some force in the contention of Mr. Hasan Jan and the word "exhibit" in cl. (c) of s. 34 may mean something more than mere filing or delivering the accounts; but it is not necessary to lay any very great stress upon the word "exhibit" in cl. (c). The whole tenor of the Act shows that the District Judge has jurisdiction to examine the accounts; and if that is so, it is clearly within the jurisdiction of the District Judge to call upon the guardian to pay into Court any sum that he may find due upon a true account of the affairs of the minor. I am, therefore, of opinion that the learned District Judge was within his jurisdiction in imposing the fine. On the merits, however, having regard to the fact that a substantial portion of the amount disallowed by the District Judge has been allowed by this Court, it is not proper to impose a fine upon the guardian in the present case.

The order imposing the fine is, therefore, set aside. It will no doubt be open to the District Judge to act under this section if the guardian again fails to deposit the amount found due within the time to be fixed by him.

Macpherson, J.—I agree.

B. K. P.

Order set aside.

A. N. A.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 122
of 1925.

November 3, 1927.

Present:—Sir Dawson Miller, Kt., Chief
Justice, and Mr. Justice Adami.

NATHO SINGH AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

LACHU SINGH AND OTHERS—DEFENDANTS

—RESPONDENTS.

Mortgage—Permanent lease by mortgagor in possession, validity of.—Tests—Transfer of Property Act (IV of 1882), s. 66.

It cannot be laid down as a proposition of law that the very act of granting a permanent lease of *bakasht* lands to a tenant is itself an act which is outside the scope of the authority of a mortgagor in possession. The test for determining whether such a lease is valid or void is that laid down in s. 66 of the Transfer of Property Act, namely, whether it is destructive or permanently injurious to the property and likely to render the mortgagee's security insufficient. [p. 158, col. 1.]

Appeal from a decision of the District Judge, Monghyr, dated the 3rd November, 1924, confirming that of the Subordinate Judge, Monghyr, dated the 16th March, 1922.

Messrs. *Murari Prasad* and *S. S. Bose*, for the Appellants.

Mr. *S. N. Roy*, for the Respondents.

JUDGMENT.

Miller, C. J.—The suit out of which this appeal arises was instituted by the plaintiffs for a declaration of their title to, and recovery of possession of, 34 *bighas* odd of what is described as *bakasht* land in village Bariarpur which lies within Taluka Zafarpur. It appears that Taluka Zafarpur was mortgaged in the year 1895 to a Mr. Thomas, who in 1907 obtained a decree upon his mortgage against the mortgaged property and in 1908 sold the decree by a *kabala* to the plaintiffs. In 1919 the plaintiffs appear to have obtained execution of the decree and purchased the property themselves at the auction sale. When they came to take possession of village Bariarpur, they found various persons in possession over certain portions of the land and they brought this suit against seven different sets of defendants for the purpose of ousting them and getting possession over the lands in suit. We are concerned in this appeal only with the interest of the defendants Nos. 7 to 10 who are some of those who have been described as the second party defendants in the suit and their interest is confined to 12 *bighas* of land of which they obtained a tenancy from the mortgagor in possession in the year 1912. They claimed that having obtained a permanent lease of their 12 *bighas* from the mortgagor, who was then in possession, they were entitled to remain in possession and the purchasers at the sale in execution of the mortgage decree could not turn them out.

The learned Subordinate Judge of the trial Court found against the present appellants on the ground that the permanent lease granted to them by the mortgagor did not appear to be *bona fide* and valid.

as against the plaintiffs. On appeal to the District Judge, he puts the matter somewhat differently. He apparently considers that there was some fraud or collusion between the mortgagor and the appellants and says: "In my opinion there can be no doubt that this lease was a collusive and fraudulent one and was executed to cheat Harkhit's creditors and was not executed *bona fide* in the ordinary course of the management of the property".

From that decision of the defendants Nos. 7 to 10 have appealed, and two points have been relied upon in argument in support of their appeal. In the first place, it is pointed out that in the plaint from first to last there is not a word suggesting that there was any fraud in the transaction which resulted in the permanent lease granted to the appellants, nor is any mention made of any collusion. The only case made with regard to these defendants is that which appears in para. 8 of the plaint, and the allegation there is that it was admitted by all parties that the said lands formed the *khudkasht* of the former proprietors. It then refers to certain proceedings which were pending between various parties interested in *Taluka Zafarpur* and continues:—"During the pendency of the aforesaid criminal case, the defendants' 1st party had ceased to possess any interest in *Taluka Zafarpur* aforesaid and, without any title to keep possession of the said lands by making settlement with the defendants 2nd and 7th parties, was urged on their behalf although they had no right to keep possession or to make settlement with the tenants, nor was any such right urged on their behalf, and their entire interest in *Mauza Bariarpur* aforesaid had been transferred". This passage is somewhat obscure but it is the only allegation put forward in the plaint so far as the case against the present appellants goes and the allegation there apparently is that the mortgagors being no longer proprietors had no power to grant a permanent lease to the appellants. There is not a word of any fraud or any collusion on the part of the defendants. Again, when we turn to the issues in the case, there is no suggestion of any fraud or collusion between the mortgagors and the appellants. The seventh issue is "Have defendants 2nd and 7th parties acquired valid tenancy right as alleged? "It is not disputed that a permanent lease of 12 *bighas* of

bakasht land was granted to the defendants Nos. 7 to 10 at a rental of Rs. 5 per *bigha* and it is not disputed that they have been in possession thereof since that date up to the present time and the mortgagors were certainly in possession in 1912. Therefore, having produced their deeds, it seems to me that the appellants had done all that was necessary to show *prima facie* that they had a right to remain in possession. If, in fact, the mortgagors had no interest in the property at the time they granted the lease, then undoubtedly the lease would not be valid and that being the only issue raised in the pleadings and it being no longer disputed that the mortgagors were proprietors at least to the extent of a 10-annas share in the property at the time when the permanent lease was granted in 1912, it seems that there was an end of the case made by the plaintiffs in their plaint, and all these questions of fraud and collusion which were considered by the lower Appellate Court ought never to have been taken into consideration at all. There can be no collusion between parties in doing an act they have a perfect right to do.

The only other point was whether assuming the mortgagors were in possession notwithstanding the allegation made in the plaint, they were entitled to grant a permanent lease of 12 *bighas* of the *bakasht* land to these defendants, or whether such a proceeding was in contravention of s. 66 of the Transfer of Property Act. On this question also I think that our decision must be in favour of the appellants. The section provides as follows:—

"A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act. *Explanation*.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage".

On that part of the case all we know is that the property was sold and fetched a sufficient sum to satisfy the whole of these mortgage debts. There is not a scrap of evidence before the Court to show that the security was in any way rendered insufficient by any act on the part of the mort-

gagors in granting the permanent lease to these appellants. It was contended, however, on behalf of the respondents that the very act of granting a permanent lease of *bakasht* lands to a tenant is itself an act which is outside the scope of the authority of the mortgagor in possession. I cannot accede to such a proposition. It seems to me that the effect of the section is correctly and concisely stated at page 1176 of Sir Hari Singh Gour's book on the Law of Transfer, (5th Edition) where he states the law as laid down in the case of *Wazir Ali v. Moti Chand* (1) and says "But so stated, the statement is too wide. In the case of an English or possessory mortgage it is perfectly correct to say that the mortgagor can make no lease without the consent of the mortgagee, but in any other case there appears to be no authority for similarly limiting the powers of the mortgagor. On the other hand, being the owner of his own property, he is not only entitled to create leases but may do so irrespective of their effect upon the mortgagee's security, provided only they are not wasteful within the meaning of this section, which permanent or long leases would presumably be if they materially prejudice the saleable value of the property and are injurious to the interest of the mortgagee". Then in a later passage he says—"The test by which the mortgagor's leases would be judged is stated in the section, viz., were they destructive or permanently injurious to the property likely to render the mortgagee's security insufficient. It has been held in some cases that where the mortgagor's leases are questioned by the mortgagee the burden is on the lessee to prove that they were usual and given in the ordinary course of management. This view follows the English Law but ignores the different stand point from which law views the mortgagee's rights in the country which an apprehensive mortgagee may enlarge by contract, but not otherwise than as provided in this section, even if he is an English mortgagee".

In the present case there is not from start to finish a single scrap of evidence to show that this permanent lease granted by the mortgagors in possession has in any way been destructive or permanently injurious to the mortgage-debt. The debt has in fact been satisfied. If a case of that

(1) 2 A. L. J. 291.

sort was to be made out, then it was clearly, in my opinion, for the plaintiffs to make it. But as I have already said, the evidence is absolutely silent on the point and when we consider that the property sold was sufficient to satisfy the whole of the mortgagees' claim, then I cannot see how it can, in any view of the case be said that the permanent lease granted in 1912 was in contravention of s. 66 of the Transfer of Property Act. In my opinion the learned District Judge ought never to have entered into his question of fraud and collusion which was nowhere pleaded in the plaint and does not even find a place in the issues framed before trial.

I think that this appeal must be allowed with costs here and in the Courts below. The judgment of the District Magistrate will be set aside as against these appellants and in lieu thereof the suit will be dismissed as against the present appellants with costs throughout.

Adami, J.—I agree.

A. N. A.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 224 OF 1925.

August 10, 1927.

Present:—Mr. Justice Das and

Mr. Justice James.

TARACHAND MARWARI—PLAINTIFF—

APPELLANT

versus

THE BENGAL NAGPUR RAILWAY CO.

AND OTHERS—DEFENDANTS—RESPONDENTS.

Railways Act (IX of 1890), s. 72—Risk Note Form B—Suit for non-delivery—Burden of proof of loss—Duty of Railway Company—Mere plea of loss, whether sufficient.

In a suit for damages for non-delivery of goods consigned to a Railway Administration for carriage the Railway Administration must prove that the goods consigned have been lost, before they take advantage of the agreement contained in the Risk Note to throw upon the plaintiff the onus of showing that the goods were lost by dishonesty or wilful negligence. It is not sufficient for the Railway Company to plead execution of the Risk Note and to plead loss; they must definitely prove that there has been loss of the goods. [p. 159, col. 2.]

Nagendra Nath Sen v. B. & N. W. Ry. (1) and *Puran Das v. E. I. Ry. Co.* (2), followed.

Appeal from a decision of the Additional Subordinate Judge, Purulia, dated the 20th December, 1924, reversing that of the Munsif, Raghunathpur, dated the 26th April, 1924.

Mr. S. N. Bose, for the Appellant.

Messrs N. C. Sinha and N. C. Ghosh, for the Respondents.

JUDGMENT.

James, J.—The suit out of which this appeal arises was instituted against the E. B. Ry. Co., and two other Railway Companies for compensation for non-delivery of four bags of *dhania* and 23 bags of tamarind. The defendant Railways admitted that the goods had not been delivered to the consignee; and the E. I. Ry. Co., by whose line the goods had been carried while they were in transit to their ultimate destination, admitted that they had been lost. The defendants denied liability, pleading that the plaintiff had executed a Risk Note in Form B exonerating the carriers by Railway from liability for loss of the goods, unless such loss should be due to wilful neglect on the part of Railway servants. The defendants did not succeed in proving by evidence that the goods had been lost; and on this account the Munsif of Raghunathpur held that they were not entitled to take advantage of the terms of the Risk Note executed by the plaintiff. On appeal, the learned Subordinate Judge of Purulia held that it was sufficient for the Railway Company to plead loss and that they were not obliged to prove it before they could take advantage of the Risk Note. He, therefore, allowed the appeal, and dismissed the suit. The plaintiff comes up in second appeal to this Court.

Mr. S. N. Bose argues for the plaintiff that in the absence of proof of loss, deterioration, or destruction, such as would bring the case within the terms of the Risk Note, he is entitled to a decree. It was not proved that the goods had actually been despatched from Kushthia, after they had been made over to the Eastern Bengal Railway Company; and it is not suggested on behalf of the Railway Companies that loss has been proved in this case. Mr. N. C. Sinha for the respondents argues that the defendant Company has merely to plead loss; and the onus will then be upon the plaintiff to prove that the loss was caused by some set of dishonesty or wilful negligence on the part of a servant of the Railway Administration. But in the recent case of *Nagendra Nath*

Sen v. B. & N. W. Ry. (1) it was held, following the decision of the Full Bench in the case of *Puran Das v. E. I. Ry. Co.* (2) that the Railway Administration must prove that the goods consigned have been lost before they take advantage of the agreement contained in the Risk Note to throw upon the plaintiff the onus of showing that the goods were lost by dishonesty or wilful negligence; and that it is not sufficient for the Railway Company to plead execution of the Risk Note and to plead loss; they must definitely prove that there has been loss of goods. It is not suggested that in the case with which we are here concerned, the defendant Railways did prove that the goods had been lost. Therefore, they cannot take advantage of the agreement contained in the Risk Note. The goods were accepted for carriage by Railway; they have not been delivered to the consignee; and the carriers must be held responsible for their value.

The plaintiff's suit must accordingly be decreed against the Railway Company to whom the goods were delivered for carriage. The appeal is allowed; the decree of the lower Appellate Court is set aside; and the plaintiff's suit is decreed against the E. B. Ry. Co. The plaintiff will be entitled to his costs throughout.

Das, J.—I agree. These cases are free from all complications. The plaintiff in this case sues upon the contract and for damages for non-delivery. I do not think that the proposition is disputed in any of the judgments to which my attention has been drawn that in a case where the plaintiff is suing upon the contract for non-delivery of the goods, the onus is upon the Railway Company to prove the loss of goods.

B. K. P.

Appeal allowed.

(1) 105 Ind. Cas. 546.

(2) 102 Ind. Cas. 673; 8 P. L. T. 415; A. I. R. 1927 Pat. 234; 6 Pat. 718.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE

No. 125 of 1927.

November 14, 1927.

Present.—Justice Sir. Jwala Prasad, Kr.,
and Mr. Justice Ross.*Babu*, CHHANU PRASAD SINGH—

ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 350, 526—Transfer—Reasonable apprehension, whether sufficient—Accused's right to fresh examination of witnesses.

It is enough for the transfer of a case that the applicant for transfer has reasonable grounds for apprehension that he will not receive proper justice at the hands of the trying Magistrate. It is not for the Court to decide whether the apprehensions of the accused are true or not.

An accused has, under s. 350 of the Code of Criminal Procedure, a right to demand that the witnesses or any of them be summoned and re-examined when the case is tried by the Magistrate to whom it is transferred for trial. He can, however, waive his right.

Application for transfer of a case from the Court of the Sub-Divisional Magistrate, Supaul, to the Court of some other competent Magistrate elsewhere.

Messrs. S. Sinha and Murari Prasad, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.

Jwala Prasad, J.—This is an application for the transfer of the case from the Court of the Sub-Divisional Magistrate of Supaul, a similar application made to the District Magistrate having been refused. The application to this Court reproduces substantially the allegations made in the application to the District Magistrate for the transfer of the case. We have heard Counsel on both sides and have carefully considered the allegations made by the petitioner and the explanation which was offered by the Magistrate in connection with the application made to the District Magistrate. No further explanation has been given to this Court and the Magistrate relies upon the explanation given by him to the District Magistrate.

It seems to us that from the circumstances disclosed in the applications and what transpired in Court during the trial of the case, the accused may reasonably apprehend that he will not receive proper justice at the hands of the Sub-Divisional Magistrate of Supaul. Whether his apprehensions are true or not it is not for us

to decide; it is enough for the transfer of the case that he has reasonable ground for such an apprehension. Whereas the several petitions filed by the petitioner before the Sub-Divisional Magistrate during the trial show want of propriety, the Magistrate's remarks on various occasions on the other hand exhibit lack of judicial temper. We need not enter into a detailed discussion as regards the various allegations made in the petitions. We think that the case is one which should be tried by another Magistrate.

The case is accordingly transferred to the head-quarters of Bhagalpur to the file of the District Magistrate who will himself try the case or have it tried by any competent Magistrate subordinate to him.

The accused under s. 350 of the Code of Criminal Procedure Code has a right to demand that the witnesses or any of them be summoned and re-examined when the case will be tried by the Magistrate to whom it will be transferred for trial. The accused can, however, waive his right and Mr. Sinha, who appears for the petitioner, assures us that the accused will not insist upon the examination again of the witnesses already examined in the case and that the trial now in the Court to which the case will be consigned will continue from the stage at which it had reached in the Court of the Sub-Divisional Magistrate of Supaul. It may be observed that the Sub-Divisional Magistrate has refused to summon the witnesses for the defence. It will be open to the accused to make a further application before the Magistrate to whom the case will now be transferred and it will be for that Magistrate to decide the question upon merits. The order of the Sub-Divisional Magistrate of Supaul upon this particular point will not, therefore, stand in the way of a further application being made by the accused to examine defence witnesses.

Ross, J.—I agree.

A. N. A.

Application granted.

RANGOON HIGH COURT.

CIVIL REVISION No. 32 OF 1927.

July 28, 1927.

Present:—Mr. Justice Pratt.

MAUNG PO PE—APPLICANT

versus

MAUNG KWA AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 58—Execution of decree—Attachment—Application after sale to remove attachment, maintainability of—Execution sale, effect of.

A Court has no jurisdiction to entertain an application under O. XXI, r. 58 of the Civil Procedure Code, after the properties attached are sold in execution. A sale in execution *ipso facto* determines the attachment.

Gopal Chandra Mukerji v. Notobar Kundu (1) and Puhup Deo Kuer v. Ram Charitar Barhi (2), relied on.

Mr. Chatterjee, for the Applicant.

Mr. Mitter, for the Respondent.

JUDGMENT.—This is an application under s. 115, Civil Procedure Code, to revise the order of the Township Judge, Myaing, in Civil Miscellaneous Case No. 1 of 1927, ordering the removal of attachment of land attached in Execution Case No. 31 of 1926.

It is contended that the order for removal of attachment was *ultra vires* as the land had already been sold before the application was made.

A reference to the execution proceedings shows that the land in question was sold on the 17th December, 1926, and the application for removal of attachment was not made till the 4th of January following.

It is true the sale had not been confirmed, but I am of opinion that the contention that the attachment was no longer subsisting is correct.

I have been unable to find any officially reported cases on the subject, possibly the rulings on the point have not been recorded as it was considered too obvious.

Mr. Chatterjee for applicant relies on the Calcutte Bench case of *Gopal Chandra Mukerji v. Notobar Kundu (1)*.

It was there held that an order under r. 60 of O. XXI must be made before the sale has taken place. It was also pointed out that sub-r. (2) of r. 58, which provides for the adjournment of a sale pending the investigation of a claim preferred under sub-r. (1) makes it clear that the application for removal of attachment and order under r. 60 must be prior to the sale in execution.

The Bench held that the subordinate Court had acted clearly in excess of jurisdiction and violation of an express provi-

(1) 15 Ind. Cas. 53; 16 C. W. N. 1029.

sion of the Code, and that it was a case in which it ought to interfere on revision.

This case was followed by a Bench of the Patna High Court recently in *Puhup Deo Kuer v. Ram Charitar Barhi (2)*.

In the Patna case the sale of land in execution took place after the application under O. XXI, r. 58 had been filed.

Mullick, J., in giving judgment remarked:—"It is obvious that, after the sale was held, the attachment was *ipso facto* determined and the Court had no longer any jurisdiction to try the claim case".

I have no doubt that this is sound law.

It is obvious that respondent has a remedy under r. 100, if dispossessed or that he may resist the auction-purchasers taking possession under r. 97, if he has no cause of action under r. 90.

I hold that the order of the Township Court was without jurisdiction and set it aside accordingly. Applicant will be allowed costs. Advocate's fees two gold mohurs.

A. N. A.

Application allowed.

(2) 74 Ind. Cas. 87; 4 P. L. T. 544; A. I. R. 1924 Pat. 76.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION No. 58 OF 1927.

July 19, 1927.

Present:—Mr. Justice Maung Ba.

K. K. S. A. R. FIRM—APPELLANTS

versus

MAUNG KYA NYUN AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—'Any other sufficient reason', interpretation of—Reason, whether should be ejusdem generis—'Ejusdem generis', meaning of.

Although the words 'any other sufficient reason' in O. XLVII, r. 1 of the Civil Procedure Code mean a reason sufficient on grounds at least analogous to those specified immediately previously, it is not necessary that the reason should be *ejusdem generis* with those previously specified. The phrase *ejusdem generis* is more restricted in its meaning than the word 'analogous'. [p. 163, col. 1.]

The summons to a witness in a case was returned.

unserved as the witness could not be found. The Court with a view to avoid the case pending idly declined to adjourn the case for giving a further opportunity to the party concerned to secure his attendance and decided the suit. The witness was subsequently found out and the party applied for review of the case, and the application was granted by the trial Court.

Held, that there was a sufficient ground for review, and the order of the trial Court granting the application was not illegal. [p. 162, col. 1.]

Mr. Ganguli, for the Appellants.

Mr. Basu, for the Respondents.

JUDGMENT.—This is an application for a certificate under cl. 13 of the Letters Patent that it is a fit case for appeal.

As the point involved is one of construction to be put upon the phrase "any other sufficient reason" used in r. 1 of O. XLVII, Civil Procedure Code, I have allowed both sides to argue that point. The applicant Chettyar firm brought a suit against the respondents on a promissory note, and the respondents denied execution of that note. In the evidence tendered by the applicants it was alleged that the writer of the note was one Ma Tin U, but the applicants made no attempt to produce her. Consequently the respondents applied to the trial Judge for an adjournment to enable them to produce her in order to rebut the evidence tendered against them. The learned Judge accordingly adjourned the case. The respondents took out a summons, but as the witness was not to be found at her old address the summons was returned unserved. The respondents then applied to the Judge to give them another adjournment to enable them to make further efforts to secure that witness. But the Judge, who was presumably actuated by a desire to show short duration, refused to grant any more adjournment and proceeded with the trial which resulted in a decree being passed against the respondents. The respondents subsequently succeeded in finding the witness and applied to the trial Court for a review. The Judge granted the review and gave the following reason: "I see every effort was made by the applicants to bring Ma Tin U into the witness-box but as she could not be found applicants were obliged to close their case as no further adjournment was allowed. The reason why this Court declined to allow any further adjournment by that time was to save the case pending idly for many months and not with reason to object to the examination of Ma Tin U. Since the Court has no

objection to examination of Ma Tin U, I consider this application on this ground is a fit one to be admitted." Against that order the applicants went upon appeal to the District Court. The learned District Judge dismissed the appeal recording the following reason: "The lower Court was satisfied that respondents had made every effort to bring Ma Tin U to Court. There was documentary evidence on the record showing how respondents had taken out a summons and how that summons was returned with a report that Ma Tin U's whereabouts were unknown. In my opinion the provisions of O. XLVII, r. 4, sub-cl. (2) (b) have been complied with and so there is no cause for interference." The Chettyar firm were still not satisfied and came up to this Court on revision. I dismissed that application for revision saying, "On taking account of the circumstances under which the respondents were not given an opportunity of producing the rebutting evidence, I consider that those circumstances constituted a 'sufficient reason' within the meaning of r. 1 of O. XLVII, Civil Procedure Code. That reason need not be *ejusdem generis* with the other two specific grounds mentioned in that rule. It must be one sufficient to the Court or Judge dealing with the application for review. The question of the sufficiency of any reason must depend upon the circumstances of each particular case."

It is now contended that my view, namely, "that reason need not be *ejusdem generis* with the other two specific grounds," is incorrect. In support of this contention the case of *Chajju Ram v. Neki* (1), decided by a Full Bench of the Privy Council has been quoted. Viscount Haldane, who delivered the judgment of the Board, construed the phrase "any other sufficient reason" in the following words: "Their Lordships think that r. 1 of O. XLVII must be read as in itself definitive of the limits within which review is to-day permitted, and the reference to practice under former and different Statutes is misleading. So construing it they interpret the words 'any other sufficient reason' as meaning a reason sufficient on grounds at least analogous to those specified immediately previously."

(1) 72 Ind. Cas. 566; 3 Lah. 127; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 435; A. I. R. 1922 P. C. 112; 16 L. W. 37; 17 P. W. R. 1922; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. O.) 99; 36 C. L. J. 459; 49 I. A. 144 (P. O.).

In my opinion there is a distinct difference between the words "*ejusdem generis*" and at least analogous." The Latin phrase "*ejusdem generis*" according to Chambers' Twentieth Century Dictionary means "of the same kind." The same Dictionary defines "analogous" as "bearing same; correspondence with; or resemblance to; similar in certain circumstances or relations." So in my opinion the phrase "*ejusdem generis*" is more restricted than the word "analogous." In Byrne's Law Dictionary "*ejusdem generis*" is defined as follows: "It is a rule of legal construction that general words following enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration and to be construed as including only all other articles of the like nature and quality." So I am of opinion that my statement that "the reason need not be *ejusdem generis* with the other two specific grounds" is not inconsistent with the construction put by their Lordships of the Privy Council, viz: "that the reason must be sufficient on grounds at least analogous to those specified immediately previously." I, therefore, still hold that the particular circumstances of the present case constituted a reason analogous to the other two reasons previously mentioned in r. 1, namely, discovery of new and important matter and error apparent on the face of the record.

For the above reasons I do not consider that a case is made out for granting the certificate applied for under the Letters Patent. The application is accordingly dismissed with costs—Advocate's fee three gold mohurs.

A. N. A.

Application dismissed.

RANGOON HIGH COURT.

CIVIL REVISION No. 137 OF 1927.

July 11, 1927.

Present :—Mr. Justice Maung Ba.

U PO NYUN AND ANOTHER—APPLICANTS

versus

MA PAN ME—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise pending suit including extraneous matters—Procedure—Form of decree.

Where an agreement or compromise entered into pending a suit comprises matters relating to the suit as well as other matters, the proper method of carrying out of the terms of O. XXIII, r. 3 of the Civil Procedure Code would be for the decree to recite the whole of the agreement and then to conclude with an order relating to that part that was the subject of the suit. The decree taken as a whole should include the agreement but the operative part of the decree should be confined to the subject-matter of the pending litigation. [p. 164, col. 2.]

Hemanta Kumari Debi v. Midnapore Zemindari Co. (1), relied on.

Mr. Kyaw Din, for the Applicants.

Mr. Guha, for the Respondent.

JUDGMENT.—This revision arises out of Civil Regular Suit No. 51-A of 1926 of the District Court of Tharrawaddy. In that suit applicants, U Po Nyun and his second wife Ma Ohn, brought an action against his adopted daughter Ma Pan Me to have a deed of gift executed in her favour set aside on the ground of fraud and misrepresentation. It appears that U Po Nyun had adopted Ma Pan Me, her sister Ma Pan Thwe and her brother Maung Po Hman, before he married the second wife; that there were other suits between U Po Nyun, his two adopted children and grand-children, Saw Thein and Than Mya; that all these suits were compromised and that the terms were embodied in one agreement. So far as this suit is concerned, the agreement between the parties was that the suit should be dismissed without costs except that U Po Nyun was to have a decree for the pucca building and the granary, which were covered by the said deed of gift and also that the defendant, Ma Pan Me, as well as Maung Thu Daw, Maung Po U, Maung Saw Thein and Ma Than Mya were to be allowed to live in the pucca building and store paddy in the granary. The agreement was signed by U Po Nyun and Ma Ohn on the one part and Maung Thu Daw, Ma Pan Me, Maung Po U and Maung Po Hman on the other.

The learned Judge did not write any judgment embodying the terms of that agreement but in his diary order dated the

9th December, 1926, ordered that there would be a decree in terms of the agreement so far as it related to the suit. That order was followed by a decree, which ordered that the plaintiffs U Po Nyun and Ma Ohn were to be the owners of *pucca* building and granary; that the registered deed of gift made in favour of Ma Pan Me was to stand except that the plaintiffs were to have the *pucca* building and the granary and further that the suit be dismissed without costs as regards the rest of their claim.

Ma Pan Me thought that this decree was not in accordance with the terms of the compromise and applied to the District Judge for an amendment of the decree. The learned Judge then ordered that Ma Ohn's name should be omitted and that the right of Ma Pan Me to live in the *pucca* house and store paddy in the granary should be mentioned.

As regards the first point about the inclusion of Ma Ohn's name, it may be pointed out that she was a party to the agreement of compromise and that she was a co-plaintiff in the suit. It may also be pointed out that, as second wife, she has an interest in the subject-matter according to Burmese Buddhist Law. Therefore, the first part of the order is quite wrong. Her name should be included.

As regards the second point, the learned Judge was of opinion that this leave to live in the house and store paddy in the granary formed part of the consideration. He has overlooked the fact that U Po Nyun and Ma Ohn agreed to allow not only Ma Pan Me but also four others to have such a right. No doubt it is a matter of some difficulty in finding which matters relate to the suit and which matters do not relate to the suit within the meaning of r. 3.

In *Hemanta Kumari Debi v. Midnapore Zemindari Co.* (1), their Lordships of the Privy Council indicated how that phrase "matters relating to the suit" should be interpreted. At page 45* their Lordships observe:—"The terms of this section need careful scrutiny. In the first place, it is plain that the agreement or compromise, in whole and not in part, is to be recorded, and the decree is then to confine its

operation to so much of the subject-matter of the suit as is dealt with by the agreement. Their Lordships are not aware of the exact system by which documents are recorded in the Courts in India, but a perfectly proper and effectual method of carrying out the terms of this section would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation the decree taken as a whole would include the agreement."

In the present suit U Po Nyun and Ma Ohn sought to have the deed of gift, whereby U Po Nyun had given away all his immoveable property to Ma Pan Me, cancelled, alleging that his intention was to give her only 100 acres of land whereas the deed covered nearly 800 acres as well the house and granary. The effect of the agreement was that Ma Pan Me consented to have the deed cancelled so far as the house and granary were concerned. It is not quite correct to give a decree declaring that U Po Nyun is the owner of that property. The decree should be in favour of U Po Nyun and his wife to the effect that the suit be decreed so far as the house and granary are concerned. Therefore, it is questionable whether the permission to live in the house and store paddy in the granary is a matter relating to the suit. It appears that Ma Pan Me and the other children have been living with U Po Nyun all the time. No doubt, after this litigation the relationship between them must have become strained. However, this permission to Ma Pan Me and others to live in the house and store paddy in the granary is part of the agreement which can be enforced if necessary. There is a conflict of judicial opinion whether such enforcement can be done in execution or by a separate suit. The Court is informed that U Po Nyun has even filed a suit to get the dispute regarding the nature and extent of this permission settled. So far as this suit is concerned, this permission, which is in favour of several persons including Ma Pan Me, should be left out and not embodied in the decree.

I, therefore, set aside the amended decree

(1) 53 Ind. Cas. 534; 47 O. 485; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 46 I. A. 240; 22 Bom. L. R. 488 (P. C.).

*Page of 47 C.—[Ed.]

of the District Court and direct that the first decree do stand.

The applicants are entitled to costs in this Court, three gold mohurs.

A. N. A.

Application allowed.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 285 of 1926.

July 18, 1927.

Present :—Sir Guy Rutledge, Kt.,
Chief Justice, and Mr. Justice Brown.

MAUNG PWA AND OTHERS—DEFENDANTS

—APPELLANTS

versus

MAUNG PO SA AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Mortgage—Simple mortgage—Subsequent delivery of possession to mortgagee—Extinguishment of simple mortgage—Suit for redemption—Plea of outright sale—Burden of proof—Adverse possession.

A executed a simple mortgage to B in 1905. In 1906 A gave possession of the mortgaged properties to B. In 1926, the heirs of A sued B for redemption of the properties alleging that possession was given only for securing payment of interest on the mortgage-debt. B pleaded that the properties were made over to him by way of outright sale in satisfaction of the mortgage-debt and interest:

Held, (1) that whatever be the nature of the transaction of 1906, it had the effect of extinguishing the previous simple mortgage and that the suit for redemption could not be maintained; [p. 166, col. 2.]

Maung San Min v. Maung Po Hlaing (4), relied on. (2) that inasmuch as the burden of proving title, regarding the suit as one based on title, was on the plaintiffs, it was for them to show that the defendant came into possession of the lands as alleged by them and that his possession was not adverse to the plaintiffs. [*ibid*]

Maung Ok Kyi v. Ma Pu (1), *A. T. A. R. M. M. Chetty Firm v. Mahomed Kasim* (2), and *Ma Dun v. Lu O* (3), doubted.

Per Rutledge, C. J.—It cannot be laid down as a proposition of law that when land is mortgaged without possession and possession is subsequently given to the mortgagee the burden of proving that the transaction in which possession was given was an outright sale lies on the mortgagee. In cases of long possession the onus is on the party out of possession. In cases, however, where the possession has been for less than 12 years and where title of the previous owner is admitted, the onus may properly be put on the person who alleges an outright sale. [p. 167, cols. 1 & 2.]

Mr. Thein Maung, for the Appellants.

Mr. Hay, for the Respondents.

JUDGMENT.

Brown, J.—The land in suit originally belonged to one Ma Sa Pa. In the year 1905 Ma Sa Pa effected a simple mortgage of the land in favour of the appellant

Maung Pwa and his deceased wife, Ma Shwe Hnit, by a registered deed. The principal amount secured by this registered instrument was Rs. 1,500 and the rate of interest Rs. 2-8-0 per cent. per mensem. About a year later Ma Sa Pa was unable to pay the interest on the mortgage and possession of the land was given to Maung Pwa.

The respondents, who are the children of Ma Sa Pa and her legal representatives, have sued for redemption of the mortgage of the land, and have been given a decree. Against this decree the appellants have now appealed.

The original simple mortgage is admitted and it is also common ground that possession of the land was given to Maung Pwa a year after the mortgage. The plaintiff-respondents say that, when possession of the land was made over, it was made over simply as security for payment of the interest under the mortgage, the annual rent for the land being accepted in lieu of interest. The defendant-appellants say that the land was made over to them outright by way of sale for the sum of Rs. 1,900 made up of the principal and interest due on the mortgage.

The trial Judge held that the burden of proving the outright transfer or rather the contract to transfer outright rested on the appellants and that the appellants had not discharged that burden.

It is contended on behalf of the appellants that the simple mortgage of 1905 is no longer in existence and that the suit is, therefore, not maintainable. If the simple mortgage was extinguished in 1906, then quite clearly there is no mortgage now in force, as at the time of the making over of the possession of the land s. 59 of the Transfer of Property Act was in force and there is no suggestion that any registered deed was executed at the time of this transaction.

We have been referred to the decision of a Full Bench of this Court in the case of *Maung Ok Kyi v. Ma Pu* (1). The facts of that case were very similar to those of the present case. In that case also there had been a simple mortgage of land by a registered deed and possession had been made over to the mortgagee about a year after the mortgage. The original owner of

(1) 99 Ind. Cas. 519; 4 R. 368; 5 Bur. L. J. 145; A. I. R. 1927 Rang. 33 (F. B.).

the land sued for redemption of the mortgage and the defendants pleaded that the land had been made over to them outright; but there was admittedly no registered instrument for the subsequent transaction. It was held that in such circumstances it was open to the defendants to plead the invalid sale to them as a defence to the mortgage claim. That point is not now in dispute. Nor did the trial Judge take a contrary view. His view was that the burden of proof in such circumstances lay on the defendants. But in the course of the judgment in the case of *Maung Ok Kyi v. Ma Pu* (1), the learned Chief Justice expressed the view that the onus of proving what the subsequent transaction was lay on the person who was not in possession. A somewhat similar point was considered by us in the case of *A. T. A. R. M. M. Chetty Firm v. Mahomed Kasim* (2). In that case we accepted the law as laid down in *Ma Dun v. Lu O* (3) that when land was mortgaged without possession and possession subsequently passed to the mortgagee, the burden of proving that the transfer in which possession was given was an outright sale lay on the person alleging it. We held, however, that, in considering whether the burden of proof had been discharged, all the circumstances of the case including the conduct of the parties must be borne in mind. The result of that case was that we held the outright sale to have been proved. Our decision accepting the view as to the burden of proof taken in *Ma Dun's case* (3) was, therefore, merely *obiter* and I feel doubtful whether that decision was correct. But it is unnecessary now to pronounce definitely on the general proposition. In the present case the plaintiff Maung Po Sa says as to the subsequent transaction: "U Pwa and Ma Hnit agreed to reduce Rs. 50 out of interest Rs. 450 and agreed to keep the suit land with them for Rs. 1,900 by way of usufructuary mortgage." This alone suggests the entering into a new contract. As pointed out by the learned Chief Justice in *Maung Ok Kyi's case* (1), the outstanding characteristic of a simple mortgage is that possession remains with the mortgagor. And if possession subsequently passes to the mortgagee that possession is not explained or accounted for by the simple mortgage instrument.

(2) 90 Ind. Cas. 1011; 3 R. 367; A. I. R. 1925 Rang. 377.

(3) 2 Ind. Cas. 535; 5 L. B. R. 40.

The land in dispute in the present case has been in the possession of the defendant for 20 years and the principal point in dispute in the present case is as to the possession of this land. An action for recovery of possession could not possibly arise on the contract of a simple mortgage. We think it is clear that what the plaintiffs are really suing on is not a simple mortgage at all but the alleged usufructuary mortgage and that, whatever the nature of the transaction in 1906, it had the effect of extinguishing the previous simple mortgage. That being so, it follows that there is now no legal mortgage in effect and in accordance with the ruling of a Full Bench of this Court in the case of *Maung San Min v. Maung Po Hlaing* (4), the suit, as framed, for redemption of the land will not lie. The plaintiffs might have been able to sue for possession based on title. But even if they were allowed now to change the suit and sue on the title, I do not think that they can be held to have succeeded. There is no mortgage of the land and the defendants have been in possession for 20 years. The suit, if based on title, must be a suit under the provisions of Art. 142 of the Limitation Act and in suits under that Article the burden of proving that the possession of the defendant is not adverse lies on the plaintiff. In this case the defendants clearly plead that their possession was adverse from the first. In order to succeed in the case, it was, therefore, clearly necessary that the plaintiffs should show how the defendants came into possession of the land and that that possession was not adverse. It follows from this that the burden of proof as to the nature of the original transaction rests on the plaintiffs. If they cannot prove how possession passed, no presumption that the possession was not adverse can be drawn.

For these reasons I am of opinion that the trial Judge was wrong in placing the burden of proof in the case on the defendants; and it is clear from his judgment that his decision in favour of the plaintiffs was not based on any special belief in the plaintiffs' evidence but on the view that the defendants had not satisfactorily proved their case. As is only to be expected after so many years, the oral evidence as to what took place when handing over the land is not satisfactory on either side.

The defendants have produced an

(4) 94 Ind. Cas. 567; 4 R. 1; A. I. R. 1925 Rang. 291; 4 Bur. L. J. 118 (F. B.).

unstamped and unregistered deed, which is certainly not on the face of it convincing. What is, however, quite clear and is not denied by the plaintiffs is that in the year 1907 the Deputy Commissioner gave a certificate that they had acquired the status of landholders in respect of the land to Maung Pwa and his deceased wife. The defendants have tried to prove that Ma Sa Pa had notice of the proceedings and agreed to the grant of this certificate. The oral evidence on this point may not be very satisfactory but the undoubted fact remains that this certificate was issued and that no objection was taken to its issue at the time. In the ordinary way notice should have issued and the plaintiffs should have heard of the proceedings before the certificate was granted. The fact that this certificate was issued to Maung Pwa without objection does lend strong support to his story that he was in possession as owner of the land.

I do not think it necessary to discuss in detail the oral evidence adduced by the plaintiffs on which the trial Judge obviously did not place any great reliance. Some of the witnesses are related to the plaintiffs and they are all Burmans as are the plaintiffs themselves; whereas the defendant is a Karen.

I do not consider that the evidence is convincing or in any way sufficient to establish the claim for possession of the suit land worth about Rs. 10,000 on payment of Rs. 1,900 from persons who have been in peaceful possession for 20 years.

I am of opinion that the suit must fail. I would set aside the decree of the trial Court and pass a decree dismissing the suit of the plaintiff-respondents with costs in both Courts.

Rutledge, C. J.—I have had the advantage of reading the judgment of my learned brother and I entirely agree with his conclusion. I only add these observations in respect of certain *obiter dicta* in a joint judgment of his and mine in *A. T. A. R. M. M. Chetty Firm v. Mahomed Kasim* (2), and in my judgment in *Maung Ok Kyi v. Ma Pu*, (1). In *Ma Dun's case* (3), Mr. Justice Irwin stated that he was bound by the decision of a Bench in *Ko Po Win v U Pe* (5), the effect of which was that, when land is mortgaged without possession and possession is subsequently given to the mortgagee, the burden of proving that the transaction

in which possession was given was an outright sale lies, in the first instance, on the mortgagee. I am not prepared to accept this statement as correct, as, in cases of long possession, I am clearly of opinion that the onus should be on the party out of possession. In cases, however, where the possession has been less than twelve years and where the title of the previous owner is admitted, the onus may properly be put on the person in possession who alleges an outright sale. I add this by way of qualification of the remark made in my judgment in *Maung Ok Kyi v. Ma Pu* (1).

The appeal is allowed and the suit dismissed with costs in both Courts.

A. N. A.

Appeal allowed.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 262 OF 1926.

July 27, 1927.

Present :—Sir Guy Rutledge, Kt.,
Chief Justice, and Mr. Justice Carr.

MAUNG BA GON—APPELLANT

versus

MA PWA THIT—RESPONDENT.

Burmese Buddhist Law—Inheritance—Heirs related in same degree—Division per capita.

Under the Burmese Buddhist Law where the heirs are all related in the same degree to the *propositus* they inherit each in his own right and not by representation and, therefore, take *per capita*.

Maung Po Thu Daw v. Maung Po Than (1), followed.

Mr *Ze Ya*, for the Appellant.

Mr. *Tun Byu*, for the Respondent.

JUDGMENT.—The question arising in this appeal is—how is the estate of the deceased Maung Aung Myin to be partitioned among his heirs, who are:—

(1) the plaintiff, the son of Aung Myin's deceased paternal aunt;

(2) and (3) two children of a deceased maternal uncle;

(4) to (9) six children of another deceased maternal uncle?

The learned Judge on the Original Side has found that the estate must be divided among these nine persons *per capita* and that each of them is entitled to a one-ninth share.

The appellant's contention is that the estate should be divided *per stirpes* and

that, therefore, he is entitled to one-third. Logically he should claim one-half because his connection with the deceased must be traced through the latter's paternal grandparents, while all the other eight heirs trace their connection through the maternal grandparents.

We think that the question is concluded by the Full Bench decision in *Maung Po Thu Daw v. Maung Po Than* (1) in which it was decided that where the only heirs were grandchildren of the *propositus* the division must be *per capita*. The cases are, of course not identical, but the principle involved is the same—that when the heirs are all related in the same degree to the *propositus* they inherit each in his own right and not by representation and that, therefore, each shares equally with all the others.

In our opinion, therefore, the decision appealed from is correct.

The appeal is dismissed with costs.

A. N. A.

Appeal dismissed.

(1) 83 Ind. Cas. 10; 1 R. 316; A. I. R. 1925 Rang. 73 (F. B.).

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 213 OF 1926.

July 15, 1927.

Present:—Justice Sir Benjamin Herbert Heald, Kt., and Mr. Justice Mya Bu.
S. R. M. M. A. CHETTYAR FIRM

—APPELLANT

versus

MA PWA MAY AND ANOTHER—RESPONDENTS.

Registration Act (XVI of 1908), s. 87—Document written on stamp of wrong description—Validity of registration.

The registration of a mortgage-bond is not invalidated by the mere fact that the document was written on a stamp paper of a wrong description. Section 87 of the Registration Act sufficiently covers such a case.

Biswanath Bhattacharjee v. Govinda Chandra Das (1), followed.

Mr. Anklesaria, for the Appellant.

Mr. Clark, for the Respondents.

JUDGMENT.

Heald, J.—Respondents sued Po Saung and Ma Twe Mi, who had purported to mortgage certain oil wells to them, to recover the amount alleged to be due on the mortgage. The date of the mortgage-bond was the 13th of March, 1924, and the suit was instituted on the 10th of June, 1924.

The mortgagors confessed judgment, but the present appellant, who in a suit instituted on the 20th of March, 1924, had on the 15th of May, 1924, obtained an attachment of the mortgaged property, claimed to be joined as a defendant and on being so joined pleaded that the mortgage was made fraudulently without consideration and by collusion between the parties to it, those parties being closely related to each other, in order to defeat the claim which he made in the suit. He brought to notice the fact that the mortgage bond was written on a Court-fee stamp and not on a non-judicial stamp and suggested that the use of a wrong stamp was an indication of the haste which was necessary if the mortgage was to be executed before his suit was filed and his attachment effected.

The Court framed issues as to whether the mortgage bond represented a genuine transaction and was executed for valuable consideration, or was executed by the parties to it in collusion for the purpose of defrauding appellant. There was also an issue as to whether the mortgage bond could be admitted in evidence on payment of duty and penalty. The Court came to the conclusion that consideration was paid, and although it found that the transaction was "highly suspicious," it held that it was not proved to be collusive or fraudulent. As for the mortgage bond, the stamp duty and penalty were paid and it was certified by the Collector to be duly stamped, and it was admitted in evidence. In the result a mortgage decree was given in favour of respondents.

Appellant appeals and his learned Advocates says that he wishes to raise two questions only:—

(i) whether the fact that the mortgage bond was written on a wrong stamp and was, therefore, not properly stamped at the time when it was registered, invalidated the registration, and

(ii) whether or not the mortgage was fraudulent and collusive.

On the first of these questions no authority has been cited in this Court which casts any doubt on the correctness of the ruling of the High Court of Calcutta in the case of *Biswanath Bhattacharjee v. Govinda Chandra Das* (1) and we are of opinion that the provisions of s. 87 of the Registration Act cover the case. We hold, there-

(1) 51 Ind. Cas. 88; 23 C. W. N. 534; 29 C. L. J. 305.

fore, that the registration of the bond was not invalidated by the fact that it was written on a stamp of the wrong kind.

[His Lordship then discussed the second question and held that the mortgage was a fraudulent and collusive transaction and set aside the mortgage-decree.]

Mya Bu, J.—I concur.

A. N. A. Order accordingly.

RANGOON HIGH COURT.

CIVIL REVISION No. 345 OF 1927.

July 28, 1927.

Present:—Mr. Justice Maung Ba.

C. R. M. A. CHETTYAR FIRM—

APPLICANTS

versus

K. R. S. V. CHETTYAR FIRM AND

OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 73—‘Same judgment-debtor’, meaning of—Decrees against several persons—Decree-holders with common judgment-debtors, whether entitled to share—Application for execution to Court holding assets; necessity of—Mere forwarding of application for execution by Court passing decree, effect of.

Where property belonging to several persons has been sold in execution of a decree against all of them, persons holding decrees against some of them alone are entitled to participate rateably in the distribution of the assets according to the interest of their respective judgment-debtors in the property sold provided they have otherwise complied with the provisions of s. 73 of the Civil Procedure Code. [p. 170, col. 1.]

The words ‘same judgment-debtor’ in s. 73 of the Code do not mean, in the case of decrees against several persons, that all the judgment-debtors of all the decrees should be the same. [p. 169, col. 2.]

Ramanathan Chettiar v. Subramania Sastrial (1), *Gonesh Das Bagria v. Shiva Lakshman Bhakat* (2) and *Chhotlal Harkisandas v. Nabibhai Mianji* (3), relied on.

A decree-holder who has not obtained a transfer of his decree to the Court holding the assets and applied to that Court for execution of his decree, but whose application for execution to the Court which passed his decree has merely been forwarded for rateable distribution to the Court holding the assets is not entitled to rateable distribution under s. 73 of the Civil Procedure Code. [p. 170, col. 1.]

Krishnashankar v. Chandrasankar (4) and *Sit Saing v. Maung Po Kaing* (5), relied on.

Mr. Thein Maung, for the Applicants.

Mr. Chäri, for the Respondents:

JUDGMENT.—This application for revision arises out of Civil Execution No. 19 of 1925 of the District Court of Prome.

The decree-holder, C. R. M. A. Chettyar

Firm, obtained a decree against Ma Shwe Yin, Ma Bibi and the legal representatives of their husbands, Meera Moideen and Muzaffar Rowther. In execution of that decree a rice-mill was attached and sold. The decree-holder objects to any rateable share being given to the four respondents, who are also Chettyar Firms, on two grounds (1) that their decrees are not against the same judgment-debtor and (2) that those decrees have not been transferred to the District Court, which holds the assets.

The mill is supposed to belong to the twodeceased Muhammadans and their wives. In the case of the applicant his decree is against both the deceased persons and their wives. In the case of the 1st respondent, K. R. S. V. Chettyar Firm, he obtained a decree in the District Court only against Ma Bibi and the legal representatives of her husband Muzaffar Rowther. In the case of the 2nd respondent, A. P. S. V. R. Chettyar Firm, he obtained a decree only against the legal representatives of Meera Moideen. In the case of the 3rd respondent, N. M. R. M. Chettyar Firm, he obtained three decrees, (1) against both the widows and the legal representatives of Meera Moideen, (2) against Ma Bibi and her children as the legal representatives of Muzaffar Rowther; and (3) against Ma Shwe Yin, Ma Bibi and the latter's children as the legal representatives of Muzaffar Rowther. In the case of the 4th respondent, R. M. M. R. M. Chettyar Firm, he obtained a decree against Ma Shwe Yin, Ma Bibi and the former's children as the legal representatives of Meera Moideen. All those decrees obtained by 2nd, 3rd and 4th respondents were obtained in the Sub-Divisional Court of Paungde. It is true that the decrees of those three respondents were not against all the judgment debtors included in the decree obtained by the applicant.

The first question is whether the phrase “same judgment-debtor” can be applied to all the decrees obtained by the applicant and the four respondents. In my opinion it can be so applied. In this view I am fortified by the following authorities.

In the case of *Ramanathan Chettyar v. Subramania Sastrial* (1) one decree was against the father alone and the other was against the father and son. The property

sold was the ancestral property of the family of which the father and son were undivided members. The learned Chief Justice, Sir Arnold White, held that the decrees were against the "same judgment-debtor" for the purposes of s. 295 (now s. 73). That case was decided in 1902. In the following year the Calcutta High Court adopted the same view in the Full Bench case of *Gonesh Das Bagria v. Shiva Lakshman Bhakat* (2). In that case B obtained a decree against three judgment-debtors, X, Y and Z, while A obtained a decree against X and Y only. The property sold was the joint property of all the three judgment-debtors. The Calcutta High Court even went further and held that in such a case a proportionate distribution of the assets according to the shares of the judgment-debtors in the property was permissible. Three years later the Bombay High Court adopted the same view in the case of *Chhotalal Harkishandas v. Nabibhai Mianji* (3). It was a Bench ruling. The learned Judges followed the rulings of the Madras and Calcutta High Courts mentioned above.

In the present case there are common judgment-debtors in all the execution cases. So it would follow that all the decree-holders are entitled to participate rateably in the distribution of the assets according to the interest of the respective judgment-debtors in the property. This disposes of the first objection.

We now come to the next objection, namely, that the respondent-decree holders are not entitled to any share on account of their failure to apply for execution of their decrees to the District Court of Prome, which held the assets. Section 73 is quite clear on the point. It lays down: "Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees..." The language is quite plain and the words "the Court" no doubt refer to the same Court described as "a Court" at the beginning of the sentence. In other words, for the decree-holders to become entitled to any share in the assets, they must have applied to the Court which holds the assets for execution of their decrees. This view has been adopted as early as 1881 in the case of

Krishnashankar v. Chandrashankar (4). That ruling was with reference to the old s. 295. In that section the words used were "have, prior to the realization, applied to the Court, by which such assets are held, for execution of decrees." So far as the question under discussion is concerned there has been no change in the law. The construction put by the learned Judges, who decided that case, was that only those decree-holders, who had actually applied for execution of their decrees to the Court holding the assets could share in the rateable distribution. This view was adopted by the late Sir Charles Fox in the case of *Sit Saing v. Maung Po Kaing* (5). In that case the plaintiff obtained a decree in the Sub-Divisional Court, while the defendants had obtained two decrees in the Township Court against the same persons. The Sub-Divisional Court realised some assets by sale of certain properties. Prior to the realisation the defendants applied to the Township Court for execution of the decrees, by attachment and sale of the same properties and in their application they stated that the property had already been attached by the Sub-Divisional Court. They asked that their applications might be forwarded to the Sub-Divisional Court so that they might obtain a rateable share. The Township Court accordingly submitted the applications to the Sub-Divisional Court. The learned Judge held "that s. 295, Civil Procedure Code requires that the persons seeking a rateable share shall, prior to the realization of the assets, have applied to the Court which holds the assets, for execution of their decrees and under s. 230 an application for execution of a decree can only be made to the Court which has passed the decree or to a Court to which the decree has been sent for execution under ss. 223 and 224. The decrees of the Township Court had not been sent to the Sub-Divisional Court; consequently the latter Court had no jurisdiction to entertain the defendant's application and the order for rateable distribution was illegal." According to this construction it is essential that an application for execution has been made to the Court which holds the assets. To determine the rights of the respondents it is now necessary to decide whether the requirements of s. 73 have been complied with by them.

(2) 30 C. 583; 7 G. W. N. 414 (F. B.).

(3) 29 B. 528; 7 Bom. L. R. 567.

(4) 5 B. 198; 3 Ind. Dec. (N. S.) 132.

(5) 1 L. B. R. 121.

In Civil Execution Case No. 8 of 1926 the application for execution was made to the Sub-Divisional Court. On the 18th June, 1926, the Sub-Divisional Judge recorded this order:—"It is forwarded to the Additional District Judge for rateable distribution as the rice-mill attached will be sold by auction on the 1st July, 1926." The decree has not been transferred to the District Court and no application for execution has been made to that Court. I must, therefore, hold that the requirements of s. 73 have not been complied with by the 4th respondent.

In Civil Execution No. 70 of 1925, the application for execution was made to the Sub-Divisional Court. On the 9th of March, 1926, the Sub-Divisional Judge recorded this order:—"The decree-holder filed application to the effect that the attached property is under proclamation for sale in the District Court and asked me to send this case to the District Court for rateable distribution." In this case also the requirements have not been complied with.

In Civil Execution Case No. 6 of 1926, the application was made to the Sub-Divisional Court. On the 2nd June, 1926, the Sub-Divisional Judge recorded this order:—"Put up with Civil Execution No. 8 of 1916 of the Sub-Divisional Judge, Paungde" and in that execution case the Sub-Divisional Judge on 10th July, 1926, recorded this order:—"U Than Maung for Mr. Ahmed present, and says that the attached property will be sold on the 17th June 1926, in execution of a decree in the Additional District Judge's Court and asks me to send the case to the Additional District Judge's Court for rateable distribution. I accordingly forward these cases to the Additional District Judge for rateable distribution." By 'these cases' the learned Judge meant Civil Execution Nos. 6, 7 and 8 instituted by the same decree-holders, N. M. R. M. Firm. In all these three cases also the requirements of s. 73 have not been complied with.

It is urged on behalf of these respondents that the submission of the records by the Sub-Divisional Court should be considered to be equivalent to a transfer of the decree to the District Court; s. 63 says that "where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realise such property and shall deter-

mine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached". It is urged that under this section the District Court is the Court which shall receive or realise the assets and which shall determine any claim thereto and that this section will be in conflict with s. 73. It is doubtful whether this argument is correct. If the language is strictly interpreted the phrase, 'any claim thereto' seems to refer to the claim to the property under attachment and not to the claim to the assets after realisation. In my opinion this section contemplates such a claim as is contemplated by O. XXI, r. 50.

For the above reason I hold that in the case of respondents Nos. 2 to 4 they are not entitled to any rateable distribution and they should be excluded, and that in the case of the 1st respondent, as his decree was obtained in the same District Court and as he has made the application for execution to that Court, he is entitled to a share in the assets, although his decree is not against all the judgment-debtors against whom the applicant has obtained a decree. But as already pointed out in the earlier part of the judgment, his share must be determined according to the interests of his judgment-debtors in the rice-mill.

The order of the District Court is modified accordingly and the applicant is entitled to his costs in this Court against respondents Nos. 2, 3 and 4. This 1st respondent is entitled to his costs in this Court against the applicant.

A. N. A.

Order modified.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 26 OF 1927.

August 1, 1927.

Present:—Justice Sir Benjamin Herbert Heald, Kt., and Mr. Justice Darwood.**MAUNG THA DUN AND ANOTHER.**

—APPELLANT

versus

PO KA AND ANOTHER—

RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 5 (1), 59 (a), 68—Civil Procedure Code (Act V of 1908), O. XXI—Sale by Receiver in insolvency—Deposit of amount due to creditors and 5 per cent. on purchase-money by insolvent—Sale, whether can be set aside—O. XXI, whether applies to sales by Receivers—Setting aside sales by Receivers—Principles.

An insolvent is not entitled to have a sale by the Receiver set aside on making a deposit of the amount due to his creditors and 5 per cent. of the purchase-money within 30 days of the sale. The provisions of O. XXI of the Civil Procedure Code do not apply to sales by Receivers in insolvency. [p. 172, col. 2.]

A sale by a Receiver is not a "proceeding under the Act" within the meaning of s. 5 (1) of the Provincial Insolvency Act. [*ibid.*]

Cheda Lal v. Lachman Parshad (1), followed.

It is settled law that a Court has no jurisdiction to set aside a sale held or made by a Receiver which is not in excess of his authority in the absence of proof of fraud or collusion or material illegality or irregularity in conducting the sale or misconduct on his part causing injury to the estate. [p. 173, col. 1.]

Mr. Aiyangar, for the Appellants.

Mr. Sen Tun Aung, for the Respondents.

JUDGMENT.—In Civil Miscellaneous No. 139 of 1925 of the District Court, Pegu, the appellants were adjudicated insolvents on the 23rd September, 1925, on the petition of a creditor. On 4th September, 1926, the Bailiff of the District Court, Pegu, who had been appointed Receiver, proceeded to sell the property now in question after the issue of a proclamation of sale in accordance with the provisions of O. XXI, r. 66, Civil Procedure Code. The property was purchased by the respondents for Rs. 2,650 of which one-quarter was paid at once and the balance on 17th September 1926. On 25th September 1926 appellants filed a petition in which they stated that they were willing to pay their debts in full and that the property was sold for a price much below its real value. They asked to be permitted to deposit in Court whatever amount the Court fixed and, on such deposit being made, for the annulment of the order of adjudication and of the sale. On 30th September they tendered Rs. 1,525-12-9 to pay their creditors in full and Rs. 132-8

being 5 per cent. on the purchase-money, to be paid to the purchaser as compensation for the cancellation of the sale. The Court ordered the money to be deposited in Court.

The Receiver and the purchasers—the respondents—opposed the application to set aside the sale.

On the 13th December, 1926, the order of adjudication was annulled but the application to set aside the sale was dismissed as the Court held that the provisions of the Civil Procedure Code did not apply to a sale made by a Receiver in insolvency.

Appellants have received leave to appeal. Their grounds of appeal are numerous but may be reduced to two.

The first is that the provisions of the Civil Procedure Code apply to the sale and under those provisions the appellants are entitled to have the sale set aside.

The second is that in the circumstances of the case the District Judge should not have confirmed the sale but should have set it aside under the provisions of s. 68 of the Provincial Insolvency Act.

It has been argued on behalf of the appellants that as the Receiver chose to adopt the method laid down in the Civil Procedure Code in proclaiming the sale the rest of the provisions of O. XXI of the Code apply to the sale, and one of those provisions entitles the appellants to have the sale set aside on certain conditions. The argument is not sound.

Reliance has also been placed on s. 5 (1) of the Provincial Insolvency Act. That section runs thus:—"Subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction."

A Receiver's sale is not a "proceeding under the Act"—"proceeding" in this section means a proceeding in Court: *vide Cheda Lal v. Lachman Parshad* (1). This ruling also decided that sales by Receivers in bankruptcy are not governed by O. XXI of the Civil Procedure Code. Clause (a) of s. 59 of the Provincial Insolvency Act gives general power to a Receiver to sell the property of the insolvent without the sanction of the Court and no restriction whatsoever is placed as to the manner in which the sale

(1) 37 Ind. Cas. 830; 39 A. 267 at p. 272; 15 A. L. J. 253.

is to be conducted. He is to exercise his own discretion and may sell by public auction or private contract. Nowhere is it laid down that a Receiver's sale is governed by the provisions of O. XXI, Civil Procedure Code, and learned Counsel for the appellants is unable to quote any authority for the argument he puts forward. It is an untenable one.

The next point for consideration is whether the circumstances in which the sale took place were such as to justify an order to set it aside. For the purposes of this appeal it may be assumed that the petition asking for cancellation of the sale was in effect an appeal under s. 68 of the Provincial Insolvency Act to the District Judge against the sale made by the Receiver. But in view of the fact that the Receiver was entitled to sell the property without the consent of the Court the power of the Court to set aside the sale comes into question.

It may, we think, be taken as settled law that the Court has no jurisdiction to set aside a sale held or made by the Receiver in the absence of proof of fraud or collusion or material illegality or irregularity in conducting the sale or misconduct on his part causing injury to the estate. The sale may of course be set aside if the Receiver acts beyond his authority or in excess of the powers conferred on him.

In the present case it is noticeable that the appellants when seeking to set aside the sale made no allegations of material irregularities in connection with the sale. This, however, may have been due to the fact that if they wished to succeed under the provisions of O. XXI, r. 89, Civil Procedure Code, they were debarred from applying to have the sale set aside on the ground of material irregularity in making or conducting the sale.

The only alleged irregularity which appellants now bring to our notice is that in the proclamation of sale the appellants have been described as the "applicants for insolvency," instead of as "insolvents." The term "Dewali shoukthu" may mean petitioning-creditor as well as insolvent but unless the text is separated from the context insolvent is the only meaning applicable to it in the proclamation. There is no suggestion that any one was deceived by the alleged misdescription or that it led to any loss of

price at the auction. The appellants must have been aware of the error but took no steps to have it rectified. The fact that the property fetched only Rs. 2,650 merely indicates that that was its true value. The appellants' value it at over Rs. 4,000. Neither this, nor the misdescription of the appellants in the proclamation, nor both combined, are a good ground for setting aside the sale which was completed as soon as the purchase-money was paid in full. The purchasers were then entitled to a conveyance even without any confirmation of the sale by the Court. There are no grounds setting aside this sale and the appeal must, therefore, be dismissed with costs.

A. N. A.

Appeal dismissed.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 627 OF 1926.

July 29, 1927.

Present:—Justice Sir Benjamin Herbert Heald, Kt., and Mr. Justice Darwood.

MAUNG PO SI AND ANOTHER—APPELLANTS
versus

K. P. A. P. FIRM—RESPONDENTS.

Mortgage—Suit for sale against mortgagor and purchaser of house standing on mortgaged property—Preliminary decree—Question of apportionment, when arises—Transfer of Property Act (IV of 1882), s. 82.

A mortgagor instituted a suit for sale against the mortgagee and a person who had purchased and dismantled a house which stood on the mortgaged property. A preliminary decree for sale was passed against both and the purchaser appealed contending that the trial Court should have apportioned the mortgage-debt between himself and the mortgagee.

Held, that the question of the personal liability of the appellant could not arise until it became necessary to make a personal money-decree and that the appeal from the preliminary decree was, therefore, misconceived. [p. 174, col. 2.]

Mr. Halker, for the Appellants.

Mr. P. B. Sen, for the Respondents.

JUDGMENT.

Heald, J.—The respondents K. P. A. P. Chetty Firm, sued one Po Hmyin to recover Rs. 3,216-6-0 which they alleged to be due on a registered mortgage of a

holding of over 25 acres of paddy land and of a garden with the house standing on it. They joined the present appellants as defendants on the ground that appellants had brought the house which was subject to their mortgage and had dismantled it and removed the materials. They claimed that they were entitled to a mortgage decree against the appellants as well as against Po Hmyin.

Po Hmyin did not contest the suit.

Appellants said that they bought the house from Po Hmyin on the 7th of January, 1924, that is three months before the date of respondents' mortgage, the date of which was the 9th of April, 1924, and that the mortgage did not affect their title to the house. They produced a document recording the sale of the house to them. They admitted that they had dismantled the house and removed the materials.

The trial Court found that the house was still standing on the land at the time of the mortgage and was not dismantled and removed until shortly before the respondents' suit was filed. The learned Judge said that the document recording the sale of the house to appellants could not be received as evidence of the sale because it was not registered and needed registration since the house was immoveable property. He said further that the document itself was open to suspicion. He gave respondents a preliminary mortgage decree for the full amount of the mortgage money against appellants as well as Po Hmyin. That decree which is in the usual form merely declares the amount due on the mortgage, and the costs of the suit, directs that on the defendants paying that amount into Court before a certain date, the plaintiff shall return the documents, relating to the mortgaged property, and that in default of payment the mortgaged property or a sufficient part thereof shall be sold.

There is as yet no final decree for sale and no personal money decree against either appellants or Po Hmyin.

Appellants appealed against the preliminary decree on grounds that no decree should have been passed against them, that they were no longer in possession of the materials of the house, having sold them, and that in any case they

could not be liable for more than the value of the house.

At the hearing in the lower Appellate Court the only matter argued was that the Court ought to have ascertained the value of the house and apportioned the liabilities between them and Po Hmyin in accordance with the principles laid down in s. 82 of the Transfer of Property Act.

The lower Appellate Court following the ruling in *Roghu Nath Pershad v. Harlal Sadhu* (1) said that s. 82 had no application in order to compel the mortgagee to apportion his claim amongst the various properties mortgaged, and dismissed the appellants' appeal.

Appellants now come to this Court in second appeal on grounds that the trial Court ought to have apportioned the mortgage debt between them and Po Hmyin, that the value of the house which they purchased was only Rs. 300 and that the principle which was applied by the lower Appellate Court did not apply in the present case because in this case the properties which the mortgagor sold were moveable properties.

It seems to me that the question which appellants wish to raise does not arise at the present stage of the case and that their appeal was misconceived. The preliminary decree gives them the right to redeem the mortgage if they desire to do so, but does not compel them to redeem it. If they fail to redeem it, and if Po Hmyin does not redeem, a decree for sale of the mortgaged property will follow but it is clear that the house which has been dismantled and of which the materials have been sold cannot be sold under that decree.

The question of appellants' personal liability will not arise unless and until it becomes necessary to make a personal money decree against Po Hmyin and against appellants. Then it may be necessary for the Court to apportion the liability, but at present there is no such necessity and it is clear that the necessity may never arise, since the part of the mortgaged property which is left, namely, the paddy land and the garden, may be more than sufficient to satisfy the mortgage debt.

Although, therefore, I am of opinion that the judgment of the lower Court was wrong in so far as it may be regarded as deciding that appellants are liable for the whole

(1) 18 C. 320; 9 Ind. Dec. (N.s.) 213.

amount of the mortgage debt, because I think that the question of the amount, for which they may ultimately be liable has not yet arisen and may never arise and, therefore, ought not to have been decided, I would hold that the preliminary decree against which appellants are appealing was properly made, and I would dismiss their appeal with costs.

Darwood, J.—I concur.

A. N. A.

Appeal dismissed.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 296
OF 1927.

August 30, 1927.

Present:—Mr. Justice Baguley.

BURMA RAILWAYS COMPANY,

LIMITED—DEFENDANT—APPELLANT.

versus

MAUNG HLA TIN—PLAINTIFF—

RESPONDENT.

Landlord and tenant—Lease for cultivating purposes—Trespass by third person—Removal of earth—Suit by lessee for damages—Measure of damages—Practice—Precedents.

In a suit for damages by a lessee of a piece of land for cultivating and grazing purposes against a trespasser who has encroached upon a portion of the land and removed a quantity of earth therefrom, the lessee is entitled to claim as damages only the loss which he has incurred by reason of the deprivation of the use of the portion of the land encroached upon. He is not entitled to recover damages on the basis of the value of the earth removed. [p. 176, col. 2.]

Damages vary considerably according to a party's interest in the land. [p. 176, col. 1.]

Whittham v. Westminster Brymbo Coal & Coke Company (1), distinguished.

It is dangerous to apply the principles given in peculiar cases to cases in which the facts are totally different. [p. 176, col. 2.]

JUDGMENT.—Respondent, Maung Hla Tin, is lessee of some land adjoining the Burma Railways Company's line. The land is apparently a good deal higher than the line itself. In the course of work in connection with the Pegu-Kayan line construc-

tion the Railways Company's servants, while excavating for earth, went over the boundary line between the plaintiff's land and the Railway line and dug a considerable amount of earth from the plaintiff's land. This was about the beginning of 1926. The plaintiff discovered this fact and sent a letter, Ex. B, dated the 2nd February, claiming Rs. 3,930 as damages. The Railways Company replied asking for time to go into the matter, and, finally they sent him a letter, Ex. K, dated the 20th April, admitting that they had encroached upon an area of 15 acre and offering, without prejudice, the sum of Rs. 100 as compensation. The plaintiff was not prepared to accept this, and, on the 16th June, 1926, filed the present suit. An amended plaint was filed on the 9th October. It is headed "suit for the recovery of Rs. 1,000 as damages for earth removed from the plaintiff's land." It sets out that in January the defendant Company trespassed on the land and removed 810 sadrams of earth. It goes on to value the earth removed at Rs. 2,430; but the prayer is for Rs. 1,000 only as damages for earth removed.

The defendant Company in their written statement admit encroachment of 08 acre only and say that they only removed 43 sadrams of earth. The written statement further submits that compensation cannot be assessed on the quantity of earth removed.

Evidence was gone into, and the trial Court dismissed the claim on the ground that, as the plaintiff was only a lessee of Government, holding the land under a lease for cultivation or grazing purposes only, he could not claim any compensation. The Township Judge seems also to have been influenced by the fact that before he wrote his judgment the land had been acquired by Government. The real reason for his finding is not particularly clear.

The plaintiff went in appeal before the Additional District Judge and, though he comes to a very definite conclusion, I am afraid that his judgment is also not quite as clear as it might have been. He states definitely that in argument before him the plaintiff was suing for trover and not trespass. I agree that the claim made is one for damages for removal and conversion of earth. Nevertheless, having taken up

this standpoint the learned Judge assessed damages as the value of 49 acre of land at Rs. 1,171 per acre. It seems to me that, if the claim is one for trover, damages must be assessed by the ton or cubic feet. An assessment per acre as this is shows that the case was regarded as being one of trespass.

However, before me the case was treated as one for damages in general.

The plaintiff was a lease-holder of the land and the damages to be awarded to him must be for the damage done to his interests. This is pointed out in *Mayne on Damages* at page 424 and the following pages. "Damages will vary considerably according to the plaintiff's interests in the land."

On the other side, it was contended before me that the Courts could not look into the plaintiff's title, and I was referred to *Salmond's Law of Torts*, pages 228 and 229. "In other words, no defendant in an action of trespass can plead *jus tertii*—the right of possession outstanding in some third person—as against the fact of possession in the plaintiff."

This argument, I think, shows a misapprehension of the facts of the case. The plaintiff is suing for the injury done to him. What he had was the right to go on occupying the surface of this land for about fifteen years after the date of the trespass. If the argument is that, I am unable to look at the plaintiff's interests at all but to hold that because he was in possession of the land he must be regarded as the full and outright owner. I can not see my way to accept it. The plaintiff filed his lease as an exhibit, and it is impossible for the Court to refuse to read the plaintiff's documents which he has filed. He being only a lessee, his interest is that of a lease-holder. He has no right to minerals or to take out and cart away the earth. He has been deprived of the use of part of the surface of the earth because the defendant Company had removed it and that, so far as I can see, is the full extent of his damage.

I have been referred to *Whitwham v. Westminster Brymbo Coal & Coke Company* (1), in which it is laid down in one particular case that the damages to which the

plaintiff was entitled must be assessed partly with a view to the benefit derived from the trespass of the trespasser. The facts of that case are totally different to the facts in the present one. In that case the trespass had gone on for years and the defendants had been tipping spoil from a mine on to the land of the plaintiff. *Lopes, L. J.*, in his judgment at page 543* says: "It is a peculiar case" and it is dangerous indeed to apply principles given in peculiar cases to cases in which the facts are totally different! In the case of a wilful wrongdoer, no doubt, the gain obtained by him from his trespass would be taken into consideration in assessing the damages to be awarded to the plaintiff, but there is no suggestion here, I think, that the defendant Company was a wilful wrongdoer. It was a case of unintentionally overstepping the boundary, and, as soon as the fact had been brought to their notice, they took steps to remedy the matter by acquiring the land under the Land Acquisition Act.

Holding, as I do, that the plaintiff had no right to the earth, any damage payable for removing the earth, would have to be paid to his landlord. The damage awardable to the plaintiff must be assessed on the diminution in the value of his land. For this we have to determine the area of land of which he has been deprived, for, once the Railways Company had used the land as an earth quarry, there can be no doubt that its value for cultivation and grazing purposes would be nil.

[His Lordship found on the evidence that the plaintiff was deprived of the use of 26 of an acre only and allowed the sum of Rs. 100 which had been offered to him by the Railway Company. His Lordship further ordered that the appellant should pay the costs throughout.]

A. N. A.

Appeal partly allowed.

*Page of (1896) 2 Ch. D. 538—[Ed.]

ODH CHIEF COURT.

CRIMINAL APPEAL No. 606 OF 1927.

December 16, 1927.

*Present:—*Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.**MADARU—ACCUSED No. 2—APPELLANT**
*versus***EMPEROR—RESPONDENT.***Penal Code (Act XLV of 1860), s. 302—Murder—Assailants engaged in brawl—Member of one party striking member of the other side who is empty-handed and not an active participant with hatchet—Offence—Sentence.*

Where during a brawl in which the assailants on both sides are using sticks, a member of one side intervenes with a hatchet and strikes over the head of a member of the other side, who is empty-handed and taking no active part in the fight and kills him in consequence, he commits murder and not culpable homicide not amounting to murder. [p. 178, cols. 1 & 2.]

Criminal appeal against an order of the Second Additional Sessions Judge, Lucknow at Unao, dated November 19, 1927.

Messrs. J. Jackson and H. Husain, for the Appellant.

Mr. H. K. Ghose, Government Pleader, for the Crown.

JUDGMENT.—Madaru, a Behna aged 25 of Sahrawan a village in the Unao District, has been convicted by the learned Additional Sessions Judge of Unao of the offence of murder under s. 302, Indian Penal Code, and sentenced to death subject to confirmation by this Court. He appeals and the reference in confirmation is also before us.

These are the facts. In this village the family of which Madaru is a member occupies a house which adjoins the house occupied by certain Pasis. Adjacent to the two houses is a rain-water drain. The occurrence took place on the 16th July, 1927. The rains having set in, the drain in question was overflowing. Unless it was cleared the water flowed into the appellant's house. When cleared it spilled over into the Pasis' house. It was over a dispute in relation to this trifling matter that Sadhu Pasi lost his life. What happened was this. Early in the day the Behnas had been diverting the water in such a manner that it spilled into the Pasis' house. There had been a quarrel. Later, Abdul, the appellant's father, was again, in order to save his own premises, taking such action that the water according to the Pasis would flow into their house. This took place in the evening, and another quarrel then began. It is not very clear what was the exact sequence of incidents in this quarrel, but it is quite clear that

five male members of the Pasis' family and four male members of the Behnas, family appeared on the scene. On the Pasis' side were Bhawani the uncle, Puran and Sadhu deceased who were own brothers and two men called Hembraaj and Mihi, who were cousins. On the Behnas' side were Nabi and Abdul who were brothers and Sardar and Madaru who were the sons of Abdul. Both sides indulged in the abuse and remonstrance usual to the members of their castes on such occasions and from words they rapidly came to blows. Bhawani and Puran on the one side received injuries and Nabi, Abdul and Sardar upon the other side received injuries, the weapons used being *lathis*. They did not receive serious injuries, but Sadhu received injuries which caused his death.

The evidence is that Madaru who at the time when the fight arose had been shaping a piece of wood into an agricultural implement came on the scene with a hatchet and struck Sadhu over the head with this hatchet a blow, which penetrated into the bone of the skull and fractured left parietal and the right frontal bones, injured the brain, and caused death within a very short period. Apart from the evidence of Puran and Bhawani there is the evidence of certain neighbours who witnessed the incident. Those neighbours are Bhawani Din, a Thakur, Ishur Din, a Brahman and Ajudhia Prasad, a Brahman. These three persons who were cross-examined at length and whose evidence has in no way been shaken, in our opinion, in cross-examination have deposed with certainty that the deceased man Sadhu was taking no active part in the fight and that at no time had he used violence to anyone. There is evidence which we accept that he had joined in abusing the Behnas, but the attack upon him was not justified in any way as he was stated by these witnesses to have been empty-handed. Great stress was laid down by the learned Counsel for the appellant upon a statement made by Sub-Inspector Suraj Narain that Puran had stated to him on the following morning that Sadhu had brought a shovel in order to clean out the drain. We do not consider that the statement was admissible in evidence as the provisions of s. 162 of the Code of Criminal Procedure had not been complied with. But putting this statement at its highest, it would mean very little. Sadhu might have brought a spade with which to clear out the drain

and yet at the same time been empty handed when he was attacked. He could have brought the spade and put it down. We have the evidence of three witnesses who are not shown to be biassed in any manner that Sadhu was empty-handed at the time that Madaru the appellant came and struck him a violent blow on the head with the hatchet. We have the hatchet before us. The blade is a heavy blade ending in a sharp edge. The blade is 5" long and $1\frac{1}{2}$ " wide. The handle is 2 feet long.

Madaru refused to make any reply in the Committing Magistrate's Court, and in the Sessions Court he made a simple denial. In his appeal from the Jail for the first time he has suggested that he was not present on the spot. He has not been able to meet in any way the evidence of the witnesses against him. It was open to him to have called as witnesses in his defence his father, Abdul and his uncle Nabi. He could not call his brother Sardar for Sardar was charged with the murder. Sardar has been acquitted of murder and sentenced to six months' rigorous imprisonment for simple hurt. He has not so far appealed. But apart from his father Abdul and his uncle Nabi, he has not attempted to call any of the neighbours who might have been in a position to see the occurrence. All the neighbours who have been called as witnesses have deposed against him. It has been suggested in defence that the feelings of the Hindus and Muhammadans in this village are so strained that no Hindu would give truthful evidence on behalf of a Muhammadan. We are unable to attach any value to that suggestion as we find that there is nothing to support it. We find the case to be clearly a case of murder.

The learned Counsel for the appellant put forward as his main defence that the culpable homicide had been committed in a sudden fight in the heat of passion upon a sudden quarrel. He did not contest the finding that his client had struck the fatal blow, but he suggested that the offence committed was at the worst culpable homicide not amounting to murder, and in any circumstances he pleaded for a remission of the capital sentence. We do not consider that Exception 4 of s. 300, Indian Penal Code, has any application, because Madaru distinctly took undue advantage over the deceased man. When a brawl is taking place in which the assailants on both sides are using sticks, a member of one side, who

intervenes with a hatchet and strikes over the head of a member of the other side, who is empty-handed and taking no active part in the fight and kills him in consequence, in our opinion, commits murder and nothing less. We find that the appellant has been rightly convicted of murder. We believe the evidence of Puran and Bhawani in the main and we find that Bhagwan Din, Ishar Din and Ajodhia Prasad have told the truth.

The question of sentence presents some difficulty. The murder was undoubtedly not premeditated. The victim had been using bad language, and the hatchet was being employed shortly before the quarrel by the appellant for a perfectly innocent purpose. We have given full weight to all the above facts, but at the same time we are obliged to take the view that these savage homicides are too prevalent in Oudh to justify the exercise of clemency. When, as here a man rushes into a brawl with a heavy hatchet and strikes with all his force, as Madaru clearly did, one of his neighbours who is unable to defend himself upon the head with the hatchet and kills him we are unable to reduce the capital sentence. We therefore dismiss the appeal, uphold the conviction and confirm the sentence and direct that Madaru be hanged by the neck till he be dead.

G. H.

Appeal dismissed.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 275 OF 1927.

November 16, 1927.

Present :—Mr. Justice Raza.

DUKHI SINGH AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

SARJU DEI AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Birt, meaning of—Execution of birt-deed by joint owner—Validity of deed.

'Birt' generally means an under-proprietary right and a birt-deed executed by one of several joint owners is consequently null and void against those who were not parties to it. [p. 179 col. 2; p. 180, col. 1.]

Ram Autar v. Drigpal (1), *Lal Mohammad Khan v. Amatul Fatima* (2) and *Jalaluddin Khan v. Rampal* (3), referred to.

Appeal against the order of the Additional Subordinate Judge, Fyzabad, dated the 18th May, 1927, modifying that of the Munsif, Havali at Fyzabad, dated the 12th March, 1927.

Mr. Naziruddin, for the Appellants.

Mr. Ali Zaheer, for the Respondents.

JUDGMENT.—This is an appeal from a decree of the Additional Subordinate Judge, Fyzabad, dated the 18th May, 1927, modifying a decree of the Munsif, Havali at Fyzabad, dated the 12th March, 1927.

The facts of the case so far as it is necessary to state them for the purpose of disposing of this appeal, are as follows:—

The plaintiffs, Dukhi Singh and Pudan Singh, are the cousins of the defendant No. 2, Inderjit Singh. Sheoambar Singh, had two sons, namely, Pirthi Singh and Chatter Singh. The plaintiffs are the sons of Pirthi Singh deceased. The defendant No. 2 is the son of Chatter Singh deceased.

The dispute in this case relates to plot No. 184 in village Bargoara, District Fyzabad. It is not disputed that the plot in suit was owned by Sheoambar Singh and on his death it was owned by his two sons in equal shares. It is not also disputed that the descendants of Sheoambar Singh were not living jointly as members of a joint Hindu family. The plaintiffs brought the present suit, alleging that the defendant No. 1, Musammam Sarju Dei, had taken possession of the plot in suit wrongfully, in collusion with the defendant No. 2, Inderjit Singh.

The defendant No. 1 alone resisted the plaintiffs' claim. She alleged that there was a private partition between Pirthi Singh and Chatter Singh about 20 or 22 years ago, that the plot in suit fell to the share of Chatter Singh in that partition, that the plot in suit was thus owned and possessed by Inderjit Singh exclusively, that Inderjit Singh transferred the plot to her by a *birt*-deed dated the 12th June, 1917, and that she was thus in rightful possession of the plot in suit. She pleaded limitation also.

The learned Munsif held that the plot in suit was the joint property of the plaintiffs and the defendant No. 2, that there was no private partition under which the plot in suit fell to the share of the defendant No. 2 or his father, that the defendant No. 2 was never in exclusive

possession of the plot in suit, that the plaintiffs were in possession of the plot within limitation and that the *birt*-deed executed by the defendant No. 2 in favour of defendant No. 1 was void. The plaintiffs' claim was, therefore, decreed with costs.

The defendant No. 1 appealed and the result was that the decree of the learned Munsif was modified by the learned Additional Subordinate Judge on the 18th May, 1927. The learned Additional Subordinate Judge agreed with the learned Munsif's findings of fact generally, but he accepted the defendant No. 1's contention that the defendant No. 2 is still bound by the deed and it is possible that on partition the plot may fall to his (defendant No. 2's) share. He was of opinion, therefore, that the plaintiffs should not be given a decree for possession of the plot in suit. He gave them a decree for a declaration to the effect that the *birt*-deed executed by the defendant No. 2 in favour of defendant No. 1 is not binding on them (plaintiffs). As the appeal failed substantially the parties were ordered to bear their own costs.

The plaintiffs have now come to this Court in second appeal. They contend that the lower Appellate Court was wrong in not passing a decree for possession of the plot in suit in their favour.

The defendant No. 1 has filed cross-objections. She contends that the whole of the plaintiffs' suit should have been dismissed and that she is entitled to costs of the suit in the Court of first instance and also in the lower Appellate Court.

I have examined the record.

It has been found that the plot in suit is the joint property of the plaintiffs and defendant No. 2 and that the defendant No. 2 was never in exclusive possession of the plot. We have the concurrent findings of the lower Courts on these points. These findings are supported by admissible evidence and cannot be impugned in second appeal. As the defendant No. 2 was never in exclusive possession of the plot in suit, he was wrong in transferring the plot to the defendant No. 1 by the *birt*-deed dated the 12th June, 1917. The word '*birt*' generally implies an under-proprietary right [See *Ram Autar v. Drigpal* (1).]

The deed in question shows clearly that the defendant No. 2 attempted to make the defendant No. 1 an under-proprietor of the plot in suit and gave her a heritable and transferable right of property in the plot by the deed. He had no power to do so when the plot in suit was the joint property of the plaintiffs and the defendant No. 2. It was held in the case of *Lal Mohammad Khan v. Amatul Fatima* (2) that a joint co-sharer has no right to execute a perpetual lease of the joint property and a lease violating the above rule is null and void against persons who are not a party to the lease. In that case also there was a lease by means of which the lessor had carved out a tenure of the nature of an under-proprietary interest. It appears that the defendant No. 2 had executed the deed in question in favour of the defendant No. 1 during the minority of the plaintiffs. The deed in question is null and void as against the plaintiffs and cannot affect their interests in the property in suit. As pointed out in the case of *Jalaluddin Khan v. Rampal* (3) one co-sharer has no right to appropriate to himself a specific portion of the common land and to exclude his co-sharers from all use and enjoyment of the same without a lawful partition. But where a person has been in possession of a piece of joint land for a long time without any let or hindrance by the other co-sharers, the latter have no right to eject him or his transferee or to disturb his possession or enjoyment otherwise than by seeking partition. Such a co-sharer or his transferee is entitled to continue in such possession so long as such user does not interfere with the use by other co-sharers of what is in their possession.

I hold that the deed in question is null and void as against the plaintiffs and they are entitled to possession of the plot in suit to the extent of their share. The plaintiffs have a half share in the plot in suit. It was admitted on behalf of the plaintiffs in the first Court that the share of the defendant No. 2 in the plot in suit is half. (See proceedings of the 5th March, 1927, page 14). The plaintiffs are, therefore, entitled to a decree for joint possession of the plot in suit to the extent of a half share. They have nothing to do with the defendant No. 2's half share in the property.

There is no substance in the cross-objection.

The result is that the appeal is partly allowed and the decree of the lower Appellate Court is set aside. The decree of the first Court is modified. The plaintiffs will get a decree for joint possession of the plot in suit to the extent of a half share. They will get half of their costs from the defendant No. 1 in all the three Courts. The cross-objections are dismissed with costs.

G. H.

Appeal partly allowed.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 227 OF 1927.

November 7, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

GAYA DEEN SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

MADHO SINGH—DEFENDANT—
RESPONDENT.*Hindu Law—Widow—Gift by widow—Nearest reversioner joining in execution—Validity of gift.*

A deed of gift executed by a Hindu widow with the consent of her husband's nearest reversioner who actually joins in the execution thereof is valid and cannot be challenged by him or his transferees. [p. 181, col. 1.]

Jamuna Kunwar v. Madari Singh (1) and *Ramgouda Annagouda Patil v. Bhansaheb* (2), referred to.

Second appeal against the decree of the District Judge, Fyzabad, dated the 15th March, 1927, confirming that of the Subordinate Judge, Sultanpore, dated the 20th December, 1926.

Messrs. Ram Prasad and Moti Lal Sak-sena, for the Appellants.

Mr. Bisheshwar Nath Srivastava, for the Respondent.

(2) 76 Ind. Cas. 534; 26 O.C. 239; A. I. R. 1924 Oudh 60.

(3) 106 Ind. Cas. 359; 4 O. W. N. 871; A. I. R. 1927 Oudh 467.

JUDGMENT.—In this appeal we are concerned with the validity of a deed of gift executed jointly by a Hindu widow with the estate of a Hindu widow under the Mitakshara Law and Jaskaran Singh, who was at the time the nearest reversioner to the estate. Not only did Jaskaran Singh join in the execution of that deed of gift but he subsequently confirmed his action. On the death of the lady, Jaskaran Singh was the person who under the Mitakshara Law was entitled to inherit the estate. The validity of the deed of gift is now disputed by Jaskaran Singh himself and by three persons to whom he has transferred his rights in the estate. The three persons in question are reversioners standing more remote than Jaskaran Singh. They had no claim to succession under the Mitakshara Law on the death of the widow. The point of law might have necessitated a more or less lengthy discussion, had it not been decided by this Bench on the 13th September, 1927, after the present appeal was admitted. It was decided by this Bench in *Jamuna Kunwar v. Madari Singh* (1). Before this Bench arrived at that decision their Lordships of the Judicial Committee had considered the point once more. They considered the point in *Ramgowda Annagowda Patil v. Bhansaheb* (2), on the 11th July, 1927, but at the time of the previous decision of the Bench, that decision had not reached India. The decision of this Bench is in accord with the authority of their Lordships. In the decision of their Lordships of the Judicial Committee, to which we have just referred a deed of gift executed by a Hindu widow with the consent of her husband's nearest heir was held to be an alienation justified by the law. Our decision stated the same principle in the following words of the head-note: "A gift by a Hindu widow, which she is not ordinarily competent to make, can become a valid alienation if made with the consent of her husband's kindred, subject to the qualification that if her husband has no kindred or the kindred have failed before they have had an effective opportunity of objecting, the abstention to object cannot be

regarded as a consent." In the present appeal, as has already been noted, not only did the nearest reversioner consent to the alienation, but he actually joined in the execution of the deed. For these reasons we dismiss this appeal with costs.

G. H.

A. N. A.

*Appeal dismissed.***ODH CHIEF COURT.**

SECOND CIVIL APPEAL No. 218 OF 1927.

November 1, 1927.

Present:—Mr. Justice Misra.Nawab MOHAMMAD ALI KHAN—
PLAINTIFF—APPELLANT*versus*Musammat BADRUNNISA AND ANOTHER—
DEFENDANTS—RESPONDENTS.*Landlord and tenant—Mortgage of house by tenant in town—Zemindar's right of re-entry—Presumption—Right of tenant to sell house site.*

Unless a custom to the contrary is established, the occupiers of houses in town should be considered to have a power to transfer the right to occupy the sites on which their houses stand along with a sale of the materials thereof. The presumption applicable to an agricultural village does not obtain in towns. [p. 182, col. 2; p. 183, col. 1.]

Banwari Lal v. Raina (1) and *Jamna Kuer v. Abdul Nabi* (2), referred to.

Where a house has been transferred by the tenant by way of mortgage and not by way of sale, the proprietor is not entitled to re-enter unless there is express provision in the *wajib-ul-arz*, or any satisfactory evidence as to the existence of a custom, giving the proprietor a right of forfeiture or re-entry in case of a breach of the rule against alienation by way of mortgage. [p. 184, col. 1.]

Ali Muhammad Khan v. Chhedan (3), *Lal Bahadur v. Mohammad Karim Khan* (4), *Nurendro Narain Roy v. Ishan Chunder Sen* (5) and *Ram Raj Singh v. Tej Singh* (6), referred to.

Uzmat-un-nissa v. Ganesh Prasad (7), distinguished. Second appeal against the decree of the Second Additional Subordinate Judge, Lucknow, dated the 25th February, 1927, confirming that of the Munsif, Haveli, dated the 6th April, 1926.

Mr. Niamatullah, for the Appellant.

Messrs. M. Wasim and Naziruddin Siddiqi, for the Respondents.

(1) 106 Ind. Cas. 328; 4 O. W. N. 903; A. I. R. 1927 Oudh 469.

(2) 105 Ind. Cas. 708; 4 O. W. N. 876; A. I. R. 1927 O. 227; 53 M. L. J. 350; 46 C. L. J. 267; 39 M. L. J. 250; (1927) M. W. N. 736; 29 Bom. L. R. 1380; 32 T. W. N. 88 (P. C.).

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for possession. The facts of the case are: The plaintiff-appellant is the *zemindar* (proprietor) of a *Mohalla* called by the name of Mirzaganj, situate in the town of Malihabad, District Lucknow. Within the said *zemindari* lies a plot of land described as *Ahata* No. 484 on which stands a *pucca* house bearing No. 250. The house was purchased by defendant No. 2, Mushir Ahmad Khan, from the heirs of Umed Ali Khan, son of Major Bax Khan who had originally built it. On the 29th September, 1924, defendant No. 2 transferred the said house to defendant No. 1 *Musammât* Badrunnisa, by way of usufructuary mortgage. The term fixed in the mortgage was a period of 45 years but the deed clearly provided for redemption at the expiry of the said period. The plaintiff brought the present suit against *Musammât* Badrunnisa, the mortgagee, and Mushir Ahmad Khan, the mortgagor, impleading both of them as defendants Nos. 1 and 2 respectively. The plaintiff's allegation was that the status of defendant No. 2 was that of an ordinary *riyaya* who had no right to transfer the said house by way of mortgage, and the house having been so transferred the plaintiff as proprietor of the village was entitled to re-enter on the site of the house in dispute by asking defendant No. 2 to remove the materials of that house. The plaintiff, therefore, claimed possession of the plot in suit by demolition of the said house.

The defendants denied the plaintiff's title to the plot in suit on which the house stood and contended that the *riyayas* living in the town of Malihabad had a right to transfer their houses as they stood, and that in any case, the plaintiff had no cause of action for taking possession of the site of the house in suit because defendant No. 2 had only executed a mortgage in respect of that house which could not be considered as equivalent to sale.

The plaintiff contended in reply that the mortgage in suit was really a sale clothed in the form of a mortgage in order to defeat the plaintiff's right of re-entry as proprietor.

The learned Munsif of Haveli, Lucknow, who tried the suit, found that the plaintiff was the owner of the land on which the house stood, but held that the land was situate in the town of Malihabad of which

Mirzaganj was only a part where no such custom as pleaded by the plaintiff by which a *riyaya* could not transfer the right of residence in his house, had been established to exist. He further found that the mortgage in question was not a sale but a genuine mortgage and the transfer being by way of mortgage and not by sale the plaintiff was not entitled to re-enter upon the plot on which the house in suit stood. On these findings he dismissed the plaintiff's suit.

The plaintiff then appealed against the decree of the learned Munsif and the Second Additional Subordinate Judge of Lucknow, agreeing with the findings of the Munsif on all the points, dismissed the appeal.

In second appeal it is now contended before me that under the *wajib-ul-arz* of the town of Malihabad a *riyaya* has got no right of transfer; and that the plaintiff is entitled to eject the defendants even though the transfer was by way of mortgage. As to the first point it appears to me that the *wajib-ul-arz* is not very clear; although it gives clearly a right to the residents of that town who belong to high castes (*qaum asharaf*) to sell the materials of their houses, yet it does not contain a provision restraining them from selling the houses as they stand. The learned Advocate for the plaintiff-appellant contended that there being no express provision permitting the residents to sell their houses no such right should be presumed to exist. The Courts below have, however, decided the point against the plaintiff-appellant treating the case in dispute as one relating not to an agricultural village but to a town. They have relied on cases decided both by the late Court of the Judicial Commissioner of Oudh and the Allahabad High Court; for the proposition that in case of towns no such presumption ought to be made and that in such cases unless a custom to the contrary is established the occupiers of houses should be considered to have a power of transfer of the right to occupy the sites on which their houses stand: *Vide Banwari Lal v. Raina* (1) decided by Lindsay, J. C. and *Jamna Ku v. Abdul Nabi* (2) decided by Chamier and Rafique, JJ. After due consideration

(1) 9 Ind. Cas. 427.

(2) 16 Ind. Cas. 353.

I am in entire agreement with the proposition laid down in these cases. The Courts below have concurrently found in the present case that Malihabad is a town and that the land in suit is situate in Mirzaganj, a part of that town. Under these circumstances I am not inclined to hold unless a definite custom to the contrary is established, about which I do not find any satisfactory evidence on the record, that the residents of the town of Malihabad have no right to sell the right to occupy the sites of houses along with the sale of the materials thereof. In these circumstances the plaintiff is not entitled to exercise his right of re-entry on the land in suit by seeking possession thereof by demolition of the house standing thereon.

As to the second point, I am clearly of opinion that the plaintiff cannot exercise the right of re-entry even if he be considered entitled to the exercise of such right because the house in suit has only been transferred by way of mortgage and not by sale. In *Ali Muhammad Khan v. Chhedan* (3) it was held by a Bench of the late Court of the Judicial Commissioner of Oudh that there was an essential distinction between a transfer by way of lease or mortgage and a transfer by way of sale in which different considerations would apply. In that case the plaintiff who was the proprietor of village Maharaj Nagar had sued for ejectment of the defendants from certain groves because some of them who were proprietors of those groves and who possessed no right to transfer any of them, had mortgaged the said groves to other defendants. The suit of the plaintiff was based on an alleged right of re-entry. It was argued in that case that the grove-holders had no transferable rights and that by transferring the possession to a stranger they had forfeited whatever rights they possessed so as to give to the plaintiff a right of re-entry. The learned Judges remarked as follows:—

"We have already said that the plaintiff has, in our opinion, failed to establish any Customary Law binding on the parties which makes the forfeiture of the grove-holder's rights the necessary penalty of a breach on his part of the conditions against transfer of those rights by way of mortgage. The plaintiff, therefore, can only appeal to

the general principles of law, and these are, in our opinion, against him. Whether we refer by way of analogy to the provisions of s. 111 of the Transfer of Property Act (IV of 1882), or to those of s. 52, cl. (2) of the Oudh Rent Act, the principle involved seems to be that forfeiture of a lease is not involved in the case of the breach of any conditions for which forfeiture is not prescribed as the proper penalty under the terms of the lease or agreement under which the lessee holds. We see no good reason why a similar principle should not apply to the case of a licensor and licensee generally; and we note that a similar principle was affirmed by this Court in the case of *Lal Bahadur v. Muhammad Karim Khan* (4). We note in this connection that it may well be that a distinction ought to be drawn in a case like the present between transfers by way of lease and transfers by way of sale. In the latter case, the principles, which governed the decision in *Nurendro Narain Roy v. Ishan Chunder Sen* (5), would have to be considered. These principles seem to us to have also determined the decision of this Court in an unreported case, viz., *Sheo Dayal v. Deputy Commissioner of Barabanki as Manager of the Court of Wards in charge of Bilahra Estate*, (S. C. A. Nos. 53 to 57 of 1909) decided on April 8th, 1909. The transfers with which the Court had to deal in these cases were transfers by way of sale, and I may add that the rights of the grove-holders in the village which was there in question, as recorded in the *wajib-ul-arz*, would seem to have been even more strictly limited than those proved by the *wajib-ul-arz* in the present case. At any rate, in the case of a transfer by way of sale, it may be said that there has been on the part of the transferor an entire abandonment of his rights in favour of another person, so that if a grove holder in a case like the present purports to sell outright whatever rights he may possess in respect of his grove, he clearly has no rights left which he can set up against another person, and the transferee who is left in actual possession cannot plead that there exists as between himself and the landlord any contract of license in respect of the trees in the grove, or the land on which they stand, which can secure him against ejectment or prevent the landlord from treating him as a mere trespasser.

(4) S. C. 240.

(5) 22 W. R. 22; 13 B. L. R. 274 (F. R.)

(3) 15 Ind. Cas. 385; 15 O. C. 91.

The case of a mortgage is different, in that the grove-holder cannot be said to have entirely parted with or abandoned his own rights, and he has still something left which he can plead against the landlord so as to protect the mortgagee, who after all is only in temporary possession by permission of the mortgagor and subject to the latter's right of redemption. It seems to us very difficult in a case like the present to draw any valid distinction between a mortgage such as we have before us and a *zar-i-peshgi* lease, or a lease for a term of years, or even a sale of the produce of the trees for a particular year, or specified number of years. In the absence, therefore, of any express provision in the *wajib-ul-arz*, or any satisfactory evidence as to the existence of a custom giving the proprietor a right of forfeiture or re-entry in case of a breach of the rule against alienation by way of mortgage, we are unable to see that such right arises in favour of the plaintiff in the present case by reason of any general principle of law."

I am in entire agreement with the view taken by the learned Judges in the above case. So far as I am aware the case has been uniformly followed in Oudh. It was also followed by a learned Judge of this Court in *Ram Raj Singh v. Tej Singh* (6). It was also contended by the learned Advocate for the appellant that the mortgagee must be treated in such cases as a trespasser and in that view of the case the appellant would be entitled to possession by ejecting him as such. Reliance was placed upon a decision of the late Court of the Judicial Commissioner of Oudh in *Azmat-un-Nissa v. Ganesh Parsad* (7). It is clear from the facts of that case that it was a case of complete abandonment by sale and the defendants were, therefore, treated as trespassers. In the case of a mortgage no such view is possible to be taken. A mortgagee is only in possession for a specified period on behalf of the mortgagor and after the expiry of that period the latter would be entitled to re-enter into the possession of the property by redeeming it. If the mortgagee were to be treated as a trespasser liable to ejectment and the plaintiff given possession on foot of such a transfer, the obvious result of it would be to oust the mortgagor who

had never abandoned the property. I, therefore, hold that the plaintiff cannot exercise his right of re-entry even if he were possessed of such right in the present case since it is only a case of mortgage and not of sale.

The appeal, therefore, fails and is dismissed with costs.

G. H.

Appeal dismissed.

OUDH CHIEF COURT.

DIVORCE CASES NOS. 5 AND 6 OF 1927.

November 8, 1927.

Present:—Mr. Justice Pullan.

GRACE CAROLINE FOSTER—

APPLICANT

versus

ALFRED BERTRAM FOSTER—

RESPONDENT.

ALFRED BERTRAM FOSTER—

APPLICANT

versus

GRACE CAROLINE FOSTER AND ANOTHER

—RESPONDENTS.

Divorce—Grounds for divorce—'Cruelty'—Isolated acts of violence, whether sufficient—Adultery of wife—Condonation—Revival—Mere familiarity with co-respondent, effect of—Dissolution of marriage—Policy of law.

In order to establish a case of cruelty against her husband, a wife must prove more than mere isolated acts of violence. The degree of violence necessary varies in accordance with the status of the parties. [p. 186, col. 1.]

The law as regards revival of a condoned offence is that if such a subsequent offence should arise, the forgiveness is cancelled and the old cause of complaint is revived even if the offence is not *ejusdem generis* with the original offence. [p. 190, col. 2.]

But there is no authority for the view that an offence by a wife less than adultery with another person revives an adultery committed by her previously and which has been condoned by her husband. At least the second offence, if it is not adultery, must be one of which a Court can take cognisance. [*ibid.*]

Mere familiarity with another person, does not revive a condoned offence of adultery so as to justify a decree for divorce. [p. 191, col. 1.]

Pereira v. Pereira (1) and *Collins v. Collins* (2), referred to.

A decree for dissolution of marriage should not be granted merely because the husband has shown himself to be suspicious, jealous or even occasionally violent. It is not the object of the law to make such separations easy. [*ibid.*]

Mr. Ghulam Hasan, for the Applicant.

Mr. Walford, for the Respondent.

JUDGMENT.—Grace Caroline Foster has sued for the dissolution of her marriage with Alfred Bertram Foster on the allegation that he has habitually treated her cruelly and beaten her and also that he has committed adultery with Miss

(6) 99 Ind. Cas. 203; 3 O. W. N. 964; L. R. 8 A. (O.) 26; A. I. R. 1927 Oudh 46.

(7) 83 Ind. Cas. 51; 1 O. W. N. 515; 10 O. & A. L. R. 1305; 11 O. L. J. 750; L. R. 6 A. (O.) 6; A. I. R. 1925 Oudh 262; 28 O. C. 119.

Cynthia Bartlett, a young lady of 17 years of age, who lived in the house adjoining that of the parties. This suit was filed on the 5th of May 1927, the day on which the Courts closed for the Vacation. A cross-suit was filed by Mr. Foster on the 13th of July when the Courts re-opened in which he sought to divorce his wife on account of her misconduct with one Charles Holloway who has been impleaded as a co-respondent. The two suits have been tried together and issues were framed which covered the facts alleged in both cases. The issues are as follows:

1. Has the respondent Alfred Bertram Foster beaten his wife, petitioner, on sundry occasions without proper cause and especially on the 25th March, 1925, 19th April, 1927 the 25th April, 1927 and the 29th April, 1927?

2. If so do these assaults amount to legal cruelty?

3. Has the respondent committed adultery with one Cynthia Bartlett between the 25th April and the 1st May, 1927, and in particular on the 29th and 30th April, 1927?

4. Has the petitioner committed adultery with one Arthur George Stubbs in Calcutta in the month of April, 1920, and if so has this offence been condoned by the respondent?

5. Has the petitioner subsequent to the condonation committed adultery with Dudley Melville Gordon in 1921, first in Naini Tal and then in Calcutta and if so has this adultery also been condoned by the respondent?

6. Has the petitioner been guilty of adultery with Charles Holloway who has been cited as co-respondent in this case at 60, Abbot Road, Lucknow, between the 13th and 17th April, 1927, and again in the Railway train between Lucknow and Allahabad on or about the 18th April and in the Grand Hotel, Allahabad, on the 18th and 19th April?

7. If so, has the last adultery been condoned by the respondent?

8. Is the petitioner entitled to a decree for dissolution of marriage by way of divorce against the respondent or to any other relief?

9. Is the respondent entitled to a decree for dissolution of marriage by way of divorce against the petitioner or to any other relief?

10. Is the respondent entitled to a decree for damages and costs as against Charles Holloway, cited as co-respondent, and if so how much.

Before proceeding to discuss the issues in detail, I shall state briefly the events which led up to these cross cases. The parties were married at Lucknow on the 16th October, 1915, Mrs. Foster being then apparently about 15 years of age. Mr. Foster was then, and is now, employed in the Government Secretariat. His duties took him to various places and the parties lived together in Lucknow, Nagpur, Calcutta and Naini Tal. It is not necessary to consider whether the parties were or were not a happily married couple prior to the year 1921. They had several children and they lived together. They have now for the purposes of this case made attacks on each other but they have not been supported by evidence and each of them contradicts the allegations of the other. In 1921, however, there is no doubt that Mrs. Foster became implicated with a man named Gordon and, as the result of this affair which I shall discuss later, the parties went to Calcutta where Mr. Foster brought a complaint against Gordon of adultery, and ultimately withdrew from the case on receiving payment of Rs. 1,000. After that the parties continued to live together as man and wife and more children were born. In 1925 they had a quarrel and Mrs. Foster made a complaint in the Magistrate's Court at Lucknow. The complaint was of a trifling nature and was not pressed and after that it appears that the parties lived together as before, received and entertained their friends and there was no open breach until the present year. On the 12th of April, 1927, Mr. Foster's duties took him to Allahabad. On the 17th of April, which was Easter Sunday, Mrs. Foster followed him to Allahabad. She went accompanied by the co-respondent Charles Holloway, her small child of three or four years of age, and a young unmarried woman named Silvia Bartlett. It is admitted that while they were in Allahabad they attended a dance at the Railway Institute and put up at the Grand Hotel. On the 19th of April they met Mr. Foster. It is admitted that he came to the Hotel and found Mrs. Foster, Mr. Holloway, the child, and Miss Bartlett resting in one room, that he was extremely annoyed and used violent language to his wife, and committed some assault upon her

of a trivial nature and took away her wedding ring. After that it appears that he himself came and stayed in the Hotel. Holloway went back to Lucknow that night, but Mrs. Foster and the child and Miss Bartlett stayed on and their Hotel bill was settled by Foster, who took them back to Lucknow himself on the night of the 21st of April. After they reached Lucknow there was a quarrel, the details of which are by no means clear, and Mrs. Foster left her husband and went to live with her father. During the succeeding days Mrs. Foster and her husband appear to have seen each other occasionally and to have had more than one quarrel over the custody of the youngest child. It may be remarked that the elder children were at school in Calcutta. I find from a letter sent to Mr. Foster by the Deputy Commissioner of Lucknow, which is dated the 30th of April, that Mrs. Foster and her father went to see the Deputy Commissioner, presumably on that date, and accused Mr. Foster of having assaulted them. This must refer to some incident in connection with the attempt to recover the child but it does not appear to be the occasion on which Mrs. Foster received an injury, namely, a black eye, which was visible when she filed her suit on the 5th of May. Mr. Foster did not go to see the Deputy Commissioner but on the following day he took the child away in a motor car and made a report at the Police Station. He returned accompanied by a constable and had a further altercation with his wife and her father when he was attempting to leave the house with the child on his way to Naini Tal to resume his duties. It is probably on that occasion that Mrs. Foster received her black eye and it is also on that occasion that she damaged her first finger and thumb in an attempt to assault her husband. That night Mr. Foster left for Naini Tal and Mrs. Foster's suit was filed four days later.

The first allegation of the wife relates to cruelty. Cruelty is defined in Halsbury's Laws of England, (para. 975 of Vol. 16) as "conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger." In order to establish a case of cruelty against her husband a wife must prove more than isolated acts of violence. No doubt the degree of violence varies in accordance with the status of the parties. The parties in this

case are Anglo-Indians and, although Mr. Foster draws a good salary, they do not live in such circumstances that a blow between husband and wife would be considered very seriously. Mrs. Foster admits that when she went to the Magistrate in 1925 she had no visible injury and, whichever version of the affair is believed, it was the result of a momentary quarrel. She says that her husband beat her because she reproached him for coming home late at night in a state of intoxication, and he says that he beat her because he saw her being kissed by a man at a dance. Such an affair standing by itself would hardly be taken account of in divorce proceedings, especially as the parties lived together peacefully for the next two years. The more recent assaults are first of all that at Allahabad, where the husband, who did not know that his wife intended visiting Allahabad, found her at the Grand Hotel in one room with a young man and a girl, and it can hardly be said that he had no justification if he felt angry. Here too there is no allegation that the assault was a serious one or left any considerable mark of injury, and there remains only the incident in Lucknow. Now Mrs. Foster stated that there were two assaults in Lucknow, one on the 25th of April, and one on the 29th. But the injury that she showed the Court on the 5th of May was seen by a Doctor, on the 3rd May, who gave it as his opinion that the injury was two days old and as Mr. Gwynne says nothing about this injury in his letter of the 30th of April, it seems to be much more probable that Mrs. Foster received this injury in the free fight which she had with her husband over the person of the child on the 1st of May. If that were so the injury was caused in a sudden quarrel and not under circumstances which could be held to amount to cruelty. There are some vague allegations that her husband was addicted to wine and women and gambling, also that he did not give her his pay or allow her to manage the expenses herself, but none of these allegations are pressed and they are not supported by any reliable evidence, nor is there any evidence of neighbours or others that Mr. Foster was in the habit of assaulting his wife. On the contrary, as I have stated above, there is evidence that they were giving evening parties and remained on friendly terms until his departure for Allahabad. In my opinion all that she has proved on the score of cruelty are certain

isolated assaults all of which arose on the spur of the moment and on some real or fancied provocation. The allegation of cruelty, therefore, fails and my finding on the first two issues is that, although Mr. Foster has from time to time assaulted his wife, it is not true to say that he did so habitually, or that these assaults amount to legal cruelty.

Mrs. Foster's second allegation is that her husband committed adultery with Miss Cynthia Bartlett between the 25th of April, the date on which Mrs. Foster says she left her husband's house, and the 1st of May. The Bartlett family at that time lived next door to the Fosters and the two houses were connected by a door leading from the bed-room of one house into the bed-room of the other. The Bartletts were apparently in a poor condition financially and there were actually six persons living in a house which only had one bed-room. Under such circumstances it is not surprising that the two families saw a good deal of each other and, considering that Miss Silvia Bartlett, the elder sister, was the person who had accompanied Mrs. Foster to Allahabad, on the occasion which gave rise to the quarrel, it is not surprising that Mr. Foster after his wife left him, saw and conversed with the Bartlett family on many occasions. That he should have under these circumstances committed adultery with the younger sister, a girl of 17, who was engaged to be married is, *prima facie*, improbable. The near proximity of her father, her mother, her sister and her brothers, rendered it unlikely that opportunities would arise for misconduct of the kind even if the girl herself were willing. There are three witnesses who have given evidence indicating that there was misconduct between the two. The first is Mrs. Foster herself who says that she went to the house in order to try and secure the person of her son on the 29th of April, she went into the bedroom and that there she found her husband and Miss Cynthia Bartlett, that she then turned Miss Cynthia Bartlett out, apparently through the door leading into the adjoining house, which was open, and that then her husband turned her out. Mrs. Foster is physically a very weak woman and it seems in the highest degree improbable that, in the presence of her husband, she would have been able to turn Miss Cynthia Bartlett out of the room and, even had she been able to do so, I am

unable to believe that any guilty connection could have been contemplated by the pair with the door open between the two houses. Moreover, Mrs. Foster must be regarded in a matter of this kind as a highly interested witness and I cannot place implicit confidence on her statement. The next witness is one McGuire, one of the numerous persons who appears to have aroused Mr. Foster's unreasonable jealousy. All that he says is that he saw Mr. Foster and another man sitting with the two Bartlett girls. It is extremely probable that he did, but in my opinion this does not indicate any undue intimacy in the case of such close neighbours. The third witness is a *darzi* who used to work for Mrs. Foster, but who says that he was commissioned by Mr. Foster to make a dress or dresses for Mrs. Bartlett and her two daughters. There is nothing in this man's evidence to give the impression that he is speaking the truth. His story is in the highest degree improbable, as he would not have been admitted to the room when the parties were engaged in the manner described by him. He failed to answer the one searching question put to him in cross-examination, namely, what was the material of the dresses which he had made. This is a thing which no *darzi* could have forgotten. Thus in my opinion Mrs. Foster's allegation that her husband committed adultery with Miss Cynthia Bartlett is improbable in itself and unsupported by reliable evidence, and I find accordingly on the third issue.

I now turn to Mr. Foster's case against his wife. Learned Counsel relying upon his interpretation of the law of divorce has sought to re-introduce in this case two previous instances in which it is said that Mrs. Foster was guilty of adultery but her offences were condoned by her husband. As his argument is one which must be met, I think it necessary to consider the two previous cases. The first relates to a man named Arthur George Stubbs, with whom it is said that Mrs. Foster committed adultery in Calcutta in the month of April, 1920, when her husband was in Naini Tal. Mrs. Foster produced a letter written by his wife which was suggested to be some sort of a confession, but it is not so nor does it appear that it was written at that time. Apart from this there is absolutely no evidence worthy of the name that Mrs. Foster committed adultery with Stubbs. It appears that she was engaged to him

before she married her husband and this fact may have aroused her husband's jealousy, but I find on this issue that no such adultery was committed.

The fifth issue relates to the case of Mr. Gordon and this cannot be disposed of in so summary a fashion. In the hot weather of 1921 Mr. and Mrs. Foster were living in Naini Tal in Brookhill Cottage. The other half of the cottage was occupied by Mr. Alexander and his family, both Mr. Alexander and Mr. Foster being employed at the time as shorthand writers to the Hon'ble Finance Member, Sir Ludovic Porter. Mr. Foster brought into his house a school friend named Gordon and very unwisely left Gordon in the house with his young wife when he went on duty to Simla. He is thus responsible for anything that may subsequently have occurred. When he came back from Simla a complaint was made by Mr. Alexander about the conduct of Mrs. Foster and Gordon. Mr. Alexander has been examined as a witness and I see no reason to disbelieve his statement in this matter. There is on the other hand nothing to support Mrs. Foster's allegation that the report was really made about Mr. Foster's misconduct with Mr. Gordon's sister. It appears that orders were given by Sir Ludovic Porter for Mr. Gordon to be turned out of the house. These orders were carried out, but not only did Mr. Gordon leave the house but Mrs. Foster also left the house and they travelled together to Calcutta. Even Mrs. Authray, who has been examined on commission in Calcutta on behalf of Mr. Foster and who is clearly in favour of Mrs. Foster and wished to help her in every way, admitted that Mrs. Foster came to her house in Calcutta accompanied by Gordon, and there is the further evidence of a Calcutta Pleader Mr. D'Silva, who shows that Mr. Foster consulted him with regard to his projected case against Gordon, and Mrs. Foster in his presence admitted that she had committed adultery with Gordon. No doubt Mrs. Foster now denies this and, for that matter, she denied it at the time because she refused to make any such statement to the Magistrate. But taken together the evidence of the intimacy of the parties in Naini Tal, the report against them, their departure for Calcutta, their arrival at Calcutta together and Mrs. Foster's confession before a Pleader, are sufficient to establish the adultery. It is not necessary

to take into account the evidence of a servant that he actually saw the parties in a most compromising attitude. His statement is on the face of it improbable and not worthy of belief, but I have no doubt whatever that they were guilty. Whether Mrs. Foster and her husband had colluded in the matter in order to obtain damages out of Gordon is a point on which I can give no opinion, but undoubtedly Mr. Foster decided to forgive his wife and he came to that decision very quickly, because he began to cohabit with her as soon as he reached Calcutta and before he had received the substantial sum of Rs. 1,000 for withdrawing the case. I find, therefore, on this issue that Mrs. Foster actually committed adultery with Gordon in 1921 and that that adultery was condoned by Mr. Foster. This fact, of course, only becomes relevant to the present case if I can accept the legal argument produced on behalf of Mr. Foster, and even so it depends greatly on my finding on the next issue which deals with the alleged adultery between Mrs. Foster and Charles Holloway.

There is evidence, which there is no reason to doubt, that the Holloways are close friends of the Fosters. Charles Holloway is now a youth of about 19 years of age and in letters written four years ago by Mr. Foster to Mrs. Holloway she refers to him in affectionate terms as a boy. There is no doubt that Charles Holloway went with Mrs. Foster and Miss Bartlett to Allahabad. They travelled together in the same compartment in the train. They went to a dance together and they spent the last few hours of the night and the following morning in the same room in the Hotel at Allahabad. Living as these people live it cannot be supposed that there was anything improper in these three persons and the child travelling together or even occupying a single room, while they were waiting after the dance to return to Lucknow. No doubt each of the parties and Miss Bartlett have been anxious to say as little as possible against themselves and they have, therefore, given different versions of the affair, but to my mind it is quite immaterial whether Mr. Holloway asked Miss Bartlett to go and took Mrs. Foster as a chaperon, or whether Mrs. Foster asked Holloway to go and took Miss Bartlett as a chaperon, or whether Mrs. Foster and Miss Bartlett intended to go unaccompanied and picked up Mr. Holloway at the station. All these suggestions

have been put forward but it is most probable that they all agreed together that they would go to the dance. When they got to Allahabad on the following morning they did nothing unnatural or improper. They went to the house of Mr. Lewis, who is employed in the Finance Department and knows Mr. Foster very well, and they asked if he could put them up. He refused and they had to find some place where they could stay after the dance was over. They had not much money and they decided to share a room. In doing so they did nothing wrong, but Charles Holloway was in a difficult position, because he was at that time under suspension from his duties in the Railway and he was afraid to let his name appear in the Hotel register; consequently the party was entered as "W. James and family." Mr. Foster had made capital out of this by incorrectly stating in his petition that his wife and Charles Holloway were entered as Mr. and Mrs. James. Mr. Foster has alleged that his wife and Charles Holloway committed adultery in the train and again in the Grand Hotel. His only informant could have been Miss Silvia Bartlett; the latter has appeared as a witness. She is certainly not favourably disposed towards Mrs. Foster. She is annoyed, I may say justifiably annoyed, at the fact that her young sister has been cited as a co-respondent, but she has not said one word in her evidence which would indicate that either in the train or in the Hotel any adultery took place or even any familiarity between Mrs. Foster and Charles Holloway. Mr. Foster alleges that when he came into the Hotel he found Mrs. Foster and Charles Holloway on one bed with Charles. Holloway's arms around Mrs. Foster's neck. Miss Bartlett denies that she saw anything of the kind. She says that she was asleep and when she awoke she saw Charles Holloway standing and Foster attacking his wife. *Prima facie* it is very improbable that any woman, let alone a married woman and a mother of several children, would have sexual intercourse with a young man in the presence of a young and unmarried woman. It is in fact almost incredible and when the unmarried woman in question who is hostile to her, gives evidence indicating that no such event occurred, it is impossible for any Court to assume that adultery took place under these unlikely conditions. But apart from this there is much evidence in this case to show

that not only did no such adultery occur, but Mr. Foster himself never supposed that it did. He says that he turned Charles Holloway out of the room and he subsequently went back to his work, took no further interest apparently in the proceedings of the parties and came back between 6 and 7 in the evening to see what had happened to them. The Hotel manager, who was called as a witness by both parties, states that a lodger came to him complaining that there was a fight going on in the room next to hers and he went to see what was the matter. When he got there there was no noise and he concluded that it was all over but he saw nobody come out of the room either Foster or Holloway and had either of them done so he must have seen them. Consequently I am more inclined to believe the story that Mr. Foster stayed quietly with the party and had a meal with them as is indicated by the Hotel bill which shows that luncheon was given to four persons on that day. Then as to the events of the evening they are not the doings of an outraged husband. Even on his own showing he was so little disturbed by this evidence of his wife's misconduct that he went to see the Manila Carnival. As a matter of fact he either went with the whole party or met them there and stayed in their company until it was time for Charles Holloway to catch the night train to Lucknow which would be about half past nine. Thus he was in their company for something over two hours before Charles Holloway departed and he remained with them in the Carnival for some considerable time after that and took his wife and Miss Bartlett to the Hotel where they remained for the night. He then stayed in Allahabad, which presumably he had to do on account of his duty, but he also kept his wife and Miss Bartlett at the Hotel and spent a considerable part of his time with them. He also paid the Hotel bill and took them back to Lucknow. Mrs. Foster states that he actually cohabited with her but I am not able to say whether this is true or not. Even if he did not, his conduct would be so remarkable in the case of an outraged husband that it might very well be considered to be condonation. It is not necessary to go further into the evidence as to this incident. Mrs. Foster has on the main been corroborated by Mr. Lewis and the co-respondent, and the differences between

her statement and those of Miss Bartlett have already been noted. It must be remembered that Miss Bartlett has her own character to consider and it might not be considered proper for her to admit that she had been present had these two persons actually committed adultery in her presence. But in my opinion no such incident can have occurred, and I find without hesitation that there was no adultery between Charles Holloway and Mrs. Foster either in the train or in the Hotel in Allahabad.

There remain two further incidents spoken to by Miss Bartlett before the parties went to Allahabad. Now if Miss Bartlett really saw what she says, it is hardly likely that she would have consented to go with this couple to Allahabad knowing that Mr. Foster was on duty there and that there was a grave danger of their being detected. She says that she went twice into the house after Mr. Foster's absence and found Holloway and Mrs. Foster on each occasion in what might be considered a compromising attitude, that is to say, they were alone in the room and one or other of them was lying on the floor. She also says that Holloway on the first occasion looked nervous and turned over on to his stomach. This may mean that he had something to conceal or that he merely realized that he should not have been there with Mrs. Foster when her husband was away. But I am not inclined to accept Miss Bartlett as evidence on this point. She was on her own showing employed in a boot shop in Lucknow at the time and it does not appear likely that she would have been in her house at 2 o'clock in the afternoon, and her statement must be discounted by the fact that her sister was implicated in this case and that she was only too anxious to say anything that she could, that would damage Mrs. Foster without damaging herself. It is very easy to make an assertion that two persons had been found in a compromising position but such a statement uncorroborated does not go very far and the other evidence shows that Charles Holloway was a friend of the family, both of Mr. Foster and Mrs. Foster, that he was treated as a boy, that he was often in and out of the house and I am inclined to think that some perfectly innocent episode has been exaggerated by Miss Bartlett in return for the attack upon her sister. I,

therefore, find on issue No. 6 that no adultery took place between Mrs. Foster and Charles Holloway, and, that being so, issue No. 7 does not arise.

I now turn to the point of law raised by Mr. Ghulam Hasan on behalf of Mr. Foster. His argument is that, even if adultery is not proved between Charles Holloway and Mrs. Foster, there has been a matrimonial misconduct which enables him to revive the previous adultery with Gordon in spite of its condonation. This is not the law and the rulings to which I have been referred establish no such proposition. The law is as stated in Halsbury's Laws of England (Vol.-16, para. 1003) "if such a subsequent offence should arise the forgiveness is cancelled and the old cause of complaint is revived even if the offence is not *ejusdem generis* with the original offence." The first ruling to which I have been referred is *Pereira v. Pereira* (1), but there it appears that the case was one in which the respondent had committed adultery with the co-respondent on a previous occasion and subsequently behaved in some manner short of adultery with the same person and it was held that the first adultery was revived. All the other rulings refer to the case of a husband and are based on the fact that it requires a combination of offences for a wife to divorce her husband. Such rulings have no application to a case like this, and I can find no direct authority for the view, that an offence by a wife less than adultery with another person revives an adultery committed by her previously and which has been condoned by her husband. At least the second offence, if it is not adultery, must be one of which a Court can take cognisance. This is the view expressed by Lord Balckburn in a decision of the House of Lords, *Collins v. Collins* (2). Now there is nothing that has passed between Charles Holloway and Mrs. Foster of which the Court could take cognisance. It is difficult to see what offence short of adultery could have been committed between Charles Holloway and Mrs. Foster. At most it may be said that they were guilty of familiarity but familiarity is not an offence, and it is stated in para. 1004 of Lord Halsbury's Laws of England that the doctrine, which is that on which Mr. Ghulam Hasan relies, does not go the

(1) 5 M. 118; 2 Ind. Dec. (N. S.) 82 (F. B.).

(2) (1884) 9 A. C. 205; 32 W. R. 500.

length of making mere familiarities revive adultery. Thus, in my opinion, no facts have been brought to light in this case which can revive the adultery of 1921, between Mrs. Foster and Gordon. That has long ago been forgiven and could only become relevant in a subsequent case if Mrs. Foster renewed her relations in some manner with Mr. Gordon or actually committed adultery with another person.

I have now to consider what order I can pass in this case. In my opinion neither party has made out a case for divorce and it only remains to be considered whether the case is one in which I should allow Mrs. Foster a separation. Now it is easy for a wife, who has some grievance against her husband, to say that she would rather take an allowance and live apart from him but it is not the object of the law to make such separations easy. They are merely a short road to prostitution and in my opinion there are certain things which a wife must put up with. In this case her husband has shown himself to be suspicious, jealous and occasionally violent but I am not satisfied that it has been proved that he is unfaithful, that he fails to support her or her children in decency or that he is habitually cruel. I neither think that it is for her advantage nor in the interest of justice that she should be given a separation from her husband under such circumstances. Rather it is a case in which both parties have rushed into Court without sufficient cause and expended a great deal of venom against each other and implicated unnecessarily other innocent persons. I must, therefore, decline to grant the alternative relief which Mr. Walford asked for his client and I dismiss both suits. The parties to bear their own costs throughout.

G. H.

*Suits dismissed.***ODDH CHIEF COURT.**

SECTION 25 APPLICATION No. 52 OF 1927.

November 16, 1927.

Present:—Mr. Justice Raza.

SHEOPAL—PLAINTIFF—APPLICANT

versus

CHITORIA AND OTHERS—DEFENDANTS

—OPPOSITE PARTY.

*Provincial Small Cause Courts Act (IX of 1887),
s. 25—Erroneous decision of question of limitation—
Revision—Interference.*

Where a Judge trying a small cause suit in a carefully reasoned judgment decides, after considering the various authorities, the suit to be time-barred, the fact that the Judge has arrived at incorrect interpretation of the authorities is no ground for interference by the High Court.

Mohammad Saadat Ali Khan v. Kuer Lal (1), followed.

Application for revision of the order of the Subordinate Judge, Rae Bareilly, dated the 21st September, 1927, in Small Cause Court Suit No. 374 of 1927, sitting as Judge of Small Cause Court.

Mr. S. N. Srivastava, for the Applicant.

Mr. Ali Mohammad, for the Opposite Party.

JUDGMENT.—This is an application in revision against an order of the learned Subordinate Judge of Rae Bareilly in a suit decided by him in the exercise of his Small Cause Court powers.

The suit was based on a bond payable by instalment. It was provided by the bond that should default be made in payment of one instalment, the whole should be due. The suit was brought by the plaintiff after the death of the defendants' father, Thakur who had executed the bond. The defendants denied the bond and the alleged payment and pleaded bar of limitation. The learned Subordinate Judge held that the bond was proved. He found that the alleged payment was also proved but he dismissed the suit on the ground of limitation, as he held that the payment in question was not a good payment under s. 20 of the Limitation Act.

I have heard the learned Pleaders on both sides, at some length. I think this application should be dismissed.

The learned Subordinate Judge in a carefully reasoned judgment decided that the suit was time barred. I am not prepared to disagree with his finding on the point under consideration. As pointed out in the case of *Mohammad Saadat Ali Khan v. Kuer Lal (1)* where the trial Judge in a carefully reasoned judgment decided, after considering the various authorities, the suit to be time-barred, the fact that the Judge had arrived at incorrect interpretation of the authorities is no ground for interference by the High Court. To go into the merits in such a case where the Judge has decided the case sensibly and intelligently, would in

(1) 93 Ind. Cas. 912; 3 O. W. M. 228; A. I. R. 1920 Oudh 519; 13 O. L. J. 641.

effect be granting an appeal on a point of law.

Hence I dismissed this application with costs.

G. H.

Application dismissed.

OUDDH CHIEF COURT.

SECOND CIVIL APPEAL N. 241 OF 1927.

December 15, 1927.

Present :—Mr. Justice Hasan

and Mr. Justice Pullan.

MURLIDHAR—DEFENDANT—APPELLANT

versus

Sheikh FAKIR BUKHSH—PLAINTIFF

AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharer—Lessee purchasing share in whole property—Defendant purchasing remaining shares—Suit for profits by lessee-co-sharer—Rate of profits to be calculated at market value and not rent paid by lessee-co-sharer.

A was a lessee of 3 shops out of 25 shops at a rent of Rs. 14-8 per month. He purchased more than one-eighth share in all the shops and the remainder was purchased by B. B brought a suit against A to eject him from the shops though unsuccessfully. A then sued for his share of the profits of the whole property as a co-sharer:

Held, that the profits of the 3 shops could not be calculated at the rate of Rs. 14-8 per month which A no longer paid but at their proper market value.

Second appeal against an order of the Subordinate Judge, Mohan Lalgunj, Lucknow, dated the 29th March, 1927, upholding that of the Second Munsif in addition to strength, Lucknow, dated the 29th November, 1926.

Messrs. Ali Zaheer and Ram Bharosay Lal, for the Appellant.

Mr. Zahur Ahmad, for the Respondent.

JUDGMENT.—The plaintiff in this suit, Sheikh Fakir Bakhsh, has been for a long time the lessee of three shops out of a block of twenty-five shops in Lucknow city. The rent which he paid for them was Rs. 14-8 a month. The property was sold and the plaintiff became by purchase the owner of a share rather more than one-eighth of the whole property and the remainder was purchased by Murli Dhar, the defendant in this suit. Murli Dhar brought a suit against Fakir Bakhsh to eject him from his three shops and he was met by the defence that Fakir Bakhsh being a co-sharer in the whole property could not be ejected. This defence appears to have been accepted by the Courts, and Fakir Bakhsh in retaliation has brought the present suit

for a share in the profits of the whole property. He has calculated these profits in such a way that he himself claims an undisputed right in his own three shops and a considerable portion of the profits of the remaining shops, because he calculates that the rent of his three shops is only Rs. 14-8 per month whereas the rent of all the other shops is considerably more. The lower Courts have decreed the suit in the manner desired by the plaintiff but, in our opinion, their decision cannot be upheld. Fakir Bakhsh has brought this suit as a co-sharer. The question whether he is or is not a tenant of three shops is immaterial for the purposes of this suit. As a co-sharer he can claim his proportionate share of the profits of the property but these profits must be the real profits of the property. It does not appear to us that the real profits of the three shops which have been occupied by the plaintiff himself are Rs. 14-8 a month, merely because that was the rent which he paid formerly to the persons from whom he has now purchased a share. We need not bind him down to his own statement in the suit brought against him by Murli Dhar that he is a co-sharer and that no relationship of tenant and landlord subsists between him and Murli Dhar. That would be going beyond the matter which we have to decide. All that we have to consider is whether he is entitled, when suing as a co-sharer to have the three shops in his own occupation assessed at a rent of Rs. 14-8, a rent it may be remarked, which he no longer pays, or at their correct market rent. In our opinion there is only one answer to this question. These shops along with all the other shops which form the property, must, for the purposes of calculating the profits, be assessed at their proper market value. We, therefore, allow this appeal and remand the case to the first Court for determination of the true profits of the whole property including the three shops of which the plaintiff claims to be a tenant and for calculation on this basis of the amount due to or by the plaintiff as the case may be. Cost will follow the result.

G. H.

*Appeal allowed;
Case remanded*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 252 OF 1927.

November 1, 1927.

Present:—Mr. Prideaux, A. J. C.

SABA—DEFENDANT—APPLICANT

versus

DAYARAM AND OTHERS—PLAINTIFFS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 151, O. IX, r. 9—Suit dismissed in default—Application for restoration filed, later than thirty days—Court, whether has inherent jurisdiction to restore—Limitation Act (IX of 1908), s. 5, applicability of.

When a definite period of limitation is prescribed by law within which action must be taken, a Court is not entitled to extend it by purporting to act under s. 151 of the Civil Procedure Code.

Ajodya Mahton v. Phul Kuer (1), followed.

Section 5 of the Limitation Act is not applicable to an application under O. IX, r. 9 of the Civil Procedure Code for the restoration of a suit dismissed in default.

Application for revision of the order of the Sub-Judge, Second Class, Balaghat, dated the 30th April, 1927, in Civil Suit No. 217 of 1926.

Mr. A. V. Vazalwar, for the Applicant.

Mr. M. R. Indurkar, for the Non-Aplicants.

ORDER.—This is an application under s. 115 of the Civil Procedure Code. The non-applicants filed Civil Suit No. 217 of 1926 in the Small Cause Court, Balaghat. On 13th December, 1926, the plaintiffs were absent and the suit was dismissed under O. IX, r. 8, Civil Procedure Code. On the 21st of January this year the plaintiffs applied that their suit be restored to file and the dismissal be set aside. The Court restored the suit to file under the powers given it by s. 151, Civil Procedure Code.

Now, it is clear that the plaintiffs were entitled under r. 9 to apply for an order to set the dismissal aside, and if they could satisfy the Court that there was sufficient cause for their non-appearance when the suit was called for hearing, the Court could make an order setting aside the dismissal; but under Art. 163 of the Indian Limitation Act the period of making such an application is limited to 30 days. Here, though the case was dismissed on 13th December, 1926, the application was not made until the 21st of January, 1927,

Section 5 of the Indian Limitation Act has not been made applicable to an application under O. IX, r. 9, and, therefore, that section will not apply to the present case. I am clearly of opinion that, where a definite period of limitation has been provided by law within which action must be taken, a Court is not entitled to extend such period by purporting to act under s. 151, Civil Procedure Code. There is authority for this view: see *Adjodhya Mahton v. Phul Kuer* (1). Section 151 of the Civil Procedure Code cannot be invoked to help a party who has a remedy provided by law and who has failed to take advantage of that remedy within the period of limitation prescribed. In the present case the Court had no power to set aside the dismissal in the exercise of its inherent powers. I, therefore, set aside the lower Court's order restoring the case to file.

The non-applicants will pay their own and the applicant's costs here and in the lower Court. I fix Pleader's fees at Rs. 15.
G. R. D. Application allowed.

(1) 65 Ind. Cas. 341; 1 Pat. 277; (1922) Pat. 61; A. I. R. 1922 Pat. 479.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 440-B OF 1926.

November 1, 1927.

Present:—Mr. Kinkhede, A. J. C.

BAPU SURYABHAN—DEFENDANT—

APPELLANT

versus

KISAN AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 102—Suit triable as Small Cause—Trial as ordinary suit—Second appeal, whether lies.

A decree in a suit triable by a Small Cause Court but actually tried by an ordinary Civil Court is not open to second appeal under s. 102 of the Civil Procedure Code. [p. 194, col. 1.]

Vinayak v. Krishnarao (1) and *Kesrisang v. Naran- sang* (2), followed.

Appeal against the decree of the First Additional District Judge, Akola, dated the 13th September, 1926, in Civil Appeal No. 112 of 1926.

Mr. G. G. Hatwalne, for the Appellant.

Mr. G. R. Deo, for the Respondents.

JUDGMENT.—This is a suit for compensation for damage done to plaintiffs' property by the wrongful act of the defendant of digging a pit close by and letting water accumulate there. It is said that the plaintiffs' walls got damp with moisture and fell down. Hence the plaintiffs claimed compensation by way of reimbursement of the expenses they are likely to suffer in erecting them. The plaint in this suit was originally presented to the Court of Small Causes but that Court returned it for presentation to the ordinary Civil Court on the ground that it involved a question of title. The Small Cause Court thus exercised the discretion what the law gave it under s. 23 of the Provincial Small Causes Courts Act. That order has become final as between the parties.

The plaint was thus entertained by the ordinary Civil Court to which it was presented in due course. The first Court decreed the claim to the extent of Rs. 10. The decision was appealed against by the defendant but his appeal was unsuccessful. He has, therefore, come up on second appeal.

The first question is whether a second appeal lies. On the strength of the rulings in *Vinayak v. Krishnarao* (1) and *Kesrisang v. Naransang* (2), I hold that the suit is not open to second appeal in view of s. 102, Civil Procedure Code.

I am asked to treat the second appeal in revision. The memorandum was filed on the 73rd day and ordinarily this Court does not entertain civil revisions presented after the 45th day. I do not see any valid reason to admit this as a civil revision especially as the result thereof would be an affirmance of the decree of the lower Appellate Court. The appeal fails and is dismissed with costs.

G. R. D.

Appeal dismissed.

(1) 25 B. 625; 3 Bom. L. R. 239.

(2) 32 B. 566; 10 Bom. L. R. 733.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 234-B OF 1925.

June 29, 1927.

Present :—Mr. Kotval, A. J. C.

MOHANLAL—DEFENDANT—APPELLANT
versus

SATYABHAMA AND ANOTHER—PLAINTIFFS
—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 10—Land which is not capable of physical possession, meaning of—Land in possession of trespasser—Sale—Suit for pre-emption—Limitation.

The words 'does not admit of physical possession' in Art. 10 of Sch. I of the Limitation Act do not merely refer to the inability of the vendor in fact to give possession to the purchaser but refer to his inability both in fact and in law. [p. 195, col. 1.]

Where a vendor is in personal and immediate possession of the property sold or where the right to such possession thereof is in the vendor at the date of the registration of the sale-deed, the property is one admitting of physical possession. [*ibid.*]

Land in possession of a trespasser at the date of the registration of a sale-deed is not land which is not capable of physical possession within the meaning of Art. 10 of Sch. I of the Limitation Act. [*ibid.*]

Appeal against the decree of the Additional District Judge, Amraoti, dated the 5th February, 1925, in Civil Appeal No. 247 of 1924.

Mr. W. R. Puranik, for the Appellant.

Mr. A. V. Wazalwar, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption in which the plaintiffs have succeeded in the lower Court. The only question for decision here is one of limitation. The sale-deed in respect of the land sought to be pre-empted was registered on the 15th of June, 1922, and the suit was instituted on the 29th of March, 1924. The purchaser-defendant pleaded that at the date of the registration, the land did not admit of physical possession as it was in the possession of a trespasser, that the second part of col. 3 of Art. 10, First Schedule to the Limitation Act, therefore, applied and that the suit was time-barred. The plaintiffs pleaded and the lower Courts have found that the purchaser took possession at the end of the year 1923.

The question for decision is whether land in possession of a trespasser at the date of the registration of the sale-deed is land which does not admit of physical possession. The following authorities sup-

port an answer to this question in the negative. [*Chandan Singh v. Chandi Prasad* (1), *Velayudham Pillai v. Thina Velagudham Pillai* (2), *Jagamaya Dasi v. Tulsia* (3) and the observations at page 58 in *Jairam v. Sitaram* (4).]

The words "does not admit of physical possession" do not refer to the inability of the vendor in fact to give possession to the purchaser. They refer to inability both in fact as well as in law. The principle applicable is that where the vendor is in personal and immediate possession of the property sold or where the right to such possession thereof is in the vendor at the date of the registration of the sale-deed, the property is one admitting of physical possession. In the case where a trespasser is in possession such right is with the vendor and the property therefore, admits of physical possession. In the case of a tenant in possession or usufructuary mortgagee in possession such right is not in the vendor and the property is, therefore, one which does not admit of physical possession.

It must, therefore, be held that land in the possession of a trespasser at the date of the registration of the sale-deed is not land which does not admit of physical possession. Limitation, therefore, began to run from the end of the year 1923 when the purchaser took possession and the suit was within time.

The appeal fails and is dismissed with costs.

IN A. N. A.

Appeal dismissed.

(1) A. W. N. (1888) 227.

(2) 62 Ind. Cas. 27; 40 M. L. J. 443; 13 L. W. 268; 29 M. L. T. 251; (1921) M. W. N. 207.

(3) 89 Ind. Cas. 444; 23 A. L. J. 885; L. R. 6 A. 521 Civ.; A. I. R. 1926 All. 70; 48 A. 12.

(4) 52 Ind. Cas. 940; 16 N. L. R. 37.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 513 OF 1926.

November 3, 1927.

Present:—Mr. Pridaux, A. J. C.

Seth POKHARDAS AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

GANPAT RAO AND OTHERS—DEFENDANTS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 38—Mortgage suit—Final decree for sale—Transfer of village in which mortgaged property is situate to another Revenue District—Court passing decree, whether has jurisdiction to execute it—Transfer of Property Act (IV of 1882), s. 52—Mortgage suit—Sale during prosecution of execution proceedings, validity of.

A Court which passes a final mortgage-decree for sale does not lose its jurisdiction to execute it by the mere fact of the portion of the District in which the property mortgaged is situate being transferred to another Revenue District. [p. 197, col. 1.]

The doctrine of *lis pendens* applies to an alienation made during the active prosecution of execution proceedings under a mortgage-decree. [p. 196, col. 2.]

Appeal against the decree of the District Judge, Bhandara, in Civil Appeal No. 39 of 1926, dated the 2nd September, 1926.

Mr. N. G. Bose, R. B., for the Appellants.
Messrs. P. A. Pandit and P. S. Deo, for the Respondents.

JUDGMENT.—This judgment also disposes of Second Appeal No. 514 of 1926. The plaintiffs are the same in each case, the 1st defendant is also the same; but in the present case Toda is the 2nd defendant, and in the other case one Tejram is the 2nd defendant.

These appeals arise out of two separate suits. One Chandan Lal, the superior proprietor of Mahal No. 2 of Mauza Bhandal-bodi, Tahsil Waraseoni, District Balaghat, sued Toda (defendant No. 2 in Suit No. 166 of 1925) and Tejram (defendant No. 2 in Suit No. 167 of 1925) and other inferior proprietors for recovery of some arrears of *malikana*, which were the first charge on the *mahal*. This was in the year 1917, and Chandan Lal obtained on 28th April, 1917, a decree for sale of Mahal No. 2 in default of payment of Rs. 1,303-0-6. The decree was made final on 6th May, 1918. Some three months after the passing of this final decree Toda and Tejram each executed on 14th August, 1918, a mortgage-deed in respect of his respective 0-1-4 share in the said *mahal*. This was in favour of the plaintiffs in the two suits which lead to the present two appeals.

The plaintiffs sued on those two mort-

gages and obtained preliminary decrees on 23rd July, 1923, and 25th June, 1923, and a final decree for foreclosure in each of the two suits on 4th October, 1924. Before the date of this final decree, however, defendant No. 1 purchased on 9th February, 1924, at an auction sale held in execution of the final decree dated 6th May, 1918, in favour of Chandanal, the whole *Mahal* No. 2 of *Mauza* Bhandalbodi which includes the 0-1-4 shares of Toda and Tejram. The purchaser obtained possession on 4th April, 1924, and got *Mahal* No. 2 mutated in his favour on 30th July, 1927. The plaintiffs who hold final decrees for foreclosure against Tejram and Toda have brought the present two suits against defendant No. 1 the auction-purchaser for possession of the shares of Toda and Tejram.

The 1st defendant contested the claims. He pleaded that as the plaintiffs' two mortgages were executed some time after the final decree in favour of Chandanal, they were representatives-in-interest of the judgment-debtors Toda and Tejram, and were bound under the principle of *lis pendens*, the suits being barred under s. 47 of the Civil Procedure Code.

The plaintiffs contended that this principle affected the auction-sales which were held after the final decree for foreclosure in their favour. It was further contended that the Court of the Sub-Judge at Bhandara had no jurisdiction to hold the sale as the village Bhandalbodi, which was situated in the Rampaili tract of the Bhandara District, was transferred to the Balaghat District in 1922. Therefore, the sale by the Bhandara Court was *ultra vires*.

The trial Court found that the plaintiffs were representatives-in-interest of the judgment-debtors Toda and Tejram as they took their mortgages after the final decrees for sale in favour of Chandanal Lal; that the plaintiffs' mortgages cannot supersede the decree for sale in favour of Chandanal Lal or the sale held in execution of Chandanal Lal's decree; that the plaintiffs cannot claim precedence over the defendant No. 1's interest in the shares of Toda and Tejram; that the plaintiffs' mortgages can be said to have been taken during the pendency of Chandanal's suit and they could not prevail against the defendant No. 1's title; and that the defendant No. 1's purchase of the shares in the two suits

was not affected by the doctrine of *lis pendens*. The suit was held to be not barred under s. 47 of the Civil Procedure Code, and the sale held in execution of Chandanal's decree was not held to be *ultra vires* and the plaintiffs could not question the validity of that sale. The suits were dismissed.

On appeal the lower Appellate Court has, in one judgment, disposed of the two cases. The Judge has with his customary thoroughness discussed the issues upon which the decision of the cases rests. He finds, dealing with the question as to whether the sale is invalid because the jurisdiction to execute the decree had been transferred to Balaghat, that the contention was without force. And as to the doctrine of *lis pendens*, pleaded by the plaintiffs, the Judge writes:—

"It is based on the assumption that the principle of *lis pendens* can be availed of by the appellants. But in the circumstances of the case, it is the plaintiffs themselves who will be adversely affected by the said principle and that it is the defendant No. 1 who is entitled to urge its application in his favour."

He further held, following the principle enunciated in *Dhiraj Singh v. Dina Nath* (1), that s. 52 of the Transfer of Property Act continues to apply from the filing of a mortgage suit until satisfaction of the decree by payment of the mortgage-money, foreclosure or sale. He finds that the plaintiffs' mortgages are inoperative against defendant No. 1's purchase and that the latter's purchase is binding on the plaintiffs who are representatives-in-interest of the judgment-debtors Toda and Tejram as on the judgment-debtors themselves. Dealing with the third contention of the appellants the Judge finds it unnecessary to determine whether the plaintiffs were transferred for value without notice of the claim of the superior proprietor Chandanal Lal for the reason that, even if the plaintiff-appellants be held to be such transferees, the finding cannot affect them in any way in the present suits. The Judge repelled the arguments made in support of an application for amendment of the plaint by the addition of an alternative claim resembling that of redemption in its character. Both appeals failed and were dismissed.

It is argued here that the Bhandara Court had no jurisdiction to execute the decree from which the sale resulted, as the village was situated in the newly formed Tahsil of Waraseoni in the Balaghat District. By Notification No. 174-214-H issued under s. 14 of the Central Provinces Land Revenue Act XVIII of 1881, the Chief Commissioner was pleased to alter, with effect from the 1st October, 1917, the limits of the Bhandara and Gondia Tahsils in the Bhandara District and those of the Balar and Balaghat Tahsils in the Balaghat District and to create a new Tahsil in this latter District to be called the Waraseoni Tahsil. Among the villages transferred to the new Tahsil as shown in Sch. B of that Notification was Bhandal-bodi. By Notification No. 366-J issued in exercise of the powers conferred by s. 15 of the Central Provinces Courts Act, 1917, and in supersession of all previous notifications on the subject, the Chief Commissioner was pleased to divide the Central Provinces into certain Civil Districts with effect from the 14th of May, 1917, and the Bhandara and Balaghat Revenue Districts were declared to be the Bhandara Civil District.

It is contended for the other side that only the revenue portion of the Gondia Tahsil went to Balaghat and the Civil jurisdiction remained as it was until 1922. It is pressed for the appellants that a decree can only be executed with regard to immoveable property in a Court in which the suit could have been instituted (s. 16 of the Civil Procedure Code); and it is stated that when the sale took place on 9th February, 1924, the suit for immoveable property lay at Balaghat and when some Judge was appointed for Balaghat and given jurisdiction, then the Bhandara Courts from that time lost jurisdiction over immoveable property in the tract transferred from the Bhandara District to the Balaghat District. I am also referred to ss. 37, 38 and 150 of the Civil Procedure Code. I do not think there is any force in this contention raised for the appellants and I agree with the learned Judge of the lower Appellate Court that, even if it be assumed that the execution of the final decree for sale was transferred to Balaghat owing to the transfer of the Rampaili tract from Bhandara District to Balaghat, the jurisdiction of the Bhandara Court to deal with execution in connection with decrees passed in cases by it

would not be affected. The Judge rightly writes:—

“In view of ss. 38 and 150, Civil Procedure Code, the jurisdiction to execute a decree can be exercised both by the Court which passed it, as well as by the Court to which the business of the former Court has been transferred. Again it has to be remembered that the Revenue District of Bhandara and the Revenue District of Balaghat are comprised in one Civil District of Bhandara and consequently every Court in the Bhandara Civil District has jurisdiction to entertain suits and execution cases arising from the whole Civil District, irrespective of the question whether the subject-matter of the suit is situated in Bhandara Revenue District or Balaghat Revenue District. Furthermore, the contention seems to have no foundation in the distribution memo. of 1920. It seems that according to the distribution memo. which was to take effect from 1st October, 1922, only new institutions were transferred to the Balaghat Court. The execution of decrees already passed by the Sub-Judge at Bhandara was expressly retained at Bhandara. Neither the distribution memo. nor the transfer of a part of Gondia Tahsil to Balaghat Revenue District can, therefore, lend any assistance to the appellant's contention.

I agree with the lower Appellate Court that the Court of the Sub-Judge at Bhandara was competent to hold the Court sale which was in execution of a final decree passed by it.

It is contended here that the plaintiffs' mortgages are not affected by the doctrine of *lis pendens*. The final decree is dated 6th May, 1918, and the sale took place on 9th February, 1924. It is said that when the plaintiffs' mortgages were executed the case of Chandan Lal was not being actively prosecuted. But this is not so. In execution case after the final decree was passed on 6th May, 1918, there was an application filed on that very day. This was disposed of on 22nd July, 1918, being struck off. Another application was filed on 22nd January, 1920, which lasted to 13th October, 1920, and then there was an application dated 24th April, 1923, to 20th March, 1924. It is very clear that the execution case was being actively prosecuted, and the purchase by the plaintiffs was made during that active prosecution.

It has been stated here that if the plaintiffs' mortgages were not invalid on account of the lease, they can redeem. But this is not a redemption case, and this contention has no force.

It is lastly urged that as the *mahal* was sold for Rs. 3,550 being purchased by the 1st defendant for that sum after paying the decree which led to the sale, there was a balance of Rs. 1,324-8-5 and that the plaintiffs were entitled to this as part of the mortgaged property. This belated plea has been raised for the first time in this Court, and I decline to entertain it. This claim was not urged during the trial of the suits.

The result is that both appeals fail and are dismissed with costs. Appellants will pay the respondents' costs.

G. R. D.

Appeals dismissed.

A. N. A.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 24-B OF 1926.

November 7, 1927.

Present:—Mr. Prideaux, A. J. C.

VITHU—PLAINTIFF—APPELLANT

versus

MAROTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Stridhan other than Saudayik—Alienation without husband's consent, validity of.

A Hindu female cannot alienate or devise her *stridhan* other than *Saudayik* during coverture without her husband's consent. [p. 199, cols. 1 & 2.]

Salemma v. Lutchmana Reddi (1) and *Bhau v. Raghunath* (2), followed.

Appeal against the decree of the First Additional District Judge, Akola, dated the 20th October, 1925, in Civil Appeal No. 237 of 1924.

Mr. S. A. Ghadgay, for the Appellant,
Messrs. A. V. Khare and W. B. Pendharkar, for the Respondents.

JUDGMENT.—Defendants Nos. 2 and 3 were the daughters of one Girmaji who died in 1908. The plaintiff's story is that he purchased the property in suit from defendants Nos. 2 and 3 who inherited it from their deceased father. But defendant No. 1 obstructed the plaintiff in taking possession. Hence the present suit. Defendant No. 1 has purchased the property

from defendants Nos. 2 and 3 on 7th June, 1909, but the plaintiff contended that on that date they were minors, so the sale is void. It was further pleaded that defendant No. 2 was not the guardian of defendant No. 3 in which capacity she is said to have executed the sale-deed in favour of defendant No. 1; and it was said that there was no legal necessity for the sale. The plaintiff's story was that defendant No. 2 was born on 13th June, 1892, and defendant No. 3 on 4th November, 1897.

The first two defendants contested the suit. Their story was that defendant No. 2 is the guardian of defendant No. 3 and was a major at the date of the sale to defendant No. 1, and that the sale was made to pay off the debts of the deceased Girmaji, and further that it was a prudent act and for the benefit of defendant No. 3. The sale to the plaintiff was impeached on the ground of undue influence and pressure; and defendant No. 3 was said to have ratified the sale to defendant No. 1 on 4th October, 1920.

The trial Court found that defendant No. 2 was a minor on 7th June, 1909, when she executed the sale in favour of defendant No. 1. Defendant No. 2 was found not to be the guardian of defendant No. 3 at that time, and the sale was found not binding on defendants Nos. 2 and 3. It was held that the sale to defendant No. 1 was for legal necessity and that defendant No. 3 did not ratify the sale, and further that the plaintiff's sale was not made under undue influence. The claim was decreed in full.

The first defendant appealed, and the lower Appellate Court's finding may be summarised as follows:—Defendant No. 2 was only 17 on 7th June, 1909, and was a minor, and, therefore, the sale-deed of that date conveyed no title to defendant No. 1, and the ratification of that deed by defendant No. 3 could not make the transaction valid and binding even against her. There was no evidence to show that defendant No. 2 made any representation that she was a major, and even if she did, that would not estop the plaintiff. There was no necessity for the sale to defendant No. 1, it not being proved that any debts due by Girmaji existed. Pressure or illegal influence was held not to be established in the plaintiff's sale. The Judge writes: "The other ground on which the sale

to plaintiff is impeached is that defendants Nos. 2 and 3 got the property from their father and these ladies could not alienate the property without the consent of their husbands. There is now no question of the consent of the husband of defendant No. 3 for that is not questioned here. There is no proof adduced by the plaintiff that defendant No. 2's husband had given his consent to the sale in favour of plaintiff. The husband Jairam (D. W. No. 7) denies this expressly. Plaintiff asserted as P. W. No. 1 that Jairam had taken part in bringing about the sale but there is no independent proof on the point. I must, therefore, find that the defendant No. 2's husband did not consent to the sale in plaintiff's favour."

Holding that the wife was incompetent to sell the property without the consent of her husband, it was found that the plaintiff had no title to the defendant No. 2's share, and the decree of the first Court was modified by decreeing joint possession to the extent of half. Against that decision the present appeal has been filed.

The appellant's arguments can be put under three heads. The first is that as Jairam the husband of defendant No. 2 consented to the sale deed dated 7th June, 1909, it should be held that he consented to the sale of the property to the plaintiff. Secondly, that as the sale was not void but voidable, the husband alone was the person who could raise the plea: and he was not a party to the case. It is thirdly argued that a broad view of the Hindu Law on the subject should be taken; and as the two ladies were absolute heirs, no consent of Jairam was necessary as regards the 2nd defendant.

It is pointed out, and I think rightly, that the Madras case quoted, namely, *Salemma v. Lutchmana Reddi* (1), does not apply; but in the Bombay case, *Bhau v. Raghunath* (2), it is expressly laid down that "except in the kind known as *Saudayik*, a woman's power of disposal over her *stridhan* is during coverture subject to her husband's consent, and without such consent she cannot bequeath it by Will when she is survived by her husband, who is not shown ever to have consented to the Will". Sir Hari Singh Gour, in his work "The Hindu Code", page 1196, states

(1) 21 M. 100; 8 M. L. J. 14; 7 Ind. Dec. (N.S.) 427.
(2) 30 B. 229; 7 Bom. L. R. 936.

that "a woman cannot alien or devise her *stridhan* other than *Saudayik* during coverture without her husband's consent." In the present case the *stridhan* was not *Saudayik*, and it seems to me that under the principle enunciated in the Bombay case above quoted, it was in the present case necessary for the consent of the husband of defendant No. 2 to be obtained to the plaintiff's sale to make it valid. I do not think that because the husband agreed to a sale in 1909, it can be held that he, therefore, consented to a sale in 1920. It cannot be held that he gave his wife general power to dispose of the property. The husband is not a party to the present case, but it seems to me that defendant No. 2 can take the plea, and the finding of the lower Appellate Court that Jairam did not consent to the alienation in favour of the plaintiff seems to be correct. The plaintiff cannot, therefore, under that sale recover defendant No. 2's share of the property.

The result is that this appeal fails and is dismissed with costs. The appellant will pay the respondent's costs.

G. R. D.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 35-B OF 1927.

November 4, 1927.

Present:—Mr. Hallifax, A. J. C.

Musammam SAKHU—DEFENDANT

—APPELLANT

versus

KASHIBA—PLAINTIFF—RESPONDENT.

Interest—*Damdapat*, rule of, whether applicable to possessory mortgages.

The rule of *damdapat* is applicable to all mortgages whether the mortgagee is in possession or not, although in some cases where the mortgagee is in possession it does not apply, in the sense of being of any effect, because the payments made every year from the income of the property keep the amount of the interest below the amount of the capital. In each case it is merely a matter of calculation. [p. 200, col. 1.]

Appeal against the decree of the District Judge, Amraoti, dated the 30th September, 1926, in Civil Appeal No. 120 of 1926.

Mr. M. B. Niyogi, for the Appellant.

Mr. B. W. Joshi, for the Respondent.

JUDGMENT.—The mortgage which is sought to be enforced in this case was executed on the 20th of January, 1914. The consideration was a loan of Rs. 1,400 which the mortgagor agreed to re-pay in instal-

ments of Rs. 200 each, with interest, on *Paush Wadya* 13th, which is approximately the 20th of January, of each of the following seven years. Interest on the loan was to be at 9 per cent. but any sum in default was to carry interest at 24 per cent. and the whole amount still due was to be paid at once on the occurrence of two defaults. The mortgagee was in possession of the mortgaged field from May, 1917 to February, 1925, and made Rs. 150 out of it in each of those eight years. He sued for the enforcement of his mortgage on the 13th of July, 1925, claiming Rs. 3,500.

The claim for more than twice the principal is based on the quaint plea that a mortgagee in possession of the mortgaged property is not subject to the rule of *damdupat*. This was apparently taken in reliance on the head-note in the report of *Panduji v. Panduji* (1). That head-note* states a proposition that is obviously wrong and does not appear in the judgment. The matter is too simple to need discussion. The rule of *damdupat* is applicable to all mortgages whether the mortgagee is in possession or not, if it is otherwise applicable, but in some cases where the mortgagee is in possession it does not apply, in the sense of being of any effect, because the payments made every year from the income of the property keep the amount of the interest below the amount of the capital. In each case it is merely a matter of calculation.

In this case no calculations have been made and the rule of *damdupat* has been regarded in the lower Appellate Court as making Rs. 2,800 due on the date of the suit. That is impossible, as one payment of Rs. 150 had been made in June, 1925, at the end of the last year of the mortgagee's possession; the total amount due at the time of that payment was only Rs. 2,800 which was reduced by it to Rs. 2,650, and the interest had no time to amount to Rs. 150 more by the date of the suit.

It seems to have been assumed that the plaintiff is entitled to all the penalties for default set out in the bond. Continuing to assume that, the account would stand as follows. In January, 1915, the interest payable was at 9 per cent. on the whole sum, that is Rs. 126. For the second year it would be at 9 per cent. on Rs. 1,200 and at 24 per cent. on Rs. 326, and thereafter at 24

per cent. on the whole sum due. At the end of the fourth year, the total shown by the account would be Rs. 3,128, but by the rule of *damdupat* not more than Rs. 2,800 would be due, and that would be reduced to Rs. 2,650 by the payment of Rs. 150. Similarly in June of each of the next seven years, that is up to a month before the institution of the suit, the amount due would be brought down to Rs. 2,800 by the rule of *damdupat* and then to Rs. 2,650 by the payment of Rs. 150.

But the assumption that the plaintiff is entitled to the full higher rate of interest, under s. 73 or s. 74 of the Contract Act, has been made without any consideration whatever. If nothing extra is allowed, that is, if the interest is calculated all through at 9 per cent. the amount due in June, 1925, was Rs. 1,936-3-6, never having reached *damdupat* at all. If we call the interest between the date of the last payment and the institution of the suit Rs. 13-12-6, which is approximately correct, the amount due when the suit was filed would be Rs. 1,950.

But the plaintiff is certainly entitled to some compensation for the defendant's failure to perform the contract, and raising the interest on default from 9 per cent. to 12 per cent. is by no means excessive for that purpose. That, however, would make the amount due in June 1925 Rs. 2,818-12-0, and the result is the same as if the rate was 24 per cent. Allowing Rs. 25 as interest for the month after the last payment, we get Rs. 2,675 due at the date of the suit.

It is in many cases a hardship arising out of the rule of *damdupat* that the plaintiff is deprived of interest after filing his suit, perhaps for years. In this case, however, the plaintiff has only himself to thank for the greater part of the delay. On that account also he will get only five-sevenths of his costs in the first Court from the defendant, and will pay the whole of the rest of the costs of both parties in all three Courts.

The decree of the lower Appellate Court will be modified into one ordering foreclosure in default of the payment by the 31st of January, 1928, of Rs. 2,675 plus five-sevenths of the costs incurred by the plaintiff in the first Court minus the whole of the costs of the defendant in the two Appellate Courts and two-sevenths of her costs in the first Court. The Pleader's fee in this Court will be fifty rupees.

A. N. A.

Decree modified.

(1) 32 Ind. Cas. 231; 12 N. L. R. 1.

*The head-note in 12 N. L. R. 1.—[Ed.]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 558 OF 1925.

September 30, 1927.

Present.—Mr. Prideaux, A. J. C.

KALURAM AND ANOTHER—DEFENDANTS—
APPELLANTS
versus

GAJASA—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92, prov. 6—Oral evidence—Construction of document—Evidence as to intention of parties—Admissibility of oral evidence to prove sale to be mortgage.

Under s. 92 of the Evidence Act extraneous evidence as to the negotiations which led up to a contract is not admissible to vary the true construction of a document. Nor is oral evidence admissible for the purpose of ascertaining the intention of the parties. [p. 203, col. 2.]

Durga Prasad Singh v. Rajendra Narayan Bagchi (7) and Balkishen Das v. W. F. Legge (9), followed.

Under proviso 6 to s. 92 of the Evidence Act, evidence of circumstances surrounding a document is admissible only for the purpose of throwing light on its meaning and it is not permissible to consider such surrounding circumstances with a view of holding that a document is different in its nature from what it actually purports to be, e. g., for holding that a document, which on the face of it was a sale-deed, was intended to operate as a mortgage. [*ibid.*]

Appeal from the decree of the District Judge, Nimar, dated the 21st September, 1925, in Civil Appeal No. 60 of 1925.

Messrs. A. V. Khare and W. B. Pendharkar, for the Appellants.

Mr. S. B. Gokhale, for the Respondent.

JUDGMENT.—The plaintiff sues to recover certain fields sold to him by the defendants by a sale-deed dated the 27th July, 1923. Execution was not denied, but it was pleaded that on the same day it was agreed between the parties that on defendants' re-paying the amount advanced with interest to the plaintiff, the plaintiff would execute a re-conveyance of the property mentioned in the sale-deed. A *chitthi* dated the 27th July, 1923, has been filed by the defendants. It was further contended that the value of the property sold by the sale-deed is more than the price paid for it, and that the sale-deed was executed under undue influence, the defendants being allowed to remain in possession of the property. The plaintiff on his side alleged that possession of the property was delivered to him and that the defendants took the land back afterwards.

The case was tried on the following issues:—

'1. Whether the plaintiff had agreed to

re-convey the property in suit to the defendants as alleged in para. 4 of the latter's written statement?

(a) Whether oral evidence to prove the alleged agreement is admissible?

(b) Did plaintiff execute the *chitthi* dated 27th July, 1923?

(c) What was the market value of the property at the time of the sale in favour of the plaintiff?

2. Whether defendants delivered possession of the property to the plaintiff and the latter was subsequently dispossessed as alleged?

3. Whether the defendants executed the sale-deed under undue influence of the plaintiff?

4. Whether the sale in favour of the plaintiff is invalid and he is not entitled to possession of the property?"

A separate finding was come to on issue No. 1 and 1 (a). The Judge found that neither the *chitthi* was admissible nor could oral evidence be given in support of the allegation that there was an agreement to re-convey. The Judge held that the defendants' case does not come under any of the provisos to s. 92 of the Indian Evidence Act. Though the Judge gave the parties an opportunity to call evidence on the remaining issues no evidence was called. The suit was decreed, and on appeal that decree was confirmed.

The *chitthi* is rather an extraordinary document. It is not in favour of the defendants. It is said to be written by the plaintiff, but the plaintiff himself states that it is a forgery. The translation of it runs:—

'Salutations to Amirsa son of Jamnsa Fakir Mussalman of Mundi from Gajasa son of Bhikasa Mahajan Khadata of Mundi. Further: As regards the writing that I have got executed by Bhai Kaluram, Deolal (and) Dashrath sons of Onkar Mahajan Khadata of Mundi and got registered, you are the *madhyasta* (mediator) in the matter. And the land that was put to auction by Kunjilalsa, Motilalsa, Motisa of Mundi and Chunilal son of Kesosa was purchased by me. The amount in that connection was deposited by them; and the dealings between themselves and myself take place, adjuring by Unkarnath. The amount of the bond of Rs. 200, is however, due to me and I shall recover it duly. I shall return all the papers on the very day on which you will ask for them. You will not be affected

in any way by your being a mediator. These papers are all worth having used for packets. I have no concern with them: they may leave bread for their children. *Mitti Shrawan Badi 2 Sambat 1980*, corresponding to 27th July, 1923. Signature, Gajasa (self), by the pen of self. The mortgage-deed is dated 27th July, 1923, by the pen of self, Gajasa, Mundi."

Reliance is placed for the appellants on proviso 2 to s. 92 of the Evidence Act, which runs:—

"The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document."

Now, assuming that the defendants' story is a true one and that the real contract between the parties was that on re-payment of the money advanced, the land was to be re-conveyed, it cannot be denied that the deed of sale is silent on this point, and such an agreement is clearly inconsistent with its terms. That seems to me to put the defendants out of Court. There is no doubt that the *chitthi* and the deed of sale were both part of the same transaction. I am referred to the Privy Council case of *Baijnath Singh v. Vally Mahomed Hajee Abba* (1). But in that case it seems that there was no document to which the provisions of proviso 2 could be applied. The other cases quoted are *Narasingerji Gujararji v. Paungauti Parthasaradhi* (2), *Umrao Singh v. Lachhman Singh* (3), *Jhanda Singh v. Wahidudin* (4), *Gujarmal Ramlal v. Sitaram Arjun* (5) and *Harkisandas Bhagwandas v. Bui Dhanu* (6). It is contended that under

proviso 2 to s. 92 of the Evidence Act existence of a separate document can be proved and that in the present case the *chitthi* does not contradict the document but shows that there was a condition of re-purchase. The appellant asks that the case be sent back to find out the surrounding circumstances and to discover whether there was a separate agreement for a re-sale.

It has to be noted that except as regards the first half of the 1st issue, for which evidence was shut up, the defendants were given an opportunity of calling evidence on the other issues framed, and it is entirely their own fault if no evidence was adduced; and the only question before me is now as regards the decision on issue No. 1 and 1 (a). It was held in *Durga Prasad Singh v. Rajendra Narayan Bagchi* (7), that the true construction of a document could not be varied by extraneous evidence as to the negotiations which led up to the contract, and in *Martand Trimbak Gadre v. Amritrao Raghojirao Dhamale* (8), it was decided that under proviso 6 to s. 92 of the Indian Evidence Act, evidence of circumstances surrounding a document was admissible only for the purpose of throwing light on its meaning and that it would not be permissible to consider the surrounding circumstances with a view of holding that a document, which on the face of it was a sale-deed, was intended to operate as a mortgage.

It seems to me that the principle enunciated in the Privy Council case of *Balkishen Das v. W. F. Legge* (9), governs the present case. In that case oral evidence for the purpose of ascertaining the intention of the parties was held not admissible, being excluded by the enactment in s. 92 of the Evidence Act. The *chitthi* was produced to prove an oral agreement of the parties, and it seems to me under the authority of *Gujarmal Ramlal v. Sitaram Arjun* (5), that direct oral evidence of the agreement is not admissible. As to how far evidence of conduct of the parties may be permitted in contradiction or variation of its terms, issues Nos. 1 (b), (c), 2, 3, and 4 relate to these matters, the appellants

(1) 86 Ind. Cas. 332; 3 Rang. 106; A. I. R. 1925 P. C. 75; 48 M. L. J. 339; 2 O. W. N. 279; 27 Bom. L. R. 787; 3 Pat. L. R. 227; L. R. 6 A. (P. C.) 57; 30 C. W. N. 242 (P. C.).

(2) 82 Ind. Cas. 993; 47 M. 729; A. I. R. 1924 P. C. 236; 20 L. W. 701; 10 O. & A. L. R. 1172; 47 M. L. J. 809; (1924) M. W. N. 915; 40 C. L. J. 481; 27 Bom. L. R. 4; 29 C. W. N. 246; 51 I. A. 305; 26 P. L. R. 18; 23 A. L. J. 161; L. R. 6 A. (P. C.) 41; 1 O. W. N. 684 (P. C.).

(3) 10 Ind. Cas. 285; 33 A. 344; 15 O. W. N. 497; 8 A. L. J. 465; 13 C. L. J. 519; 9 M. L. T. 507; 13 Bom. L. R. 404; 21 M. L. J. 637; 14 O. C. 133; 38 I. A. 104; (1911) 2 M. W. N. 242 (P. C.).

(4) 36 Ind. Cas. 38; 38 A. 570; 31 M. L. J. 750; 21 O. W. N. 66; 20 M. L. T. 529; 14 A. L. J. 1189; (1916) 2 M. W. N. 570; 19 Bom. L. R. 1; 5 L. W. 189; 25 O. L. J. 524; 10 Bur. L. T. 131; 43 I. A. 384 (P. C.).

(5) 3 N. L. R. 19.

(6) 98 Ind. Cas. 634; 50 B. 566; 23 Bom. L. R. 954; A. I. R. 1926 Bom. 497 (F. B.).

(7) 21 Ind. Cas. 750; 41 C. 493; 18 O. W. N. 66; (1914) M. W. N. 1; 15 M. L. T. 68; 19 O. L. J. 95; 40 I. A. 223; 26 M. L. J. 25; 16 Bom. L. R. 42 (P. C.).

(8) 93 Ind. Cas. 924; 49 B. 662; 27 Bom. L. R. 951; A. I. R. 1925 Bom. 501.

(9) 22 A. 149; 2 Bom. L. R. 523; 27 I. A. 58; 4 C. W. N. 153; 7 Sar. P. C. J. 641; 9 Ind. Dec. (N. S.) 1130 (P. C.).

deliberately refrained from calling evidence thereon. I do not see why they should now be allowed to call such evidence.

The result is that this appeal fails and is dismissed with costs. The appellants will pay the respondent's costs.

G. R. D.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 590 OF 1926.

October 28, 1927.

Present:—Mr. Kinkhede, A. J. C.

RAMCHANDRA NAGOBA—PLAINTIFF—

APPELLANT

versus

RETIRAM AND OTHERS—DEFENDANTS—

RESPONDENTS.

Basements Act (V of 1882), s. 7 (i)—Natural right of drainage, scope of—Right, whether extends to artificial discharge of water.

The natural right of drainage covers only the right to allow water naturally rising in or falling on land of a naturally higher level to drain off by surface flow along whatever lines the water may find its way to the neighbouring land, but does not include a right to pass the water which has come artificially thereon. [p. 204, col. 2.]

Natural rights in water do not come into existence so long as the water does not flow in defined channels, whether on the surface or under-ground. [*ibid.*]

There is no obligation, therefore, upon an adjoining land-owner to submit to an artificial discharge of water from his neighbour's land, unless he is bound by an easement to do so. [*ibid.*]

Arkwright v. Gell (1) and *Young v. Bankier Distillery Co.* (2), followed.

Second appeal from a decree of the District Judge, Bhandara, dated the 12th August, 1926, in Civil Appeal No. 47 of 1925.

Mr. A. V. Khare, for the Appellant.

Mr. M. R. Indurkar, for the Respondents.

JUDGMENT.—The appellant is a *malguzar* owning some *sir* and *khudkast* land in the village known as Katurli and the defendants, at least some of them, are the *malguzars* of the same *mouza*. That *mouza* is divided into 3 *mahals*. The dispute relates to the plaintiff's right to drain off the bed of a tank bearing old No. 221-2 new No. 293-1kh situate in *shamlat* Mahal No. 3 through its sluice A so as to discharge superfluous water remaining after the irrigation of the *ghan* crops is over, over the defendants' lands lying at the base of the tank, in order that the bed once submerged under water may be utilized by him for sowing *kathan* crop thereon. The *malguzars* defendants, who deny the plaintiff's right, are said to

have caused obstruction to him in the year 1923 in the exercise of his right to so drain off and discharge the said water, and thus prevented him from using portions of the bed, namely, 2.25 acres out of *sir* Plot No. 292 of Mahal No. 2 and 2.20 acres of *khudkast* No. 293-1kh of Mahal No. 3 for the said purpose of sowing *kathan* crop, and thereby caused him loss to the extent of Rs. 100. Hence this suit for injunction and damages against the *malguzars* defendants, and others who acted in concert with them.

The defence need not be detailed here, but it is sufficient to state that the case of the *malguzars* defendants Nos. 1 and 2, is that plaintiff cultivates the bed of the tank as it dries up, i. e., such portions only as get dried in the ordinary course by the water being used up in irrigating the *ghan* crops, and that he has no right to drain off and discharge the water on their land for drying up the bed.

The first Court held that plaintiff failed to prove any right entitling him to break open the sluice at A for draining off and discharging the superfluous contents of the tank through it, on the defendants' land, in order that the dried bed may be available to him for sowing the *kathan* crop. The plaintiff's suit was accordingly dismissed and his appeal to the District Judge's Court has also met with the same fate. The District Judge has in a careful judgment dealt with the nature of the right set up by the plaintiff from the point of view of its being either a natural right or a prescriptive right. As to the third position taken up before him, namely, of the right being a customary right he held that plaintiff did not base his right on custom, and that the plea could not, therefore, be entertained for the first time in appeal.

The plaintiff has come up in second appeal to this Court. At the very outset, I must remark that the District Judge was perfectly right in overruling the plaintiff's contentions based on an alleged custom, as he did not plead it specifically in the trial Court. This disposes of grounds Nos. 3 and 8 of this appeal.

As to the right being either a natural one or one acquired by prescription which forms the subject of the rest of the grounds of appeal, I think, the concurrent findings of fact of both the Courts to the effect that plaintiff failed to

prove it, is fatal to the success of this appeal. The lower Appellate Court has very carefully discussed the evidence both oral and documentary, and arrived at the conclusion that the evidence on record does not go the length of proving that plaintiff was entitled to open the sluice A in order to free the surface of the bed of the tank represented by Nos. 292 and 293-1kk or even No. 293/2 from the volume or expanse or sheet of superfluous water, with a view to dry it up and utilize the same for sowing the *kathan* or winter crop therein. From the fact that plaintiff used to cultivate varying areas in different years, that Court was perfectly justified in drawing the inference of fact, which supported the defence, that plaintiff sowed *kathan* crop only on so much of the bed as got dry and was not under water, about the time of the sowing and, that he did not use to drain off the water of the tank, for that purpose. The stray instances of the exercise of that right in recent years were rightly characterized as insufficient to prove a prescriptive easement to discharge the water of the tank over the defendants' adjoining land. In my opinion the lower Appellate Court's decision on this point of the right not being a prescriptive right is unassailable in second appeal.

Now it remains to be seen whether the alleged right which plaintiff claims to exercise is a natural right. This question has been discussed in para. 6 of the lower Appellate Court's judgment. The species of natural right with which we are concerned here is not the riparian right to the flow of water but the right of drainage. The former relates to the uninterrupted supply, while the latter to the interrupted clearance, of water. The latter right is based on the principle that water if allowed to stand has its own evils. It may damage buildings, stunt the growth of plots and cause decay of things submerged; cf. Katiar's Law of Easements, page 503. Hence the utility of the right of drainage, both for the protection of one's own property from the evil effects of water accumulating there, and for freeing that property, from the expanse or sheet of water coming on it either by a natural stream, or, stored there by artificial means, in order to restore it to its former condition in which it may be again available for its usual and legitimate use. As illustration (j) appended to s. 7 of the Indian Easements

Act, would show, this right is confined to water naturally rising in, or, falling on, such land, and not passing in defined channels. The natural right of drainage thus covers only the right to allow rain water falling on land of a naturally higher level to drain off by surface flow along whatever lines the water may find its way to the neighbouring land; but it does not include a right to pass the water which has come artificially thereon.

It may be useful here to point out that the natural rights in water do not come into existence so long as the water does not flow in known and defined channels, whether on the surface, or underground: Peacock's Law of Easements, 3rd Edition, page 291. There are natural rights in natural streams but no natural rights in artificial streams, i. e., streams which flow at the source by the operation of man, as opposed to natural streams which flow by operation of nature and in a defined natural channel. Not only has every land-owner a natural right to collect and retain within the limits of his own land, surface water not flowing in a defined channel, but he has also the right to draw it off on his neighbour's lower lands or put it to whatever use he pleases, agricultural or otherwise. But though there is a natural right of drainage, from higher lands to lower lands, of water flowing in the usual course of nature and in undefined channels, there is no obligation upon an adjoining land-owner to submit to a artificial discharge of water from his neighbour's land, unless he is bound by an easement to do so. *Arkwright v. Gell* (1), *Young v. Bankier Distillery Co.*, (2), quoted in Peacock's Law of Easements, page 294, 3rd Edition.

The lower Appellate Court has held that in the present case plaintiff has not acquired a prescriptive easement and is not, therefore, entitled to drain the water of the tank by discharging it through sluice A over the land of defendant No. 2 for the specific purpose pleaded by him. Since he wants to put the submerged bed of the tank to a new use, namely, to grow *kathan* crop, and this use appears to be of only recent growth, the conclusion of the lower Appellate Court appears to be sound and

(1) (1839) 5 M. & W. 203; 2 H. & H. 17; 8 L. J. Ex. 201; 151 E. R. 87; 52 R. R. 671.

(2) (1893) A. C. 691; 69 L. T. 838; 58 J. P. 100.

legal. Plaintiff cannot by using artificial means of draining off the surplus water left after irrigation of *dhan* crops, convert and use the land, which forms the bed of the tank and ought to remain submerged under water, under ordinary condition, i.e., until it gets dry by the natural process of atmospheric evaporation by the action of solar rays, for the different purpose of growing the winter crop thereon. There is nothing to prevent him from using the land if and when it may get dry in the natural course, but if he were to use artificial means in draining off the water and the Courts were to help him to do so, he would be practically imposing a new burden on the defendants' land. I am clearly of opinion that plaintiff as a *malguzar* or as co-owner of the *bodi* has no such right under Law. The right he is trying to enforce in this suit could not be called a natural right of drainage, although the same could have been acquired by him as the result of a prescriptive right of easement, which, however, as shown above, he has failed to establish.

For these reasons I uphold the dismissal of the plaintiff's suit for injunction and damages. The appeal fails and is dismissed with costs.

G. R. D.

Appeal dismissed.

A. N. A.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 58-B OF 1926.

June 16, 1927.

Present:—Mr. Hallifax, A. J. C.

GOVIND AND ANOTHER—PLAINTIFFS—

APPELLANTS

versus

MALKARJUNAPPA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Interest—Rule of damdupat, meaning of.

Under the rule of *damdupat* interest ceases to run altogether when it equals the principal. The rule does not mean that the amount of interest that may be recovered at any one time shall not exceed the principal and that the excess that may remain may still be recovered, though not at that time. [p. 206, col. 1.]

Dhondu v. Narayan (1) and *Sukalal v. Bapu Sakharam* (2), referred to.

Appeal against the decree of the Sub-Judge, First Class, Amraoti, dated the 30th June, 1926, in Civil Suit No. 52 of 1925.

Sir H. S. Gour, Kt., and Mr. M. B. Marathe, for the Appellants.

Messrs. K. G. Deshpande and R. R. Jayavant, R. B., for the Respondents.

JUDGMENT.—The question in this case is one of the meaning of the rule of *damdupat* by which the parties are bound. The suit rested on a mortgage for Rs. 5,000 executed on the 25th of September, 1914. The only payment was one of Rs. 4,865 made on the 16th of October, 1925. On the 16th of December of that year, that is two months later, the plaintiffs filed the present suit, in which they claimed a decree for Rs. 10,000, asserting that by that time more than Rs. 12,000 appeared due at the foot of the account.

In the plaint it is stated that by the account the amount due to the plaintiffs on the 16th of October, 1925, was Rs. 17,633 which the payment of Rs. 4,865 on that day reduced to Rs. 12,768. By adding interest to that, the amount due on the date of the suit, strictly according to account, would be about Rs. 13,456, though it is stated to be slightly less. Anyhow it is more than Rs. 10,000, and the plaintiffs claimed a decree for that sum only.

It was held in the lower Court that the amount due on the mortgage on the 16th of October, 1925, was, by the operation of the rule mentioned, only Rs. 10,000, and this was reduced to Rs. 5,135 by the payment made on that day. A decree was accordingly given for foreclosure on the 30th of December, 1926, in default of the payment by that date of Rs. 5,135 with interest thereon from the 16th of October, 1925. The total amounted to Rs. 6,585-5-0 and the plaintiffs have appealed, contending that they are entitled to get Rs. 10,000.

The texts on which the rule is based are cited in *Dhondu v. Narayan* (1) decided by the Bombay High Court in 1863 and in the judgment of the same Court in *Sukalal v. Bapu Sakharam* (2) thirty-six years later, and they seem to leave no doubt about the matter. The interpretation suggested for the appellants is not easy to understand; it seems to be that the amount of interest that may be recovered at any one time shall not exceed the principal, but that any excess there may be according to the account shall still

(1) 1 B. H. C. R. 47.

(2) 24 B. 305; 2 Bom. L. R. 18; 12 Ind. Dec. (N. S.) 738.

be recoverable, though not at that time. Such an interpretation reduces the rule to a nullity, in addition to being directly contradictory of the words of the texts, which say that when the interest is equal to the principal, it "ceases" (Gautam) or "stops" (Katyayana).

The appellants themselves admit that if the respondents had paid Rs. 10,000 instead of a little less than Rs. 5,000 in October, 1925, the whole debt would have been wiped out, that is, that the amount due for interest on that day was Rs. 5,000 and no more. They have made the same admission in claiming no more than Rs. 10,000 in their suit; if, as they contend, a sum of Rs. 7,768 still remained due as interest after the payment in October, 1925, (though they were not allowed to recover it at that time), then there would still be more than Rs. 8,000 due to them as interest after the decree they claimed had been satisfied.

Another proof of the impossibility of the suggested interpretation will be found in an attempt to answer the question of the length of the period to be allowed between two recoveries of interest. If only interest equal to the principal can be recovered at one time, but the excess shown in the account is still recoverable later, how soon can that be done? Can it be done the next day or must there be an interval of a week or a month or a year, or need the interval be no more than a minute or two? The plaintiffs themselves left an interval of exactly two months between the payment and the suit.

The two contentions raised in a cross-objection by the respondents were expressly abandoned in this Court, and as the amount decreed in the lower Court has already been paid, it is not necessary to extend the time allowed for redemption. The appeal will accordingly be dismissed and the appellants will be ordered to pay all the costs with the exception of those incurred in connection with the cross-objection. The Pleader's fee in the appeal will be Rs. 350. There will be none for the cross-objection.

A. N. A.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 64 OF 1927.

August 19, 1927.

Present:—Mr. Hallifax, A. J. C.
SECRETARY OF STATE (G. I. P. Ry.

Co.)—DEFENDANT—APPLICANT

versus

NANDALAL—PLAINTIFF—NON-

APPLICANT.

Practice—Precedents—Rulings of High Court to which a Court is not subordinate, whether binding—Railways Act (IX of 1890), s. 75—Goods charged at lower rates—Re-calculation at higher rates on destination when allowable.

The conclusions in any judgment of the Privy Council or in a judgment of the High Court to which a Court is subordinate, which is officially published must be accepted as correct by the subordinate Court but a conclusion in any other judgment, taken by itself and apart from the reasons for it, is not even relevant and much less is it to be accepted blindly, though the judgment will usually be of the greatest use as an exposition of the reasons for coming to the same conclusion. [p. 207, col. 1.]

If a Railway Company intentionally carries goods to their destination at owner's risk at a lower rate in spite of a general rule of the Company under which such goods can be carried only at Railway risk and at a higher rate, they are not entitled to charge the higher rate at the destination as if the goods had been carried at Railway risk under the rule. [p. 208, col. 2.]

Chunni Lal v. Nizam's Guaranteed State Ry. Co. (1), Alla-ud-din v. G. I. P. Ry. Co. (2) and B. B. & C. I. Ry. Co. v. Budh Sen Pusp Chand (3), discussed.

Application for revision of the decree of the Small Cause Court, Hushangabad, dated the 22nd December, 1926, in Civil Suit No. 763 of 1926.

Mr. W. B. Pendharkar, for the Applicant.

Mr. N. R. Alekar, for the Non-Applicant.

ORDER.—On the 25th of March, 1925, the first plaintiff, who opposes this application for revision, consigned a quantity of charcoal at the Byaora Station on the Great Indian Peninsula Railway for conveyance to Byculla on the same Railway. The Station Master informed him that the charcoal could be sent at what is called the "Q. rate", which in this case is a wagon-rate and worked out at Rs. 126. That is a reduced rate, and goods sent under it are carried at "owner's risk". As a matter of fact, however, charcoal had not been allowed to be booked at that Station at the wagon-rate since 1923; it could be sent only at the "First Class rate" or maund-rate, which entailed its going at "Railway risk."

On arrival at Byculla the charcoal was weighed and the freight was re-calculated

at the maund-rate, with the result that the proper charge was found to be Rs. 305-7 in excess of the Rs. 126 paid at Byacra. This the plaintiff paid after some delay, which resulted in a further charge of Rs. 11 for demurrage. He then filed the "suit out of which these proceedings have arisen in the Small Cause Court, claiming a refund of the Rs. 316-7-0 he had paid, with interest. He was given a decree for the Rs. 370 he claimed and the defendant Company has applied for revision of the judgment.

The learned Judge of the Small Cause Court has taken the usual short cut of deciding the case according to "rulings", that is to say he has not decided at all. The conclusions in any judgment of the Privy Council or in a judgment of this Court which is officially published must be accepted as correct. A conclusion in any other judgment, taken by itself and apart from the reasons for it, is not even relevant, and much less is it to be accepted blindly, though the judgment will usually be of the greatest use as an exposition of reasons for coming to the same conclusion. Of the five judgments which the learned Judge mentions, only two are to be found in the Indian Law Reports, and only one gives reasons for the view taken.

The contract between the parties is embodied in two documents which are on the file, one executed by each of them. The first is a Consignment Note signed by the sender. In it he requests the Company to receive the goods specified by him and to send them to a certain Station. At the bottom of the document these words are printed. "*N.B.* The attention of the Sender or the Deliverer of the goods is invited to the principal terms and conditions applying to the carriage of goods by Railway, as set forth in the public notice printed on the back of the Railway Receipt."

The other document, which is the counter-part of the Consignment Note, is the Railway Receipt executed by the Company. It is an acknowledgment of the receipt of the goods, a statement of the sum paid by the consignor and the way in which that sum has been calculated, and an agreement to convey them to the destination stated and deliver them as directed, subject to certain conditions. A few of these are printed at the bottom of the front of the sheet, and among them are the words, underlined for emphasis: "Special

attention is drawn to the notes on the back, which form a legal contract". On the back is a statement that the Railway Company gives public notice of eleven different matters of which the sixth is as follows.

"The Railway have the right of re-measurement, re-weighment, re-classification and re-calculation of rates, terminals and other charges at the place of destination, and of collecting, before the goods are delivered, any amount that may have been omitted or undercharged."

The plaintiff then undoubtedly did agree that the Railway Company was entitled to re-calculate the rates at Byculla, and that he would have to pay any amount that was then found to have been undercharged or allow the Company to realise it by selling the goods. It has been suggested on his behalf in this Court that the calculation at Byculla could only be made on the same basis as that at Byacra, for the sole purpose of discovering arithmetical errors in it; it could not be made on a different basis or at different rates. To limit the meaning of the word in that way would hardly be possible even if it stood alone, but it is quite impossible when it stands alongside the word "re-classification", nor with that limitation would the words "re-measurement" and "re-weighment" have much meaning.

In *Chunni Lal v. Nizam's Guaranteed State Ry. Co.* (1) Stanley, C. J., said that in his opinion the exacting of maundage instead of wagon-rates in circumstances similar to those of this case could not be considered to be covered by any of the words "re-measurement, re-weighment, re-calculation or re-classification of rates." This is a casual remark at the end of the judgment, not a part of the basis of the decision of the case, and for the reasons stated I am unable, with all respect, to concur in the opinion expressed.

Three Allahabad cases have been cited in support of the plaintiff's contention that the Station Master as the Company's agent having once agreed, by mistake or otherwise, to carry his goods at the wagon-rate, the Company could not go back on the contract and charge the maund-rate. They are *Chunni Lal v. Nizam's Guaranteed State Ry. Co.* (1), *Alla-ud-din v. G. I.*

(1) 29 A. 223; 2 M. L. T. 42; A. W. N. (1907) 21; A. L. J. 80.

P. Ry., Co. (2) and *B. B. & C. I. Ry. Co. v. Budh Sen Pusp Chand (3)*. The last two merely follow the first, which was decided by a Full Bench in 1906, and they carry the matter no further. In all the three cases the basis of the decision was that the right of re-calculation of rates was not reserved to the Company by the written contract, but by a separate rule, of which notice was given to all persons who wished to send goods by the Railway.

On those facts there can be no doubt of the correctness of the decision in all three cases that, as the original contract was to carry the goods at the lower rate, the Company was not entitled to charge the higher rate by virtue only of their rule. But it is equally beyond doubt that in this case the sixth item printed on the back of the Railway Receipt was a part of the original contract, not a separate rule. That contract was that the Company would carry the goods for Rs. 126 or such greater sum as might be found due on re-classification or re-calculation according to the rates that should have been charged under the Company's rules, and that the plaintiff would pay any excess that might be so found due or allow the Company to sell his goods to realise it.

But there is the further consideration that the Company itself intended to carry the goods at "owner's risk" and not at "Railway risk"; that is to say, if the goods had been lost in transit, the Company would have refused to pay the difference between the damages and the higher rate, but would have pleaded that the sending of the goods at "owner's risk" was a part of the original contract, for which the consignor had received consideration in the reduction of the rate. That this would have been done as a matter of course is not denied, and anyhow it is an inevitable finding of fact, based on the common course of the conduct of Railway Companies in such circumstances.

The course of conduct which s. 114 of the Evidence Act calls "common" can be only that which is most common in the experience of the Judge who has to decide the point. Now at least two cases have occurred within my own experience in which goods, booked mistakenly at "owner's risk" as here, were lost in transit, and the plea was taken by the owner that the extra charge for "Railway risk" ought to be deducted

from the damages that would be due to him if they had been booked at the higher rate and the balance paid to him. In each case the plea was successfully taken by the Company, (which in one if not both was the defendant Company here) that the contract was to carry the goods at "owner's risk".

If it were denied that this plea would have been taken in the present case, if the goods had been lost or damaged on the journey, the denial would be met by reference to the nature of the pleas taken by other Railway Companies in *East Indian Ry. Co. v. Ram Lakhan Ram (4)*, *Agent, Bengal Nagpur Ry. v. Behari Lal Dutt (5)* and *Radhe Lal v. East Indian Ry. Co. (6)* and by this Company in *Deorao v. G. I. P. Ry. Co. (7)*. No reprobation of the taking of such pleas is implied in this reference to them; they are mentioned as further proof of the certainty that if the goods had been lost in this case the defendant Company would have pleaded that they were carried at "owner's risk."

It is proved then that the Company itself intended to carry the goods at "owner's risk," in spite of their general rule to the contrary, and so accepted the agreement made by the Station Master to carry them at the lower rate for that consideration. The lower rate was, therefore, a part of the original contract, and the re-calculation at Byculla had accordingly to be made at that rate, so that the amount paid at Byaora was correct. As the Company intended to insist on the goods being at "owner's risk" if any damage or loss did occur on the journey, the contract with the consignor suggested by the claim for the higher rate the risk had ended is in effect: "Heds I win, tails you lose."

The decision of the lower Court is correct, though the reasons for it are not. The application for revision is rejected and the Company is ordered to pay the plaintiff thirty rupees as his costs in this Court.

G. R. D.

A. N. A.

Application rejected.

(4) 78 Ind. Cas. 312; 3 Pat. 230; (1924) Pat. 9; A. I. R. 1925 Pat. 37; 6 P. L. T. 415.

(5) 90 Ind. Cas. 426; 29 C. W. N. 614; A. I. R. 1925 Cal. 716; 52 C. 783.

(6) 90 Ind. Cas. 680; 5 Pat. 128; 7 P. L. T. 57; A. I. R. 1926 Pat. 40.

(7) 14 Ind. Cas. 684; 8 N. L. R. 34.

(2) 34 Ind. Cas. 104; 14 A. L. J. 494.

(3) 79 Ind. Cas. 562; 46 A. 55; 21 A. L. J. 830; 2 O. & A. L. R. 1074; A. I. R. 1924 All. 150.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 249 OF 1926.

September 16, 1927.

Present:—Mr. Rupchand Bilaram, A. J. C.

THE OFFICIAL ASSIGNEE & THE
PUNJAB NATIONAL BANK, LTD.

—PLAINTIFFS

versus

ABDUL HUSSAIN—DEFENDANT.

Mortgage—Lease by mortgagor—Payment of rent in advance—Sale of mortgaged property by mortgagee—Auction-purchaser's right to recover rent from date of sale—Transfer of Property Act (IV of 1882), s. 50.

A lessee from a mortgagor cannot resist a suit for ejectment at the instance of an auction-purchaser from a prior mortgagee or refuse to pay rent to him which has accrued due since the purchase on the ground that it has been paid to the mortgagor in advance. In order to be entitled to the benefit of s. 50 of the Transfer of Property Act, the tenant must pay rent as rent and must not pay rent in advance which in the circumstances would be a mere loan to the mortgagor. [p. 209, col. 2.]

Madan Mohun Singh v. Raj Kishori Kumari (2), Kiran Chandra Bose v. Dutt & Co. (3) and Tiloke Chand Surana v. Beattie & Co. (4), relied upon.

Mr. Dingomal Narainsingh, for the Plaintiffs.

ORDER.—This is a suit for a declaration that a certain lease executed by the Firm of Adamji Jafferji & Sons, in favour of the defendant is void, *inter alia*, on the following grounds:—

(a) that it was without consideration;
(b) that it was executed by that firm in favour of one of their relatives at a time when that firm was not in insolvent circumstances and the lease was a fraud on the creditors;

(c) that the property having been mortgaged to the Punjab National Bank, the lease was inoperative as against their rights; and

(d) that a sum of Rs. 36,000 alleged to have been paid as rent in advance for three years was in fact never paid.

An injunction has been sought restraining the defendant from recovering rents of the property from the date of suit and a prayer requiring the defendant to render accounts of the rents recovered by him. It appears that the Punjab National Bank have obtained a final decree on their mortgage, but have not been able to bring the property to sale in consequence of an injunction issued in Suit No. 1020 of 1924 filed by some of the relatives of the mortgagors claiming an interest in the mortgaged property. At their instance, however, the Court appointed Mr. Castellino as Receiver

of the property to collect rents pending such sale. Both Mr. Castellino and the Punjab National Bank joined together in instituting this suit, and in this suit, again Mr. Castellino was appointed as Receiver to collect rents of the property subsequent to the institution of the present suit. The Firm of Adamji Jafferji and its managing proprietor Issaji have been adjudicated as insolvents and the Official Assignee in whom their estate has vested has been substituted as Receiver in place of Mr. Castellino.

The defendant has failed to appear. Mr. Fatehchand who appeared for him asked for an adjournment on the ground that the defendant had gone to Colombo to recruit his health, and on his application being disallowed he stated that he had no instructions. The suit has, therefore, proceeded *ex parte*.

The points at issue have been greatly simplified by two facts, first, that the lease has expired, and secondly, that the plaintiffs have limited their claim only to such rent as has been recovered by the Receiver appointed in this suit. The only question, therefore, is whether this rent should be held by the Receiver for the benefit of the mortgagee and the alleged co-sharers of the mortgagor or such of them as is held entitled to it or should it be paid over to the defendant.

Now, whatever doubt may exist as to the question whether the mortgagor possesses any larger powers of leasing under the Indian Law, than under the English Law [see the observations of Jenkins, C. J., in *Bal Makund Ruiya v. Mati Lal Burman* (1)], it is well settled that a lessee cannot resist a suit for ejectment at the instance of an auction-purchaser from a prior mortgagee or refuse to pay rent which has accrued due since the purchase on the ground that it has been paid to the mortgagor in advance. See *Madan Mohun Singh v. Raj Kishori Kumari* (2), *Kiran Chandra Bose v. Dutt & Co.* (3), *Tiloke Chand Surana v. Beattie & Co.* (4). As observed by Rankin, J., in the last

(1) 32 Ind. Cas. 195; 20 C. W. N. 350.

(2) 39 Ind. Cas. 182; 17 C. L. J. 384; 21 C. W. N. 88.

(3) 85 Ind. Cas. 522; 29 C. W. N. 94; 40 C. L. J. 500; A. I. R. 1925 Cal. 251.

(4) 94 Ind. Cas. 538; 29 C. W. N. 953; A. I. R. 1926 Cal. 204.

cited case in order to get the benefit of the protection of s. 50 of the Transfer of Property Act the tenant must pay rent as rent and must not pay rent in advance which in the circumstances is a mere loan to the mortgagor.

In the present case it cannot for a moment be disputed that the property should ordinarily have been sold in execution proceedings much prior to the date on which a Receiver was appointed and that it has not been so done only in consequence of the injunction operating on the mortgagees, and the appointment of a Receiver by way of equitable relief is for the benefit of the mortgagee in the first suit. It is also abundantly clear that the value of the property as a whole is much less than the mortgage claim. Under the circumstances it is inequitable that the defendant should be able to resist the recovery of the rent by the Receiver or claim an interest therein. Furthermore there is no proof in the present case that the defendant has paid any rent in advance. He has failed to appear and offered no evidence, and it is hardly likely that he could have paid any money.

I, therefore, pass a decree in favour of the plaintiffs declaring that the defendant has no claim to the rents realized or realizable after the date of the appointment of the Receiver in this suit.

I also allow costs of the suit to the plaintiffs as against the defendant.

P. B. A.

A. N. A.

Suit decreed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL MISCELLANEOUS APPEAL
No. 39 OF 1925.

September 26, 1927.

Present:—Mr. Percival, J. C., and
Mr. Rupchand Bilaram, A. J. C.
NECHALDAS—APPELLANT

versus

OFFICIAL RECEIVER—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 54—Onus of proof.

In applications under s. 54 of the Provincial Insolvency Act, the onus is, in the first instance, on the Official Receiver to prove that the dominant or the substantial or effective, though not necessarily the sole motive which the insolvent had in view was to prefer a particular creditor. But the onus is shifted on to the creditor or transferee to prove the contrary where the insolvent has made the payment or transfer of property, as the case may be, in discharge of an old debt, and on the eve of bankruptcy. And where the reason of such payment or transfer remains unexplained it is competent for the Court to hold that a *prima facie* case of fraudulent preference has been established and to act on it. [p. 210, col. 2; p. 211, col. 1.]

Official Receiver v. Kewalmal Ajumal (1), relied upon.

Appeal against the judgment of Mr. Kennedy, J. C., dated the 16th April, 1925, in Judicial Miscellaneous No. 469 of 1922, Insolvency No. 23 of 1921.

Mr. Dingomal Narainsing, for the Appellant.

Mr. Tolasing K. Advani, for the Respondent.

JUDGMENT.—This is an appeal against the decision of the learned Judicial Commissioner, Mr. Kennedy, setting aside a transfer by way of sale of certain immoveable property made by the insolvents in favour of their uncle.

Now it is well settled that in applications under s. 54 of the Provincial Insolvency Act, the onus is, in the first instance, on the Official Receiver to prove that the dominant or the substantial or effective, though not necessarily the sole motive which the insolvent had in view was to prefer a particular creditor. But this onus is shifted on to the creditor or transferee to prove the contrary where the insolvent has made the payment or transfer of property as the case may be in discharge of an old debt, and on the eve of bankruptcy. And where the reason of such payment or transfer remains unexplained it is competent for the Court to hold that a

prima facie case of fraudulent preference has been established and to act on it: *Official Receiver v. Kewmal Ajumal* (1).

In this case, there is clear evidence that the transfer was made by the insolvents on the eve of their bankruptcy, and the consideration for the transfer was an old debt. It appears that the insolvent carried on business as piece goods merchant and also entered into extensive speculative transactions in sugar, cotton and other commodities. They had indented for piece goods worth several lakhs of rupees through different importing firms. The goods had arrived and were lying with the importing firms at the risk of the insolvents and under their lien. The exchange had considerably fallen prior to December, 1920 and with it the price of piecegoods had gone down considerably. The estimated loss payable to one of the importing firms, namely, Messrs. James Finlay & Co., was Rs. 98,000 and that payable to another firm, namely, Messrs. Khan Khan & Co., was about Rs. 40,000. The insolvent Ramchand has admitted this in his deposition.

It would also appear that the insolvents suffered heavy losses in cotton, sugar and other commodities. The total loss on sugar for January and February *vaidas* was Rs. 81,000. It is a matter of common knowledge that before the arrival of sugar and about the time when shipments are made, speculators like the insolvent enter into covering contracts and are liable to pay the loss or receive the profit resulting from such contracts though the amount of loss or profit is actually payable on the date when sugar arrives. The insolvents have not prepared a statement showing when they made the covering contracts. It may fairly be assumed that a good part of this loss of Rs. 81,000 was ascertained long prior to the transfer of property to the appellant. Reading the evidence of Ramchand insolvent as a whole, we have no doubt in our minds that at the trial it was more or less conceded that the transfer was made by the insolvents on the eve of their bankruptcy. To a certain extent this fact accounts for the fact that the *potamels* have not been prepared up to now; though so ordered by the learned Judicial Commissioner.

Even if we were to exclude from our consideration the losses on sugar we think that there was sufficient material on the record for the learned Judge to hold that the insolvents had transferred the property in dispute on the eve of their bankruptcy. Under the circumstances, the onus was shifted on to the appellant to prove that the transfer was a *bona fide* transfer. This onus has in no way been discharged and we have no hesitation in dismissing the appeal with costs.

P. B. A.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 8 OF 1926.

September 2, 1927.

Present:—Mr. Percival, J. C., and Mr. Aston, A. J. C.

MAHOMED KASSIM—APPELLANT
versus

NATHO BHANO AND ANOTHER—
RESPONDENTS.

Co-owners—Adverse possession—Mere exclusive possession, effect of—Khojas, law applicable to.

In the case of tenants-in-common the possession of one owner, even though exclusive, is possession of all, and acts of ownership, even though exclusive, are not evidence of de-seizin. A tenant-in-common cannot claim adverse possession unless it is clear that he has repudiated the co-tenant's rights by acts of ouster or disclaimer or by putting forward an adverse title. [p. 212, col. 2]

Jogindra Nath Roy v. Baladeo Das (3), *Balaram Guria v. Syama Charan Mondal* (4) and *Hukam Kaur v. Bihari Lal* (5), relied upon.

The principles of Hindu Law relating to joint family are not applicable to Khojas; it applies only with regard to questions of succession and inheritance. [p. 213, col. 1.]

Appeal against the decree of Mr. Rupchand Bilaram, Additional Judicial Commissioner of Sind, in Suit No. 684 of 1921, dated the 21st October, 1925.

Mr. Kimatrai Bhojraj, for the Appellant.

Mr. G. A. Kikla, for the Respondents.

JUDGMENT.—This is an appeal from the judgment and decree of the learned Additional Judicial Commissioner of Sind who dismissed with costs a suit filed by Mahomed Kassim a Khoja Muhammadan living in Karachi against his nephew Natho Bhano and his sister-in-law Devikibai in which he prayed for par-

(1) 93 Ind. Cas. 372; A. I. R. 1926 Sind 123.

tion of certain property which he alleged to be Khoja joint family property.

It appears that one Kassim, the father of the plaintiff, died on the 5th of October, 1894, leaving two sons, namely, the plaintiff Mahomed Kassim and his brother Bhano. Bhano married Devikibai, the second defendant, and had a son Natho the 1st defendant, who was born in or about 1901. Kassim at his death left a residential house in which Kassim and Bhano were living. The plaintiff at the time of his father's death was in Bombay. The residential house was small and from 1894 until the date of the suit in 1921, the plaintiff appears to have lived elsewhere. From 1894 until his death in about 1907 the residential house was in the occupation of Bhano and from thereafter in the occupation of his son Natho. Evidence was led to show that Kassim at his death left debts to pay. Accordingly to Devikibai the debts amounted to Rs. 2,000. On the other hand, evidence of Ghulam Ali and Noor Mahomed tended to show that the witness Devikibai had very much exaggerated the extent of the debts. Ghulam Ali's evidence was that he had to be paid Rs. 300 to Rs. 400 with interest. This witness was not sure whether the debt was re-paid or not in the lifetime of Kassim. According to Noor Mahomed a debt owing to Mahomed Bhoy a Bombay merchant was fully settled after Kassim's death for Rs. 300 to Rs. 500. The learned Additional Judicial Commissioner was of the opinion that the indebtedness of Kassim was about Rs. 900 or Rs. 1,000.

We see no reason to differ from his finding on this fact and hold that the debts paid by Bhano on Kassim's death amounted to Rs. 950.

With regard to funeral expenses Devikibai's evidence was that they amounted to Rs. 200. The plaintiff stated that Bhano had told him that the funeral expenses were Rs. 100 and had asked him to pay Rs. 50. The learned Additional Judicial Commissioner considered the funeral expenses were about Rs. 200. In view of the tendency to exaggerate the expenses incurred by her late husband, I am of opinion that Rs. 150 should be taken as the extent of the funeral expenses incurred.

It follows Bhano discharged debts and funeral expenses amounting to Rs. 1,000 in all, half of which were payable by the plaintiff.

The learned Additional Judicial Commissioner taking into consideration the fact that the plaintiff made no claim to the property in suit and allowed Bhano and his son Natho to remain in possession, to discharge the debts and to exercise the rights of an exclusive owner lost his rights through the adverse possession of Bhano and Natho. He has relied on the cases of *Mirza Shamsher Bahadur v. Munshi Kunj Behari Lal* (1), *Dharani Kanta Lahiri v. Gabar Ali Khan* (2). These cases, however, do not relate to co-sharers as in the present case. So far as the plaintiff and Bhano and Natho are concerned the cases which appear to me more applicable are those referred to in *Jogindra Nath Roy v. Baladeo Das* (3), *Balaram Guria v. Syama Charan Mondal* (4) and *Hukam Kaur v. Bihari Lal* (5) where it was pointed out that in the cases of tenants-in-common the possession of one owner even though exclusive is possession of both and acts of ownership even though exclusive are not evidence of de-seizin. A tenant-in-common cannot claim adverse possession unless it is clear that he has repudiated the co-tenant's rights by acts of ouster or disclaimer or by putting forward an adverse title. In the present case, all that can be urged against the plaintiff was that he allowed his brother and nephew to remain in the residential house, took no steps to pay the debts of his father and took no steps to repair the house or pay any taxes that might be due. Reliance has been placed on a letter written by Bhano to the plaintiff in which Bhano referred to the house as "my house." But the letter itself shows that it was written during the lifetime of Kassim. For Kassim is referred to in the letter as behaving in a very childish manner and while Bhano speaks of plaintiff's wish to come and live in "my house" the letter abounds in references to the house being plaintiff's as well. When it is remembered that the house was scarcely big enough for both brothers to occupy and that Natho was only an infant about 6 years old when his father Bhano died and

(1) 12 C. W. N. 273; 3 M. L. T. 212; 7 C. L. J. 414.

(2) 18 Ind. Cas. 17; 15 Bom. L. R. 445; 13 M. L. T. 185; (1913) M. W. N. 157; 17 C. L. J. 277; 25 M. L. J. 95 (P. C.).

(3) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.

(4) 60 Ind. Cas. 298; 24 C. W. N. 1057; 33 C. L. J. 344.

(5) 15 Ind. Cas. 192; 73 P. W. R. 1912; 110 P. L. R. 1912.

the plaintiff entitled under Muhammadan Law to the custody of his person from the year 1908; when it is also remembered that the plaintiff's name at the date of the suit was shown in the Record of Rights as an owner with Natho, I am of opinion, that it is impossible to hold that there were such acts of ouster or de-seizen or repudiation in the present case as would lead to the inference that the possession of Bhano and also Natho was adverse to that of the plaintiff.

Mr. Kikla has put forward an ingenious argument to the effect that under Hindu Law it is a joint son who inherits from his father and not a separate son. Since the Hindu Law of Succession and Inheritance applies to Khojas, Bhano would have succeeded to the estate of his father Kassim if Bhano had been joint with his father and the plaintiff separate. Mr. Kikla contends that it was, therefore, material to consider whether the plaintiff at the time of his father's death was joint with his father or not. With reference to this argument, it was conceded in the written statement of the defendant that the law of joint family was not applicable to the parties. It is settled law, I think, that the Hindu Law only applies to Khoja Muhammadans with regard to the question of succession and inheritance. The principles of Hindu Law relating to joint family are not applicable to Khojas. And I, therefore, concur in the finding of the learned Additional Judicial Commissioner that the finding on the issue whether the plaintiff was joint or not was unnecessary.

In view of the findings above referred to, the plaintiff, in my opinion, is entitled to a decree for partition subject to his paying a half share of the debts and funeral expenses paid by the deceased Bhano, namely, Rs. 550 in all together with interest at the rate of 3 per cent. from 1895 to date of suit and further interest at the same rate till payment.

In deciding on the amount of interest, I take into consideration the fact that the defendant has been enjoying the property the rental value of which appears to be about Rs. 5 per month.

Each party to bear his own costs in both Courts.

P. B. A.

Decree modified.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 231 OF 1927.

August 9, 1927.

Present:—Mr. Rupchand Bilaram, A. J. C.

FIRM OF CHETUMAL BULOHAND—
PLAINTIFFS

versus

MESSERS. NOORBHOY JAFFERJI—
DEFENDANTS.

Power-of-attorney—Construction—'Security,' meaning of—Power to transfer 'securities,' whether includes power to endorse promissory notes.

Security is anything that makes the money more assured in its payment or more readily recoverable, as distinguished from a document which is merely evidence of a debt. The word 'security' is not confined to a document which gives a charge on specific property but includes personal securities for money, such as demand promissory notes. [p. 214, col. 1.]

Barry v. Harding (1) and Stirling v. John (2), relied upon.

Power to negotiate 'securities of any description whatever' includes power to endorse on demand promissory notes. [*ibid.*]

Mr. Srikishendas H. Lulla, for the Plaintiffs.

Mr. Dipchand Chandumal, for the Defendants.

JUDGMENT.—This is a suit for recovery of a sum of Rs. 5,543-8-0 said to be due on a demand promissory note for Rs. 5,000 executed by the defendants in favour of one Sheikh Ebrahimji son of Sheikh Jiwanji and endorsed on his behalf by his attorney in favour of the plaintiffs.

The claim is resisted on three grounds. In the first place, it is urged that the general power-of-attorney executed by Sheikh Ebrahimji Sheikh Jiwanji in favour of his son contains no express clause empowering the attorney to endorse demand promissory note. The power-of-attorney reads, *inter alia*, as follows:—

"I do make constitute and appoint.....my true and lawful attorney for me and in my name, on my behalf to negotiate and make sale, dispose of, assign and transfer or cause and procure to be assigned and transferred.....any of the Government promissory notes.....or securities, Bank share or shares in any public company and other stocks, funds, and securities of any description whatsoever now standing in my name or belonging to me or any part or parts thereof respectively."

There can be no doubt that in the power the expression "securities of any description whatsoever" has been used in its widest possible meaning, and is not confined only to charges on moveable or

immovable property, but includes personal securities for money. In Stroud's Judicial Dictionary it is said that speaking generally a security is anything that makes the money more assured in its payment or more readily recoverable as distinguished from, e.g., a mere "I.O.U." which is only evidence of a debt. In *Barry v. Harding* (1) a bequest for securities of money has been held to pass Bills of Exchange, promissory notes and cheques. In *Stirling v. John* (2) the Court of Appeal held that the taking of post-dated cheque by the plaintiffs in names of nominees was the taking of a "security for money" otherwise than in the money-lender's registered name within s. 2, sub-s. (1) of the Money Lenders' Act, 1900, and it was pointed out that the word "security" was not confined to a document which gave a charge on specific property. The promissory note in question is not a mere "I.O.U." which is only evidence of a debt, but is something more. It contains a promise to pay the amount on demand to the person specified in the note or to his order, and renders the note transferable by endorsement. I have no hesitation in holding that the document in question is "security" within the meaning of the power-of-attorney and that the endorsement made by the attorney was effective.

The second point taken on behalf of the defendants is that there was an account between the defendants and Sheikh Ebrahimji Jiwanji on which a sum of Rs. 10,000 was due by the defendants. It is said that in payment of that sum the defendants executed two promissory notes for Rs. 5,000 each, that they made payments towards both the notes to the extent of about Rs. 2000, that the sum due by them at the date of suit was Rs. 8,000 as principal and that interest was only due by them subsequent to the 1st December, 1926. It is contended on their behalf that the plaintiffs are not holders in due course but nominal transferees from Sheikh Ebrahimji and are bound by all the equities existing between them and Sheikh Ebrahimji, and, therefore, they must sue on both the notes and not only on one. Assuming that these allegations are true, they are no defence

to the present suit. The very object of executing two promissory notes was to enable the payee to sue on each of them individually. The defendants admit that a sum far in excess of Rs. 5,000 is due by them and, therefore, so far as the present action is concerned which is on the first of those two notes, they have no answer to this claim. The question now raised by them may possibly arise if the plaintiffs bring an action for the full amount upon the second promissory note. I, therefore, decline to go in that question in the present suit.

The last point urged is that in no case can the plaintiffs recover interest on the promissory notes prior to 1st December, 1926. Without admitting the validity of that contention Mr. Lulla has agreed to give up the interest prior to that date and this question does not, therefore, require any decision.

There will, therefore, be a decree in favour of the plaintiffs for Rs. 5,000 with interest at 6 per cent. per annum from 1st December, 1926, up to payment and costs.

P. B. A.

A. N. A.

Decree accordingly.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 83 OF 1925.
September 2, 1927.

Present :—Mr. Percival, J. C., and
Mr. Aston, A. J. C.

UDHAVDAS—APPELLANT

versus

DEVIDAS AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2 (2), 105, 115, O. XX, rr. 15 to 18—Partnership suit—Preliminary decree—Commissioner appointed to take accounts—Subsequent directions to Commissioner, whether further preliminary decree—Appeal or revision, whether lies.

Directions given to a Commissioner appointed to take accounts, subsequent to the passing of the preliminary decree in a partnership suit, do not constitute a preliminary decree against which an appeal lies but are in the nature of an interlocutory order within the meaning of s. 105, Civil Procedure Code, which could be questioned only in an appeal preferred against the final decree. [p. 215, col. 2.]

Channalswami Rudraswami v. Gangadharappa Baslingappa (3), *Bhariendu v. Yaqub Husain* (4), *Jogodishury Debea v. Kailash Chandra Lahiry* (7), *Jagmohan Das v. Indar Prasad* (5) and *Kamini Debi v. Promotho Nath Mookerjee* (6), relied upon.

Peary Mohun Mukherjee v. Manohar Mukherjee (1), not followed.

(1) 1 Jo. & Lat. 475; 7 Ir. Eq. R. 313.

(2) (1923) 1 K. B. 557; 92 L. J. K. B. 353; 128 L. T. 560; 67 S. J. 168; 39 T. L. R. 123.

Appeal against an order of the Additional Judicial Commissioner, Karachi.

Mr. G. A. Kikla, for the Appellant.

Mr. Kimatrai Bhojraj, for the Respondents.

JUDGMENT.—This is an appeal from the order of the learned Additional Judicial Commissioner directing the Official Commissioner to allow credit to the appellants in respect of some partnership goods at the market price at the date of dissolution and some at the cost price.

The order was passed in a partnership suit in which a preliminary decree had been passed referring certain matters to the Official Commissioner. The latter at the request of the parties referred certain question to the Court for directions and the Court under O. XX, r. 17 gave the special directions above referred to.

Mr. Kimatrai for the respondents has raised a preliminary objection that an appeal does not lie.

It is contended by Mr. Kikla for the appellants that the directions given by the learned Additional Judicial Commissioner amounted to a formal expression of an adjudication which conclusively determined the rights of the parties with regard to some of the matters in controversy in the suit, and that the directions, therefore, constituted a decree within the meaning of s. 2, Civil Procedure Code, and that an appeal would lie. Reliance has been placed on the ruling of the Calcutta High Court referred to in *Peary Mohun Mukherjee v. Monohar Mukherjee* (1). In that case also after a preliminary decree had been passed, the Court gave certain directions with regard to the taking of account and the manner in which they should be taken and it was held by the Calcutta High Court that these directions amounted to a preliminary decree. The Court conceded in that case that the Legislature intended there should ordinarily be one preliminary decree and one final decree in a suit. It, however, observed that there might be exceptions to this rule. Reliance was placed on a ruling of Piggot, J., in *Yakub Husain v. Bharat Indo* (2). A reference to this case shows that Piggot, J., was not the Judge who decided the case and no ruling such

as that referred to can be found in it. The reference was evidently mistaken.

For the respondents, reliance has been placed on the judgment of Hayward, J., in *Chammalswami Rudraswami v. Gangadharappa Baslingappa* (3), where various sections and orders of the Civil Procedure Code were referred to and the opinion was expressed that s. 2 of the Civil Procedure Code must not be interpreted in a literal manner but read in connection with other sections and Orders and in particular with O. XX, rr. 15 to 18, and that if s. 2 is read in the light of the other sections in the Civil Procedure Code, it will be clear that the Legislature intended that there should be one preliminary decree and one final decree in a suit. In *Bhartendu v. Yaqub Husain* (4) which was a partition suit, the Court also observed that the Code of Civil Procedure contemplates only one preliminary decree in a suit. This was followed in *Jagmohan Das v. Indar Prasad* (5) where the opinion was expressed that orders to a Commissioner with regard to ascertainment of the value of certain property were merely interlocutory orders preparatory to the making of a final decree. This view was also accepted in *Kamini Debi v. Promotho Nath Mookerjee* (6) and in *Jogodishury Debea v. Kailash Chundra Lahiry* (7) a Full Bench of the Calcutta High Court held that even an appointment of a Commissioner was an interlocutory order. In *Kamini Debi v. Promotho Nath Mookerjee* (6) the case above referred to, the opinion was expressed that a final decree ought to achieve the result of the preliminary decree.

If this view is good law and my own view is that it is, it would follow that a preliminary decree ought not only to provide an adjudication of some of the rights of the parties with regard to matters in controversy between them, but also as a general rule provide the means for bringing about a final decree in the suit. I am of opinion that the view adopted in the Bombay, Calcutta and Allahabad cases referred to is strongly supported by the wording of the Civil Procedure Code itself in O. XX, r.

(3) 26 Ind. Cas. 885; 39 B. 339; 16 Bom. L. R. 954.

(4) 18 Ind. Cas. 701; 35 A. 159; 11 A. L. J. 120.

(5) 65 Ind. Cas. 983; 24 O. C. 366.

(6) 27 Ind. Cas. 317; 19 C. W. N. 755; 20 C. L. J. 476.

(7) 24 C. 725; 1 C. W. N. 374; 12 Ind. Dec. (N. S.) 1152 (F. B.).

(1) 74 Ind. Cas. 373; 27 C. W. N. 989; 38 C. L. J. 5; A. L. R. 1924 Cal. 160.

(2) 16 Ind. Cas. 372; 11 A. L. J. 120.

17, for, if s. 2 were construed literally the subsequent directions as to accounts for which provision is made in O. XX, r. 17 should also be a decree. But in O. XX, r. 17, it is enacted that the Court may either by the decree direct an account to be taken or by a subsequent "order" give special directions. The word there used is "order" and not "decree."

For the reasons above mentioned I am of opinion that Mr. Kimatrai's contention that no appeal lies must be accepted.

Mr. Kikla does not challenge the further contention that since an appeal will lie hereafter under s. 105 no revision application will lie at this stage.

In the circumstances, I am of opinion that this appeal must be dismissed with costs.

P. B. A.
A. N. A.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUITS NOS. 398 AND 703

OF 1922 AND SUIT NO. 399 OF 1924.

August 12, 1927.

Present:—Mr. De Souza, A. J. C.
BUDHAR PRAGJI AND OTHERS—

PLAINTIFFS

versus

RAHIMTULLA KHAN AND OTHERS—

DEFENDANTS.

Transfer of Property Act (IV, of 1882), s. 59—Transfer of Property (Amendment) Acts XXVII of 1926 and X of 1927—"Attestation"—Endorsement by Sub-Registrar of admission of execution, whether amounts to attestation.

A deed of mortgage, which has been attested by only one witness but in which there is an endorsement of the Sub-Registrar (of which judicial notice is to be taken) that the parties including the mortgagor, who were present before him and were duly identified, acknowledged having executed the document, is properly attested within the meaning of s. 59 of the Transfer of Property Act read with Act XXVII of 1926 and Act X of 1927. [p. 218, col. 1.]

Radha Mohan Dutt v. Nripendra Nath Nandi (1), relied upon.

Messrs. Dipchand Chandumal and Khanchand Gopaldas, for the Plaintiffs.

Mr. G. A. Kikla, for the Defendants.

JUDGMENT.—These three suits were by consent of parties heard together, the evidence recorded in Suit No. 398 of 1922 has by consent been treated as evidence in all the three suits, and all

the three suits will be disposed of by one judgment.

The facts leading to this litigation are somewhat complicated and may shortly be stated as follows:—

One Abdulla Khan son of Manekhan had two sons Rahimtulla Khan and Ahmad who is still a minor and two daughters Mamiabai and Rajoobai. Abdulla Khan was a racket marker at the Sind Club and his son Rahimtulla Khan was for a time employed as a petty clerk at the Karachi Port Trust Office and resigned his clerical post about the end of the year 1916 to devote himself exclusively to the business of carrying out contracts under the P. W. D. For the purpose of obtaining financial accommodation for carrying out these contracts both father and son approached the Firm of Kala Gella and on the 12th October, 1918, they executed a mortgage bond (Ex. 6) in favour of the said Firm of Kala Gella stipulating to open a cash credit account with the firm up to the extent of Rs. 25,000 and as security for the said accommodation they mortgaged three properties (a) plot No. 227 S. S. E-7 Ranchore Lines quarter (b) Plots Nos. 165 and 166 S. S. E-7 Ranchore Lines quarter and (c) Plot No. 4 S. S. E-11 Garden quarter.

The account which had been opened in the name of Rahimtulla Khan was adjusted from time to time and according to the stipulation in the mortgage-bond interest was calculated with six monthly rests. Abdulla Khan died on the 24th December, 1919. But his son Rahimtulla Khan continued to draw on the account after his death and also made payments from time to time. It was found that the overdrafts were considerably in excess of Rs. 25,000 which had been secured by the mortgage (Ex. 6). On the 17th December, 1920, Rahimtulla Khan executed a mortgage (Ex. 8) in favour of the Firm of Kala Gella and one Umishanker Gangaram jointly creating a second mortgage on two of the above properties, viz., plot No. 227 S. S. E-7 Ranchore Lines quarter and plot No. 4 S. S. E-11 Garden quarter. The consideration for the mortgage is recited to be a sum of Rs. 20,000 whereof Rs. 10,000 are entered to the credit of Rahimtulla Khan by the Firm of Kala Gella in his account and the remaining Rs. 10,000 is said to have been

advanced by Umiashanker in cash to Rahimtulla Khan and deposited by the latter with Kala Gella to be drawn upon from time to time for purposes of contract business.

Suit No. 398 of 1922 has been filed by Kala Gella on his mortgage (Ex. 6) for the recovery of Rs. 31,251 being Rs. 25,000 the principal amount and the balance interest. To this suit all the heirs of Abdulla Khan including Rahimtulla Khan and Umiashanker Gangaram have been impleaded as co-defendants. Suit No. 703 of 1922 has been filed by Ahmad, a minor son of Abdulla Khan, by his next friend Hanifabai and his two sisters, Maimunabai and Hajubai, for a declaration that the property plot No. 4 sheet E-11 Garden quarter is the joint property of the plaintiffs as heirs of Abdulla Khan and not the exclusive property of Rahimtulla Khan and for an injunction restraining Rahimtulla Khan and Umiashanker from interfering with the possession of the plaintiffs. The third Suit No. 399 of 1924 was filed by Umiashanker on the mortgage (Ex. 8) which was executed in favour of himself and Pragji Kalla jointly for the recovery of a sum of Rs. 33,000 being Rs. 20,000 principal and Rs. 13,000 interest.

In Suit No. 703 of 1922 an *interim* injunction was issued restraining Umiashanker from bringing the Garden quarter property to sale. At the hearing of the rule *nisi* a consent order was passed directing that the property in question be sold by Umiashanker as the attorney for Rahimtulla Khan free of all mortgages including the interests if any of Rahimtulla Khan and all the heirs of Abdulla Khan; the sale price of Rs. 30,000 to be paid to Khetsi on behalf of Pragji Kalla who should furnish security to the *Nazir* for payment of the amount or any part thereof whenever called upon by the Court to do so. The consent order went on to provide that the question whether the whole purchase money, *viz.*, Rs. 30,000 or any portion thereof is to be appropriated towards the first mortgage (Ex. 6) or the second mortgage (Ex. 8) or in any other way is to be decided by the Court at the time of the decree. The parties including the plaintiffs to have the same rights to the application of the above proceeds Rs. 30,000 as

they would have had against the property had it not been sold. A similar consent order was passed by consent in Suit No. 398 of 1922.

* * * * *

A technical point was raised by Mr. Kikla who impeached the validity of the mortgage-deed (Ex. 8) on the ground that it was not properly attested as there was only one attesting witness whereas the provisions of s. 59 of the Transfer of Property Act require at least two attesting witnesses. The Legislature till recently had not defined 'attestation', and the Courts had held that the two attesting witnesses required under s. 59 of the Transfer of Property Act should not only have actually seen the executant executing the document but also should have signed the document after it had been executed in token of attestation. In other words, the attesting witnesses were to have been witnesses to the actual execution and not merely to an admission of execution by the executant. The law has recently been amended by Act XXVII of 1926 which enacts as follows:—

“‘Attested’, in relation to an instrument, means attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.”

As doubts arose whether this provision applied to documents executed prior to this enactment a further Amendment Act X of 1927 was enacted which gave a retrospective effect to this definition of attestation.

In the present case it is true that only one witness Nabibux actually witnessed the execution of the mortgage-deed by the mortgagor. And the question arises whether on that account the mortgage-deed is invalid by virtue of s. 59 of the Transfer of Property Act. There is an endorsement on the document made by the

Sub-Registrar that the parties including the mortgagor who were present before him and were duly identified acknowledged having executed the document. In the case of *Radha Mohan Dutt v. Nripendra Nath Nandi* (1) it has been held by a Bench of the Calcutta High Court that in these circumstances the document must be held to have been properly attested—that in view of the definition of the word 'attested' in the Amendment Act XXVII of 1926 to which a retrospective effect has been given by Act X of 1927 the Sub-Registrar before whom the executant admitted execution of the deed is a good attesting witness—that by Act X of 1927 the definition of the word "attested" in the Amendment Act XXVII of 1926 has been made applicable to transactions (however ancient they may be) that took place before the amendment and to which the Transfer of Property Act is applicable—and that the Courts will take judicial notice of the endorsement by the Sub-Registrar. Following this decision I would hold that the mortgage-deed (Ex. 8) is a validly executed mortgage.

Mr. Kikla raised another point regarding interest which he considered excessive not only because the rate of 18 per cent. was a very high rate but also because the six monthly rests which had been adopted by the mortgagees rendered the total interest exorbitant. But I find that each of the mortgage-deeds executed between the parties specifically provides for a rate of 18 per cent. and for six monthly rests and nothing has been urged by Mr. Kikla which would justify the Court in interfering with the express agreement between the parties.

I accordingly record findings on the issues in Suit No. 398 of 1922 as follows:—

1. In the affirmative.
 2. In the affirmative.
 3. In the affirmative.
 4. In the affirmative.
 5. It was the joint property of Rahimtulla Khan and the heirs of Abdulla Khan.
 6. 21st December 1919.
 7. Not necessary.
 8. Not necessary.
 9. They are liable to the extent of their interest in the property.
 10. Does not arise.
 11. Does not arise.
 12. In the affirmative.
- (1) 31 O. W. N. clx (notes).

13. The amount due on mortgage (Ex. 8) at the date of receipt of purchase money should be calculated and given to Pragji Kalla and Umiashanker in equal shares and the balance, if any, should be paid to Kalla Gella towards his mortgage (Ex. 6).

14. No relief.

15. In the affirmative.

16. Does not arise.

17. Usual preliminary mortgage decree with a direction that the balance remaining from Rs. 30,000 after paying Umiashanker and Kalla Gella under the mortgage (Ex. 8) should be appropriated towards the mortgage and a preliminary decree also to follow for the balance and costs. Liberty to plaintiff to apply for personal decree against defendant No. 1 (a) and against the estate of Abdulla Khan and Rahimtulla Khan.

P. B. A.

Decree accordingly.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 262 of 1927.

October 20, 1927.

Present:—Mr. Aston, A. J. C.
NARAINDAS & Co.—PLAINTIFFS
versus

CHANDIRAM & Co.—DEFENDANTS.

Jurisdiction—Suit on hundi—Endorsement, whether part of cause of action—'Cause of action,' meaning of—Suit on hundi or in the alternative for compensation, maintainability of—Civil Procedure Code (Act V of 1908), s. 20, O. XXXVII—Negotiable Instruments Act (XXVI of 1881), ss. 32, 117 (c).

A suit based on a hundi can be instituted in a Court within whose jurisdiction there was an endorsement of the hundi and payment of the amount thereof to the endorsee after dishonour. [p. 219, col. 1.]

Roghoonath Misser v. Gobindnarain (1), *Sobramonian Chetty v. Maung Po Tha* (2), *Mangamma v. Sathiraju* (3), *Read v. Brown* (4) and *Official Receiver v. Naraindas Lotaram* (5), relied upon.

A suit claiming in the alternative on the contract contained in a negotiable instrument or for compensation under ss. 32 and 117 (c) of the Negotiable Instruments Act can be maintained, and such a suit can be instituted under the summary procedure provided by O. XXXVII of the Code of Civil Procedure. [p. 219, col. 2.]

"Cause of action" includes all the facts, which the plaintiff has to prove to sustain his action, in fact everything which, if not proved, will give the defendant the right to judgment. [p. 219, col. 1.]

Read v. Brown (4), relied upon.

Mr. Srikishendas H. Lulla, for the Plaintiffs.

Mr. Kimatrai Bhojraj, for the Defendants.

ORDER.—By consent the question of jurisdiction has first been considered by the Court. Issue No. 10 is "Has this Court jurisdiction to try the suit?"

In support of his contention that the Court has jurisdiction Mr. Lulla relies on two facts, *viz.*, that Messrs. Naraindas and Co., Karachi, whose partners are the same as the partners of Naraindas and Co., in Lahore, in whose favour the *hundi* was drawn by the defendants negotiated the *hundi* at Karachi with the Punjab National Bank and, secondly, that Messrs. Naraindas and Co., after dishonour paid the Punjab National Bank in Karachi the amount of the *hundi*.

Mr. Lulla has cited *Roghoonath Misser v. Gobindnarain* (1) to show that an endorsement on a *hundi* alone within the jurisdiction will suffice to give the Court jurisdiction. *Sobramonian Chetty v. Maung Po Tha* (2) is to the same effect and so too *Mangamma v. Sathiraju* (3) which, is a decision of the Madras High Court. Mr. Lulla has also relied on *Read v. Brown* (4) in which it was held that the words "cause of action" include all the facts which the plaintiff has to prove to sustain his action, in fact, everything which if not proved, will give the defendant the right to judgment and he has drawn my attention to a ruling of this Court in *Official Receiver v. Naraindas Lotaram* (5) where this Court held that the mere fact that the defendant had been adjudicated insolvent within the jurisdiction of the Court would give that Court jurisdiction to try a suit relating to a debt incurred outside the jurisdiction between parties residing outside the jurisdiction. In the present case the evidence clearly shows, in my opinion, that Messrs. Naraindas and Co. who have the same partners in Karachi as in Lahore and whose Lahore branch is financed by the Karachi branch which is the head branch negotiated the *hundi* in suit in Karachi with the Punjab National Bank. The Bank credited the current account of the firm with the amount of the *hundi* less interest and commission. Subsequently, after the dishonour of the *hundi* in Rawalpindi, the Punjab

National Bank debited Messrs. Naraindas and Co., in Karachi with the amount of the *hundi*. Under s. 32 of the Negotiable Instruments Act in default of payment on maturity the maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default. Under s. 117 of the same Act an indorser, who being liable, has paid the amount due on the Bill of Exchange, is entitled to the amount so paid with interest at six per cent. per annum from the date of payment until tender or realization together with all expenses caused by the dishonour and payment.

In the present case Messrs. Naraindas and Co. had originally endorsed the *hundi* in blank when they negotiated it, and the Punjab National Bank after debiting the current account of Messrs. Naraindas and Co., (who at the time had a sufficient sum, to their credit to pay the amount debited), returned the dishonoured *hundi* to the plaintiffs. It seems to me that the plaintiffs could, had they chosen, have availed themselves of the provisions of s. 78 read with s. 82, cl. (c) of the Negotiable Instruments Act and sued the defendant on the *hundi*, which had not been honoured. But this did not, in my opinion, prevent them from availing themselves of their right to sue for compensation under s. 32 and under s. 117, cl. (c) and I am not aware of any objection to their having sued in the alternative on the contract contained in the negotiable instrument and for compensation, and to have brought this suit under the Summary Chapter. It was believed at one time that the Summary Chapter was only applicable to the simplest form of suits on negotiable instruments but the later amendment was introduced in order to remove this impression.

Taking all the circumstances into consideration, it seems to me clear that a part of the cause of action arose within the jurisdiction of this Court, since, the *hundi* was endorsed within the jurisdiction, and payment was made after default to the Punjab National Bank within the jurisdiction and the issue must, in my opinion, be answered in the affirmative and I hold accordingly.

Plaintiffs to have costs of this issue.

P. B. A.

A. N. A.

Order accordingly.

(1) 22 O. 451; 11 Ind. Dec. (N. S.) 301.
 (2) 11 Ind. Cas. 851; 4 Bur. L. T. 183.
 (3) 37 Ind. Cas. 681; 31 M. L. J. 816; 5 L. W. 246.
 (4) (1889) 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131.
 (5) 89 Ind. Cas. 493; 20 S. L. R. 209; A. I. R. 1926 Sind 31.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL JURISDICTION MISCELLANEOUS
CASE No. 253 OF 1926.

March 29, 1927.

Present:—Mr. Rupchand Bilaram, A. J. C.
Messrs. DONALD GRAHAM & Co.—
RESPONDENTS I

versus

MESSRS. BASANTRAM JHINGAN—
RESPONDENTS II.

Arbitration Act (IX of 1899), s. 19—Suit disputing factum or validity of contract—Reference relating to payment of loss during pendency of suit, if competent—Notice regarding appointment of arbitrator issued in new name of one of the parties to reference—Reference and award in old name, validity of.

The institution of a suit by one of the parties to a contract for sale of goods disputing the factum or validity of the contract does not bar disputes regarding payment of the loss which has accrued on re-sale of the goods being referred to arbitration under the submission clause of the contract, nor is it a bar to the arbitrators proceeding with the reference, the matters referred to the arbitrators not being the same as those forming the subject-matter of the action; and it is not necessary to obtain an order staying such suit before proceeding with the arbitration. [p. 220, col. 2; p. 221, col. 1.]

Jai Narain-Babulal v. Narain Das-Jani Mal (1) and *Monro v. Bognor Urban Council* (2), relied upon.

Where a contract was entered into in the name of a party and since then there was a mere change in that name and the notice calling upon the opposite party to appoint his arbitrator was given in the new name but the reference and the award were in the old name in which the contract was made:

Held, that this did not invalidate the award, especially as the party receiving the notice was not misled on account of the change of name. [p. 221, col. 2.]

Mr. Tolasing Khushalsing, for Respondents I.

Mr. Javhermal Vilaitrai, for Respondents II.

ORDER.—This is an application by one Basantram Jhingan, proprietor of respondents II to have the award obtained by respondents I against respondents II set aside.

The first and the main ground urged on his behalf is that respondents I could not go to arbitration during the pendency of a suit filed by him in the Multan Court in respect of the same goods unless that suit was stayed.

In order to appreciate fully the nature of this objection, it is necessary to refer to the facts leading up to the disputes between the parties.

It appears that on December 7, 1923, respondents II signed two contracts in

favour of respondents I for purchase of 35 cases mulls Nos. 593 and 594 Exs. D & E of February to April 1924 shipments. On arrival they took delivery of 21 cases but not of the remaining fourteen cases. On receiving a notice from respondents I that they would proceed to sell the fourteen cases and enforce payment of the loss resulting therefrom by arbitration in terms of the submission clause contained in the contracts, the applicant forestalled respondents I by instituting a suit in the Sub-Civil Court, Multan, for a declaration that the alleged contracts were mere offers which were not binding on him and had been cancelled by him and that the respondents I had no right to sell the goods on his account. He asked for a perpetual injunction restraining respondents II from auctioning the goods at his risk. In the plaint respondents I were described as Graham Trading Co., Ltd., which is the name in which respondents I are at present carrying on their business having formed themselves into a Limited Company. It is not clear from the record if a temporary injunction was issued to the respondents I restraining them from selling the goods at the risk of the respondents II or that it was served before the sale. Respondents I have sold the goods. They, however, refrained from going to arbitration for a while and applied to the Multan Court for stay of the suit under s. 19 of the Indian Arbitration Act. Being subsequently advised that the Multan suit was no bar to their going to arbitration, they called upon respondents II to nominate their arbitrator and on their failure to do so proceeded, in accordance with the submission clause, to appoint both the arbitrators and obtained an *ex parte* award which is being objected to.

Now, this is not the first case of its kind that has been filed in the Punjab Courts by up-country merchants who buy goods from Karachi firms.

The point now in issue is covered by the decision of the Punjab High Court in *Jai Narain Babulal v. Narain Das-Jani Mal* (1) where, on the construction of a submission clause identically the same as the present one, it was held that the institution of a suit disputing the factum or validity of the contract containing the sub-

(1) 69 Ind. Cas. 585; 3 Lah. 296; A. J. R. 1922 Lah. 369.

mission clause was no bar to the arbitrators proceeding with the reference, the matters referred to the arbitrators not being the same as those which are the subject-matter of the action, and that there is, therefore, no encroachment by the arbitrators upon the jurisdiction of the Court. Reliance was placed on the case of *Monro v. Bognor Urban Council* (2) which distinguishes the earlier case of *Doleman v. Ossett Corporation* (3). It was, therefore, in no way obligatory for respondents I to await the disposal of their application under s. 19 of the Arbitration Act before proceeding to arbitration. It was open to the applicant to go to arbitration without prejudice to his rights under the suit. If he refused to go to arbitration, he did so at his risk. I hold that the pendency of the suit as framed by the applicant was no bar to the reference and award.

The second objection pressed on behalf of the applicant is that stated in para. 6 of his application, which is as follows:—

"That the agreement to refer (i.e., the submission clause) and the 'actual reference to arbitration' are not between the same parties, hence neither the reference nor the award are binding on this respondent".

Now, it appears that at the time when the two contracts were made, respondents I carried on business in the name of Messrs. Donald, Graham & Co. After the goods arrived, they changed their name into "Messrs. Graham's Trading Co., Ltd." The whole of the correspondence as to non-delivery of the goods was, therefore, carried on by the Manager of respondents II in the name of Graham Trading Co., but when the reference was being signed, the Manager very rightly signed it in the name of Messrs. Donald, Graham & Co., and the award has also been made in the same name. It would, therefore, appear that the contracts containing the submission clause, the reference to arbitration and the award are all between the same contracting parties, namely, Donald, Graham & Co., on the one hand, and Basant Ram or Basant Ram's firm on the other. The objection as raised in para. 6, therefore, fails. Mr. Javhermal has attempted to argue that as the correspondence was

carried on in the name of Graham Trading Co., Ltd., the reference and the award should also have been made in that name. I am afraid I cannot allow him to blow hot and cold in this manner or to urge grounds which were not stated in his objections at the proper time. Apart from this, I have dealt with a similar point in Jurisdiction Miscellaneous Case No. 120 of 1926 (*Messrs. The Graham Trading Co. v. Messrs. Santoksing Rughbarsing*) where I have shown that the identity of the two firms, namely, Messrs. Donald, Graham & Co., and Graham Trading Co., Ltd., is the same, and as observed by me in that case, before the applicant could succeed to have the reference set aside he should prove that he was misled in any way by the notice calling upon him to appoint an arbitrator, having been signed in the name of Messrs. Graham Trading Co., Ltd., and that he would have appointed his own arbitrator if the notice had been sent to him in the old firm name. Not only has the applicant not ventured into the witness-box to give any evidence on that point, but he has himself filed a suit in the new name treating the two firms as identical.

Mr. Javhermal has given up all other objections.

I, therefore, reject the application of Basant Ram Jhingan with costs. The award to stand filed, and the order granting stay of execution to stand discharged.

P. B. A.

A. N. A.

Award to stand filed.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL APPLICATION No. 527 OF 1922.

November 18, 1926.

Present :—Mr. D'Souza, A. J. C.

RAJMAL TRILOKCHAND—APPLICANT
versus

FIRM OF ISHERDAS-KISHENCHAND

—NON-APPLICANT.

Partnership—Joint Hindu family—Partnership conducted by one co-parcener—All co-parceners, whether partners—Contract Act (IX of 1872), s. 239—Signing plaints and other documents as managing proprietor, whether proof of partnership.

The co-parceners of a joint Hindu family are not necessarily partners in a firm of which one of the co-parceners is interested merely because they are co-parceners. They cannot be held to be partners unless there is evidence to show that they agreed to combine

(2) (1915) 3 K. B. 167; 84 L. J. K. B. 1091; 112 L. T. 989; 79 J. P. 286; 13 L. G. R. 431; 59 S. J. 348.

(3) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 167 L. T. 581; 76 J. P. 457; 19 L. G. R. 915.

their property, labour or skill and share the profits or losses of the concern. [p. 222, col. 1.]

Vadilal Lallubhai v. Shah Khushal Dalpatram (1), *Sawanmal Pinanmal v. Pinanmal Danmal* (2) and *Trustees of the firm of Motharam Dowlatram v. Pahlajrai Gopaldas* (3), referred to.

The fact that a person filed suits in the name of the firm and signed process sheets in its name as managing proprietor does not necessarily lead to the inference that he is a partner inasmuch as even salaried managers in a firm often conduct legal proceedings and sign documents for the firm in their own names signing as managing proprietors. [p. 222, col. 2; p. 223, col. 1.]

Mr. Tahirram Maniram, for the Applicant.

Mr. Fatehchand Asudamal, for the Non-Applicant.

ORDER.—This is an application under O. XXI, r. 50, Civil Procedure Code, for leave to execute an award decree obtained by the plaintiffs against Isherdas, Beharilal and Gulzarilal, sons of one Uttamchand, on the ground that they were partners in the Firm of Isherdas-Kishenchand.

The application is resisted by the opponents on the ground that they had no interest in the partnership business and that the real partners in the Firm of Isherdas-Kishenchand were their father Uttamchand and one Kishenchand.

It appears that Uttamchand had three sons: the present opponents. It is undisputed that Uttamchand himself was a partner with Kishenchand in the firm against whom the award decree was obtained. The question here is whether Uttamchand's sons are liable under the decree as being members of the firm.

The allegation of the plaintiffs is that the opponents were co-partners with Uttamchand in an undivided Hindu family. This is denied on behalf of the opponents who contend that Uttamchand had divided the interest from his sons as early as 12 years ago. Be it as it may, the rule of the law is well settled that the co-parceners of a joint Hindu family are not necessarily partners in a firm in which one of the co-parceners is interested merely because they are co-parceners. It is necessary to show that the co-parceners alleged to be partners agreed to combine their property, labour and skill and share the profits or losses in the concern as required by s. 239, Indian Contract Act. It is unnecessary to quote authorities for this proposition which is well settled. I need only refer to *Vadilal Lallubhai v. Shah Khushal Dalpatram* (1) and two rulings of this Court, *Sawanmal*

Pinanmal v. Pinanmal Danmal (2) and *Trustees of the firm of Motharam Dowlatram v. Pahlajrai Gopaldas* (3).

The plaintiffs in this case state that the three sons of Uttamchand agreed to form a partnership with their father in the manner suggested. The learned Pleader for the plaintiffs points to the fact that the firm traded under the name and style of Isherdas-Kishenchand as indicating that the sons of Uttamchand must have had interest in the firm. He also points to the fact that Isherdas sued in the name of the firm as managing proprietor thereof in the plaints Ex. 6 and Ex. 12, and signed the process sheets Exs. 7 and 8, as managing proprietor of the firm as convincing proofs that Isherdas not only held himself out to be a managing proprietor, but was actually one of the proprietors of the firm.

The learned Pleader further argues that it was not till July, 1925, after the death of Uttamchand, that the idea suggested itself to the opponents to disclaim liability on the ground of their not being partners in the firm, and with this aim in view they concocted the partnership deed Ex. 13 and allowed the suit, the plaint of which is Ex. 6, to be dismissed on that ground as would appear from the judgment Ex. 15.

It is, however, not accurate to say that the opponents kept this plea up their sleeve till July, 1925, because we find that in the objections, Ex. 10 filed by Isherdas on 17th March, 1925, showing cause why execution should not proceed against him, Isherdas expressly says that the decree has been passed, not against him, but against the Firm of Isherdas-Kishenchand, and that he was not the manager of the Firm of Isherdas-Kishenchand nor was any summons issued to him, nor had he received any summons nor was he served. The theory advanced by the learned Pleader, that the plea was invented after the death of Uttamchand and the partnership deed Ex. 13, fabricated in support of this plea, seems to me to be too elaborate involving the putting together a considerable mass of perjured evidence to be readily accepted. The fact that Isherdas filed suits in the name of the Firm of Isherdas-Kishenchand and signed process sheets also in the

(2) 2 S. L. R. 13.

(3) 80 Ind. Cas. 141; A. I. R. 1925 Sind. 159.

(1) 27 B. 157; 4 Bom. L. R. 988.

name of the firm would not necessarily lead to the inference that he was a partner. It is well-known that the salaried managers in a firm not infrequently conduct legal proceedings and sign documents in Court in their own names going to the extent of describing themselves as managing proprietors. But this misdescription would not be sufficient to fasten upon them the character of the partners.

The burden of proof to show that the opponents in this case were partners in the Firm of Isherdas-Kishenchand lies upon the plaintiffs. I do not think that that burden has been sufficiently discharged.

But I do not see how the plaintiffs would be adversely affected by my finding that the opponents are not shown to be partners; admittedly Uttamchand was one of the partners and his estate in the hands of his sons, the opponents, would be liable for his debts.

The present application must be dismissed against opponents Nos. 1 to 3. No order as to costs.

A. N. A.

Application dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 149 OF 1925.

September 29, 1927.

Present:—Mr. Percival, J. C.,
and Mr. Rupchand Bilaram, A. J. C.
ADAMALI—APPLICANT

versus

ABDULALI AND ANOTHER—OPONENTS.

Civil Procedure Code (Act V of 1908), s. 149, Sch. II, paras. 3, 17, 20—Court Fees Act (VII of 1870), ss. 6, 19, Sch. II, Art. 1 (b)—Limitation Act (IX of 1908), Sch. I, Art. 158—Rules of the Court of the Judicial Commissioner of Sind, Ch. VI, r. 5—Reference in pending suit—Award—Objection in writing—Court-fee—Expiry of ten days prescribed by Limitation Act—Court-fee, whether can be received thereafter.

Written objections to an award passed on a reference made through the Court in a pending suit must bear the Court-fee prescribed under Art. 1 (b) of Sch. II of the Court Fees Act. [p. 223, col. 2.]

(The practice to the contrary prevalent in the Court of the Judicial Commissioner of Sind disapproved.)

Gopalji Kallianji v. Chhaganlal Vithalji (1), distinguished.

Under the provisions of s. 149 of the Civil Procedure Code, the Court can receive Court-fee stamp required to be affixed to an application to set aside an award, even after the expiry of the ten days prescribed by Art. 158 of Sch. I of the Limitation Act. [p. 224, col. 2.]

Application to revise an order of the Judge of the Small Causes Court, Karachi, dated the 10th September, 1925, in Suit No. 1198 of 1924.

Mr. *Pahlajsing B. Advani*, for the Applicant.

Messrs. *Javhermal Vilaitrai* and *Santadas Idanmal*, for the Opponents.

JUDGMENT.—Two points have been raised in this case; first that the learned Judge of the Court of Small Causes, Karachi, was in error in holding that the written objections to an award made in a pending suit require a Court-fee stamp of eight-annas under Art. 1 (b) of Sch. II of the Court Fees Act and secondly, that he was in error in refusing to grant an extension of time to supply the necessary Court-fee in the particular circumstances of this case.

In support of the first point considerable reliance has been placed on the uniform practice of this Court extending to several years according to which no Court-fee has been insisted upon in similar cases. It has been strenuously argued that though cl. (16) of Sch. II of the Code of Civil Procedure requires that the party objecting to an award shall make an application to the Court in that behalf such application may be oral. In this connection our attention has been invited to cls. (1), (17) and (20) of the same Schedule which expressly provide for applications referred to therein being made in writing and it is argued that a party who reduces to writing his objections in support of an oral application which is permissible under cl. (16) should not be penalised by being made to pay a Court-fee. Reference has also been made to the case of *Gopalji Kallianji v. Chhaganlal Vithalji* (1).

We have given our careful consideration to all these arguments and are of the opinion that the practice of this Court cannot be supported.

Section 6 of the Court Fees Act is imperative. It requires that in all Courts except in the High Courts in the exercise of their original jurisdiction and in the Presidency Small Causes Court no document of any of the kinds specified as chargeable in the First and Second Schedules to that Act shall be filed, exhibited or recorded or shall be received or furnished by any public officer unless in respect of such document there be paid a fee of an amount

(1) 63 Ind. Cas. 929; 45 B. 1071; 23 Bom. L. R. 614.

not less than that indicated by either of the said Schedules as the proper fee for such document.

Written objections to an award are indubitably a document filed in Court. Such a document is nothing more or nothing less than an application to the Court to set aside the award on certain specified grounds. It, therefore, falls within the purview of Art. 1 (b) of the Second Schedule of the Court Fees Act and, *prima facie*, it cannot be filed or exhibited or made use of in any manner unless the prescribed fee of eight annas is paid on it.

The question whether an application to set aside an award may be made orally or not, therefore, hardly arises. Where an application is not made orally but in writing it must be stamped. It clearly does not fall within the exceptions provided by s. 19 of the Court Fees Act which, *inter alia*, exempt a written statement in a pending suit but make no mention whatsoever of written objections to an award. The argument that the objector should not be penalised for doing the work of the Court loses all its force when it is borne in mind that in the first place the Legislature has considered it necessary to exempt written statements filed in lieu of oral defences stated to the Court but has made no similar exception in the case of written objections to an award. In the next place a person objecting to an award is allowed ten days' time to apply for setting it aside. He is at liberty to make his application on any day he likes provided he does it within the time allowed. If his suit is not fixed for hearing on the day on which he wishes to apply, he cannot do so unless he puts in his application in writing and in that event he must necessarily apply the requisite stamp. It would also appear that the rules of the Court permit oral applications being made only in certain formal matters. Rule 5 of Chap. VI reads as follows: "Motions may be made orally only in matters of routine or indulgence or in matters wholly within the discretion of the Judge or Judges either in civil or criminal matters."

An application to set aside an award is hardly a matter which would fall within the purview of this rule. Before an award can be set aside the opposite side must be served with a notice of the application. Such applications must, therefore, necessarily be in writing.

The case of *Gopalji Kallianji v. Chhaganlal Vithalji* (1) cited by the learned Pleader has no bearing to the point in issue. That case turns on the question as to the form in which an application for setting aside an award should be made. It is to be noticed that that case was pending on the Original Side of the High Court and an affidavit had been filed within the time allowed disclosing the objections to the award. The point argued was whether any further application was necessary. As the suit was pending on the Original Side of the High Court s. 6 of the Court Fees Act had no application. The question what Court-fee, if any, should have been affixed on the affidavit under the rules of the High Court was neither raised nor decided. For the above reasons we are of opinion that the decision of the learned Judge below though contrary to the practice prevailing in this Court was right and should be maintained and that the practice of this Court which is not in accordance with law should be discontinued forthwith.

On the second question we think, however, that the learned Judge below was in error. He seems to have laboured under the impression that he had no power to extend the time for supplying the necessary Court-fee stamp after the expiry of ten days contemplated by Art. 158 of the Limitation Act. In this he was clearly mistaken. Section 149 of the Code of Civil Procedure expressly empowers the Court to receive at any stage of the proceedings the whole or any part of Court-fee payable on any document presented to the Court and declares that on payment of the requisite fee the document in question shall have the same force and effect as if such fee had been paid in the first instance. In the present case not only was there no definite order by the Court requiring the applicant to supply the necessary Court-fee or to supply it within a fixed time but the applicant was clearly misled by the practice of this Court in not complying with the order, if any, in that behalf.

In the circumstances we allow this application and order that the necessary Court-fee be supplied to the Registrar of this Court within three days of this date. On that being done we order that the learned Judge should take back the case on his file and dispose of the objections according to law. Costs to be costs in the cause.

P. B. A.,

Application allowed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

May 27, 1927.

Present.—Viscount Sumner, Lord Atkinson and Lord Carson.M. A. SASSOON AND SONS LIMITED—
DEFENDANTS—APPELLANTS

versus

THE INTERNATIONAL BANKING
CORPORATION—PLAINTIFFS—

RESPONDENTS.

Banker and customer—Bills of Exchange—Sale of goods by shipment—Arrangement by purchaser with Bank for confirmed credit—Documents forwarded by vendor to another Bank for discounting—Duty of discounting Bank—Delivery of Bills of Lading to purchaser—Dishonour of Bills of Exchange at maturity—Rights of discounting Bank against vendor—Forwarding of draft D/A, meaning and effect of—Contracts—Construction of printed contracts—Principal and agent—Ambiguous direction—Reasonable interpretation—Agent's liability.

Messrs. Sassoon and Co. entered into a contract with Messrs. Knowles and Co. for the sale of 25 bales of gunnies by certain shipments. After the first purchase and sale had been concluded Messrs. Knowles and Co. entered into an agreement with the Eastern Bank by which the latter undertook to make advances against negotiable bills drawn by Messrs. Sassoon and Co. on Messrs. Knowles and Co. provided the Bills of Lading were presented to the Bank in complete sets. The Bank further agreed with Messrs. Sassoon and Co. to give confirmed credit. Messrs. Sassoon and Co. made a contract with the International Banking Corporation for the discounting of approved Bills of Exchange drawn at three months' sight D/A (delivery against acceptance). In pursuance of this agreement Messrs. Sassoon and Co. forwarded to the Banking Corporation drafts drawn by them on Messrs. Knowles and Co. against shipment with the shipping documents and the letter of advice of confirmed credit from the Eastern Bank, with a requisition for discounting the drafts and passing the amounts to their credit. The drafts were presented for acceptance to Messrs. Knowles and Co. and the documents of title were handed over to them on acceptance. Messrs. Knowles and Co. became bankrupts and the bills were dishonoured at maturity. International Banking Corporation sued Messrs. Sassoon and Co. as drawers for the amounts covered by the bills. The latter contended that in view of the confirmed credit from the Eastern Bank, the Banking Corporation ought to have delivered the Bills of Lading to the Bank and not to Messrs. Knowles and Co., that owing to the misdelivery of the documents they (Messrs. Sassoon and Co.) were deprived of their right to proceed against the Eastern Bank and that consequently they were not liable to the International Banking Corporation:

Held, (1) that as discounters the primary duty of the International Banking Corporation, both to Messrs. Sassoon and Co. and to themselves was so to present the drafts for acceptance as either to get them accepted or to get them dishonoured for lack of acceptance and that the Bank was entitled and bound to follow this instruction; [p. 231, col. 1.]

(2) that as the drafts were for the acceptance of Messrs. Knowles and Co., D/A, the Bank was entitled to deliver the Bills of Lading to them on acceptance; p. 233, col. 1.]

(3) that the primary liability of Messrs. Sassoon and Co., to the Banking Corporation as drawers was not in any way discharged by the conduct of the latter and that the plaintiff was, consequently entitled to recover the amounts due under the bills; [p. 233, col. 1.]

In re Agra and Masterman's Bank (8), distinguished.

Where a person gives an incomplete and ambiguous direction the party directed cannot be blamed if he reasonably interprets and acts upon it. [p. 231, col. 2.]

Ireland v. Livingston (7), referred to.

It is settled law that the effect of deleting words in a printed form of mercantile contract is the same as if the words had never formed part of the print at all. [p. 228, col. 2]

Appeal against the judgment of the High Court of Calcutta (Justice Sir Ewart Greaves, Kt., and Justice Sir George Claus Rankin, Kt.), dated the 11th February, 1926.

Messrs. A. Merriman, K. C., and J. Nissim, for the Appellants.

Sir H. Cunliffe, K. C., and Mr. M. R. Jardine, for the Respondents.

JUDGMENT.

Viscount Sumner.—The appellants in this case were sued in the High Court at Calcutta, as drawers of four Bills of Exchange, by the respondents, who discounted them, the bills having been dishonoured at maturity by the acceptors, Messrs. George Knowles and Company, Limited, of London. The decision went against them both at the trial and on appeal, but the High Court granted their certificate for leave to appeal to His Majesty in Council.

The appellants are export merchants in Calcutta, and on the 9th August, 1923, they offered two drafts for discount to the respondents, who are bankers there. Two others for the same amounts were sent on the 6th September. The second transaction was a mere transaction of course, following on the first.

The documents were put before Mr. Thompson, the respondent's Manager, and on his approval of them the drafts were discounted. In addition to the two drafts, there were a Bill of Lading for 25 bales of gunnies to be delivered at Dundee and an invoice and mills' specification relating to them. By arrangement, an insurance policy was to be and was produced in England and it need not be further referred to. There was, further, a letter of advice, dated the 18th June, 1923, from the

Eastern Bank, Calcutta, to Messrs. Sassoon and Company, and a memorandum from Messrs. Sassoon and Company, containing their request for discount, the amount to be passed to their credit.

This memorandum showed a conversion of the amounts of the two drafts, viz., £696 10s, into rupees at 1s. 4 $\frac{3}{8}$ d., as per Messrs. T. S. Apcar and Company's contract, dated the 11th May, 1923, being the amount for which credit was asked. The drafts were thus described: "For our 3 M/St. D/A drafts 2048 and 2048A on Messrs. George Knowles and Company, Limited, London," and they bore the words "value received for 25 bales gunnies shipped per ss. 'Malancha' to Dundee drawn under L/Agreement No. 237, dated the 30th May, 1923, signed with the Eastern Bank, Limited, London, at per advice dated the 18th June, 1923," but, except as showing the existence of some relevant agreement, with particulars to identify it and connect it with this particular transaction, these words do not carry the present case any further. The Bill of Lading for twenty-five bales of gunnies shipped by J. S. Ezra made the goods deliverable to order, and was dated the 2nd August, and the invoice, dated the 8th August, was an invoice of goods by Messrs. Sassoon and Company for account of Messrs. George Knowles and Company, Limited, for the net amount of £696-10s.

Although in the evidence nothing was specially disclosed as to the relations of Messrs. Sassoon and Company and Messrs. Knowles and Company, the transaction, so far, was of the most ordinary type. The contract with Messrs. Apcar had been made by that firm as exchange brokers between Messrs. Sassoon and Company and the International Banking Corporation. Messrs. Sassoon and Company, having sold the gunnies forward to Messrs. George Knowles and Company, wished to protect themselves against fluctuations in sterling exchange before the shipping date arrived. Accordingly, they at once made a contract, by which they became entitled to discount for their approved drafts later on at the rate current on the day of the contract itself. They were, in a word, content with their profit on the sale, and had no mind to speculate in exchange as well.

On examining the documents put before him, Mr. Thompson apprehended the nature

of the transaction above stated quite as fully as was necessary, though Messrs. Knowles and Company and the terms of their purchase contract were unknown to him. Messrs. Apcar's exchange contract was for "approved Bills of Exchange drawn at 3 M/St. D/A on London at the exchange of 1s. 4 $\frac{3}{8}$ d. per rupee," with certain options for shorter or longer terms at rates fractionally higher or lower as specified, and the letter of advice from the Eastern Bank, Calcutta, sufficed, even if Messrs. Sassoon and Company's name had not done so, to secure his approval of the drafts on behalf of the respondent Bank. Accordingly, Mr. Thompson passed on the shipping documents to be examined by his shipping department and, being found in order, they were sent with the discounted drafts to London to be dealt with there. The form in which the International Banking Corporation instructed their London correspondents was, of course, a domestic matter and gave the appellants no further rights. The obligations arising out of the discounting of the drafts under the circumstances of this case were obligations which, as between these parties, arose in Calcutta. As the letter of advice required, the amount and date of this discount transaction were endorsed on it, and stamped with the respondent Bank's name. Messrs. Sassoon and Company got credit for their Rs. 10,326-7-9. On the other hand the respondents' correspondents in London, duly following out their instructions, presented the drafts for acceptance to Messrs. Knowles and Company on the 28th August, and acceptance being duly given, handed over the documents to them. Unfortunately, the acceptances were all dishonoured at maturity, in the case of the first two at the beginning of December. The events relating to the other two drafts sued on were in all respects similar, and do not require to be further mentioned.

On the face of the bill transaction, the respondents were entitled to recourse against Messrs. Sassoon and Company. By their pleadings, the latter contended that pursuant to Messrs. Apcar's exchange contract, the International Banking Corporation purchased the drafts and no longer had the right of recourse against the drawers, that would, *prima facie*, have belonged to the holder for value; that in view of the existence of a confirmed credit

of which the International Banking Corporation had notice, they ought to have delivered the Bills of Lading to the Eastern Bank, Limited, in London, and not to Messrs. George Knowles and Company; that the appellants being precluded by this misdelivery from recovering the price of the gunnies from the Eastern Bank, were accordingly discharged from their liability on the bills to the respondents, and, in the alternative, that, if the respondents' liability for this misdelivery sounded in damages only, the amount of such damage was the same as the amounts of the bills, and could be set off so as to extinguish any liability on the bills. No custom of merchants or bankers as to confirmed credits in connection with documentary bills or otherwise was pleaded, proved, or relied on. At their Lordships' bar the appellants' Counsel did not insist on the contention that the mere negotiation of the drafts pursuant to the exchange brokers' contract was in itself an out-and-out purchase of them by the Banking Corporation without recourse to the drawers in any event, and the question whether the remedy was by way of set off or only of counter claim for damages was not debated before them.

The conclusion of the trial Judge that the transaction disclosed nothing to relieve the drawers from their liability was affirmed by the High Court, the learned Judges holding that the question really turned on the documents, and that whatever assumptions might be made in favour of Messrs. Sassoon and Company as regards their transaction with Messrs. Knowles and Company, the description which they gave of the drafts, unaccompanied by any explanation limiting the effect of D/A as a description, entitled the International Banking Corporation to surrender the Bills of Lading to the acceptors on getting their acceptance, as they did.

The facts are as follows. Messrs. Knowles and Company became known to Messrs. Sassoon and Company as early as September, 1922, and, after some correspondence, a contract was concluded between them on the 11th May, 1923, for twenty-five bales of gunnies per month, to be shipped from July to September. So far as the evidence shows Messrs. Knowles and Company were then in reasonably good credit, nor does it appear

that their insolvency was suspected until the time when they dishonoured their first acceptances. They were throughout personally unknown to the International Banking Corporation.

The terms on which Messrs. Knowles and Company from the first proposed to deal and ultimately did deal with Messrs. Sassoon and Company included the following:—the price was c.i.f. U.K., and reimbursement was to be by drafts at ninety days' sight against confirmed credit, to be opened in the sellers' favour upon the conclusion of each contract. After the first purchase and sale had been concluded, the Eastern Bank in London wrote to its branch in Calcutta on the 31st May, 1923, enclosing copies of letters of agreement with that Bank signed by Messrs. George Knowles and Company on the previous day and described as being "in favour of Messrs. Sassoon and Company available to be presented at three months' sight against full shipping documents." While this letter was in the post Messrs. Sassoon and Company cabled to Messrs. Knowles and Company on the 5th June, "Referring to your letters of credit, they must be confirmed irrevocably." Thereupon, on the 19th June, the Eastern Bank in London cabled to its Calcutta branch that the letters of agreement signed by Messrs. Knowles and Company, of which copies had been forwarded, were "now confirmed credit." The communication itself, which had obviously been made by Messrs. Knowles and Company to the Eastern Bank in London between the 5th and 19th June, is not in evidence, but Messrs. Knowles and Company's letter of agreement addressed to the Eastern Bank in London and dated the 30th May, is endorsed by some one in pencil, "Made confirmed credit, 15th June, 1923." It is sufficient to quote from it the following:—

"We hereby authorise and request you and your agents in Calcutta to give banking facilities and accommodation . . . against and/or negotiate on or before 15th October, 1923, any . . . bills . . . not exceeding three months after sight and drawn on us by or endorsed by Messrs. A. Sassoon and Sons, Limited, and . . . we hereby agree duly to accept any such bill or bills for any sum or sums not exceeding in the aggregate £2,080 and to pay the amounts of such bill or bills at maturity.

"The drawers and/or endorsers and/or the holders of such bill or bills will hand over, but merely by way of collateral security, to you Bills of Lading for merchandise . . . and we agree that, in case you consider it necessary, you shall be at liberty to sell . . . any of the said merchandise . . . and apply the net proceeds . . . towards payment of the said bill or bills. . . ."

"It is further agreed that the granting of the said facilities and accommodation and/or the negotiation of any bill or bills above referred to shall be optional, and that this agreement cannot be either revoked or altered in any way except in writing with the express consent of your Bank. . . ."

On this document, which appears to have been headed "Agreement from London No. 2 (with recourse)," no copy was sent to Messrs. Sassoon and Company, though a copy was sent to the Eastern Bank's Calcutta Branch. On the 18th June, however, the Calcutta Branch sent to Messrs. Sassoon and Company a letter of advice, of which the following parts are specially material:—

"We beg to inform you that an advice has reached us from our London office of letter of agreement, No. 237, signed by G. Knowles and Company, Limited, authorising us to negotiate a bill or bills drawn by you on George Knowles and Company. . . ."

"We are informed that Bills of Lading for merchandise, together with the relative invoices and policies . . . will be handed to us. Such Bills of Lading should be presented to us in complete sets, made out 'to order,' blank endorsed and marked by the shipping Company 'freight paid.' . . ."

"We have pleasure in informing you, that we are prepared at our option as usual to make advances against and/or negotiate any bill or bills drawn in compliance with the terms of this letter."

This letter of advice was on a printed form, and after the above words "of this letter," the form proceeded as follows:—

"it being understood that this is not a confirmed Bank credit, and you are in no way released from the ordinary liability of drawers."

These last words from "it being" to "of drawers," were deleted, and after the signature of the Eastern Bank of Calcutta there followed two additions, viz.:—

"Please note that this authority is a confirmed credit."

"When offering drafts for negotiation under this authority, it is imperative that this letter be produced to enable the negotiating Bank to note payments on the back hereof."

On these documents the following observations arise. (1) It was apparently part of the appellants' argument that the deletion of the words in the form "you are in no way released from the ordinary liability of drawers" in combination with the added words, "this authority is a confirmed credit," imports that "you are in some way released from that liability." Their Lordships cannot accept this. There is a good deal of authority, now old, about the effect of deleting words in a printed form of mercantile contract, which it is not now necessary to cite, but they take it to be settled, in such a case as this, that the effect is the same as if the deleted words had never formed part of the print at all. The words expressly added of course, remain to be construed.

(2) The letter of agreement, signed by Messrs. Knowles and Company, contains only the authority given and the promise made by that firm to the Eastern Bank, Limited. So far as the record goes it is not shown how Messrs. Knowles and Company and the Bank arranged that the Bills of Lading should reach the latter in case the drafts were discounted elsewhere, nor is any actual agreement disclosed by which Messrs. Knowles and Company undertook to accept drafts presented by other parties, though no Bills of Lading were tendered. The general effect of the Bank's undertaking and liability may be easily surmised, but their precise terms must have been a matter of express arrangement between these two parties, and the actual undertaking of the Eastern Bank in London, which almost certainly was in writing, was not disclosed.

(3) What the Calcutta Branch of the Eastern Bank conveyed to Messrs. Sassoon and Company in their letter of advice, which was all the information that the latter had about the terms of the agreement between Messrs. Knowles and Company and the Eastern Bank in London, was confined, except for the second addition above set out, to transactions, in which Messrs. Sassoon and Company would send drafts, with documents attached, to the Eastern Bank in Calcutta for discount, and would then hand over to the Bank drafts and shipping docu-

ments against payment or credit of the relative sum in rupees. Thence forward the discounting Bank would hold both drafts and Bills of Lading and, in accordance with Messrs. Knowles and Company's letter of agreement, could look after itself.

(4) It is contended that in spite of the words "when offering drafts for negotiation under this authority," which authorise negotiations to the Eastern Bank alone, the succeeding words "to enable the negotiating Bank," convey that the authority advised in the letter of advice extends to transactions with other negotiating Banks, and should not be construed as merely meaning "to enable us when we negotiate the drafts" Even if this be so (and it is a very summary way of converting the terms of a discount offer by one Bank into and undertaking applicable to actual discounts by any other Bank), it does not follow that, if a third party Bank negotiates, all the undertakings and all the dealings referred to in this letter of advice will be or can be made applicable forthwith to such a substituted transaction.

If the drafts had been offered for discount to the Eastern Bank, in Calcutta, or if, by arrangement between Messrs. Knowles and Company and the Eastern Bank, the drafts of Messrs. Sassoon and Company had been drawn on the latter [*Chartered Bank of India, Australia & China v. Macfayden* (1), *Scott v. Barclays Bank Ltd.* (2)], the transaction would have been one of a normal type, which has often been explained and illustrated in the decided cases, and it would have completely met all the mercantile necessities which such a transaction has been devised to meet [*Guaranty Trust Co. of New York v. Hannay & Co.* (3)], except the possibility that the rate of exchange might have moved against Messrs. Sassoon and Company between the 11th May and the 9th August. The negotiation of the drafts with the International Banking Corporation under the circumstances above detailed is as far as reported cases go, a novelty. It is here that the difficulty of this case begins. In the case of *Chandanmull Benganey v. National Bank of India, Ltd.* (4) some of

the drafts mentioned were dealt with in the same way and under similar circumstances, but nothing in the decision throws any light on the legal consequences, which this peculiarity may involve.

According to the evidence on both sides, however, there was nothing extraordinary, still less irregular, in offering drafts, fortified with the letter of advice of the Eastern Bank's confirmed credit, to be discounted by another Bank such as the International Banking Corporation. Mr. Young, an official of the Eastern Bank in London, said that the postscript to the letter of advice meant that the negotiating Bank might be the Eastern Bank or any other Bank, and in this he was not apparently speaking merely of his own view of the wording of the postscript but of banking practice generally, for the plaintiffs' Manager, Mr. Thompson, said frankly that, although the letter of advice "asked for the documents to go to the Eastern Bank, Limited, Calcutta," it was "quite customary for other Banks to negotiate drafts under credits belonging to other Banks," and, in fact, "likelier than otherwise." He said, further, that there was no particular difficulty about his sending the drafts and documents to the Eastern Bank for presentation to Messrs. George Knowles and Company, and that with different shippers he would have done so, but in this case he thought that the credit arrangement had been superseded by Messrs. Sassoon and Company, that for some reason they were deviating from the credit by sending in the bills for discount D/A, that they wanted to allow (*sic*) these as documents against acceptance, and that he was willing on the strength of their names to discount the drafts on those terms, *viz.*, D/A. Under the terms of the letter of advice, he would have handed the documents to the Eastern Bank and not to Messrs. Knowles and Company, but he thought this credit arrangement had been superseded.

Of this evidence the appellants' Counsel have made much, as they were fully entitled to do, and their Lordships think it right to consider the main question in the case on the footing of these answers, as both the Courts in Calcutta appear to have done. They accordingly put aside certain contentions advanced by the respondents as follows. Neither the letter of agreement nor the letter of advice nor any document, which relates to them, makes them in terms "irrevocable," the term "confirmed" alone

(1) (1895) 64 L. J. Q. B. 367; 15 R. 333; 72 L. T. 428; 43 W. R. 397.

(2) (1923) 2 K. B. 1; 92 L. J. K. B. 772; 129 L. T. 108; 28 Com. Cas. 253; 67 S. J. 456; 39 T. L. R. 198.

(3) (1918) 2 K. B. 623 at p. 660; 87 L. J. K. B. 1223; 119 L. T. 321; 23 Com. Cas. 399; 34 T. L. R. 427.

(4) 79 Ind. Cas. 757; 51 C. 43; A. I. R. 1924 Cal. 552.

being used, yet both words were stipulated for by Messrs. Sassoon and Company on the 5th June, 1923. According to Mr. Thompson, the appearance of both words on the credit document is an indispensable formality. It is not easy to see in what respect either word or both of them together would carry the matter further than the word "contract," used in its strict sense, would have done, for apparently a confirmed credit is something, formerly provisional, and now turned into something definite by way of promise, and the word "irrevocable" simply closes the door on any option or *locus poenitentiae*, and makes the agreement definite and binding—in other words, creates a true contract, which will either be performed or be broken. The trial, however, proceeded on the footing that the credit given in favour of Messrs. Sassoon and Company and referred to in the letter of advice, was in all essentials what Messrs. Sassoon and Company had bargained for, and at their Lordships' bar it was too late to argue the contrary. So, too, without actually holding that the words added to the letter of advice, which refer to "the negotiating Bank," mean that the credit and the advice are in law available to the full to any Bank other than the Eastern Bank of Calcutta, which may discount the drafts mentioned therein, their Lordships will discuss the present case on the footing of the view taken by Mr. Thompson himself, that such was their meaning to the minds of business men.

As the present case is one of first impression, two general observations may be useful. So long as trade is proceeding in its ordinary course without violent fluctuations in prices, and so long as all parties concerned are in good credit, Banks, whose business it is to facilitate trade, can and no doubt do by voluntary arrangements among themselves smooth out small difficulties and ignore informalities, when no serious consequences are likely to result. When, however, a Court of Law is for the first time called upon to fix legal liability, by declaring what the intentions of the parties must be taken to have been, it becomes necessary to consider how an unruffled and unquestioned business would work out, if difficulties were to arise such as would at each step bring out the risks to be run and the responsibilities to be borne by one or other of the respective parties. Suppose a fall in the price of gunnies, which made it

important for the buyers to avail themselves of any legal ground open to them for refusing to take up the goods or to meet the bills; suppose a financial crisis, which for the time being seriously involved the reputation of the Bank which had granted the confirmed credit; in either case suppose a discounting house, ignorant, as here, alike of the exact terms of the purchase contract and of the agreement for the confirmed credit; how is the discounting house to know whether it can safely give up the Bills of Lading to the London Bank on the one hand or whether, on the other, it can reckon on acceptance of the drafts only when it has the Bills of Lading available to be handed to the drawee against acceptance? It is to be remembered that, common as it is for the grant of the credit to be made on the terms that the grantors are to be secured by possession of the Bills of Lading, other forms of security are sometimes used, the choice of the form depending on the relations between the two parties concerned and the solvency of the importing firm [see, for example, the terms of the credit in *Kronprinsessan Margareta* (5) and in *Pfehn v. Royal Bank of Liverpool* (6).] The legal rule must be one which will fit and make sense of the transaction equally under fair-weather conditions and under foul.

Take again the practical side of the matter. There are many business situations where an offer is made, in which it is hardly possible to ask questions or to go behind the documentary materials put forward by the proposer. Underwriting a slip is one; discounting a trade draft is another. Mr. Thompson, from the documents before him, had to judge whether he would approve or disapprove, whether he would risk taking the documents or risk letting the business go past him. To ask questions, even if there had been any one at hand to answer, might have betrayed either ignorance of his own business or a desire to know too much about his customers'. The exchange memorandum told him quite plainly that the drafts were D/A, which meant "document against acceptance." Here was an instruction as to the use he was to make of Messrs. Sassoon and Company's documents of title. True, it did not say who was to present the docu-

(5) (1921) 1 A. C. 486; 90 L. J. P. 145; 3 P. Cas. 803; 124 L. T. 609; 37 T. L. R. 199.

(6) (1870) 5 Ex. 92; 39 L. J. Ex. 41; 21 L. T. 830; 18 W. R. 463.

ments to the acceptor, but it was evident that, if the letter of advise was right in saying that the Eastern Bank was to have and keep the Bills of Lading, the documents could not be handed by the respondents to Messrs. Knowles and Company against acceptance at all. As discounters, their first duty, both to Messrs. Sassoon and Company and to themselves, was so to present the drafts for acceptance, as either to get them accepted or to get them dishonoured for lack of acceptance. In their Lordships' view, the respondent Bank was entitled and bound to follow this instruction. In face of it, there could be no question of such a misdealing with the drawers' rights by way of security as would afford any answer to their action.

Two answers have been attempted in argument. The first is that the drafts were tendered as D/A drafts only to comply with the terms of Messrs. Apar's exchange contract, which fixed a standard rate for D/A drafts and options for drafts on other terms, varying from the standard by fixed fractions. It is said that all Messrs. Sassoon and Company wanted was to get the rupee exchanged at 1s. 4 $\frac{3}{4}$ d. There is, however, some confusion in this. Messrs. Sassoon and Company wished to get this rate of exchange, and had to claim it under their contract by presenting drafts of such a description as that rate attached to, but the drafts were still described as D/A drafts, and, whatever the object which was immediately in view, D/A drafts they actually were. That these letters meant "documents against acceptance" was common ground, and accordingly some clear reason has to be shown for saying that, in the circumstances of this case, they nevertheless meant documents against the Eastern Bank's acceptance, which, in fact, they had not undertaken to give, or documents to the Eastern Bank against Messrs. Knowles and Company's acceptance of the draft, if they should be willing to give it without receiving the documents. Mr. Moise Sassoon actually answered the question, "Can you explain why D/A was put in the memo?" by saying, "Because the documents were deliverable to, and for acceptance of the Eastern Bank." This was an impossible construction. Equally so is the contention that D/A is a direction merely as to the time when the shipping documents are to be surrendered and not as to the person who is to receive them. Evidence as to the meaning of D/A

as a term of art might possibly have gone as far as this, but, as the case stands D/A on this view would be an incomplete and ambiguous direction and the party directed cannot be blamed if it was reasonably interpreted and acted on [*Ireland v. Livingston* (7).] In any case, it assumes that the discounting Bank is to interfere radically with what is *prima facie* the right of the accepting consignee on what may be a mere surmise. The drafts were for acceptance of Messrs. Knowles and Company, and if the documents, that is, the shipping documents, were deliverable to the Eastern Bank, then, as far as the International Banking Corporation was concerned, these acceptors would not get any documents in exchange for their acceptance. It hardly appears that on either side there had been much consideration of the rights and obligations arising out of this use of the letter of advise as applicable to a negotiation with the International Banking Corporation.

Accordingly, a second and much more ingenious answer was given to their Lordships. On the faith of the confirmed credit, for which they had stipulated, Messrs. Sassoon and Company proceeded to put the shipment in train to come into the hands of those who might be interested in it in London. This was done by placing the documents in the hands of the International Banking Corporation in Calcutta, with notice that the transaction was backed by a confirmed credit. After this the credit could not be revoked by the Eastern Bank. Merely to hand to a banker a draft styled D/A and a corresponding letter of credit must be deemed in law to tell him that the Bills of Lading are to be handed to the issuer of the letter of credit and not to the acceptor of the draft, and his remedy is to decline to discount, however approved the bill may be as a bill, if he does not like these terms. It is true that Messrs. Sassoon and Company did not bring the terms of the credit to the Corporation's notice, nor did they know them themselves, but this does not matter. They put the Corporation in the position of being able to sue the Eastern Bank in London on the credit in accordance with the principle of *In re Agra & Masterman's Bank* (8) and on inquiry it

(7) (1872) 5 H. L. 395; 41 L. J. Q. B. 201; 27 L. T. 79.

(8) (1867) 2 Ch. A. 391; 36 L. J. Ch. 222; 16 L. T. 162; 15 W. R. 414.

would be ascertained, as business experience would have led the Corporation to anticipate, that the condition precedent to the Eastern Bank's obligation to give effect to the credit was the delivery of the Bills of Lading to them. All was really plain sailing. If only the Bills of Lading were given up to the Eastern Bank, somehow or other the drafts would be met either by Messrs. Knowles and Company, if they accepted and paid without getting the consignment or the documents which represented it, or by the Eastern Bank, if they did not. The delivery of the Bills of Lading to the Eastern Bank in London, it was said, became matter of contract between the appellants and the respondents, as the result of the discounting transaction, so that the latter's recourse against the former was suspended and became ineffectual unless and until the Eastern Bank made default. In effect, the respondent Bank was provisionally substituted for Messrs. Sassoon and Company as sureties for the acceptors on the Bills, though this substituted suretyship would itself be defeasible in case of any wrongful failure to pay on the part of the Eastern Bank.

This argument was properly and indeed indispensably reinforced by the principles, which apply when a surety has secured his secondary liability by placing in the principal creditors' hands security which belongs to himself in the first instance. Here Messrs. Sassoon and Company, having shipped the gunnies under such a form of Bill of Lading as reserved the *jus disponendi* to themselves until the documents were delivered with their authority to the buyers for the purpose of passing the property, placed these instruments, representing the goods while afloat, in the Banking Corporation's hands, as collateral security giving them a special property in the goods, but remaining available generally for the protection of the sureties to whom they belonged. They also placed within the reach and control of the principal creditors another and still more important security, the commercial pivot of the whole transaction, namely, the confirmed credit of the Eastern Bank, and to this precisely the same rules applied as to the Bills of Lading. If the Banking Corporation entered into the transaction with notice of the existence of a confirmed credit of an ordinary banking character without knowing its exact terms, that was their own affair. They took the risk of its

being such that they could comply with them. If for any reason they failed so to deal with the Bills of Lading as to secure to the drawers recourse to the confirmed credit, then, *pro tanto*, the drawers would be discharged. Between *In re Agra & Masterman's Bank* (8) on the one hand and *Polak v. Everett* (9) on the other, the discounting Bank would be quite able to look after themselves.

Their Lordships are unable to give effect to these contentions. The principle of the decision cited is one applicable between the discounting Bank and the Bank which, having established the credit in favour of the acceptor, gives notice *urbi et orbi* of its willingness to abide by the operation of the credit through the machinery of drafts discounted before acceptance. If the respondents discounted the drafts on the faith of the invitation (if any) contained in the letter of advice, *In re Agra & Masterman's Bank* case (8) entitled them, if they chose to do so, to sue on the credit agreed by the Eastern Bank with Messrs. Knowles and Company as if they had been parties to it from the beginning. If they had not discounted on the faith of that invitation, the principle would not apply, and Mr. Thompson said clearly in effect, what Messrs. Sassoon and Company can neither complain of nor deny, that for him the name of Sassoon and Company was good enough in this case, and the confirmed credit was accordingly superfluous. Apart from this, however, the principle would only confer a right of action on the International Banking Corporation against the Eastern Bank, if they chose to exercise it, but it would not impose on them a duty towards Messrs. Sassoon and Company, so as to modify the ordinary right of recourse at all events or in any event. It is a matter between the respondent Corporation and the Eastern Bank, not between Messrs. Sassoon and Company and the respondent Corporation.

On the other hand, they think that the letters D/A are a complete answer to the part of the argument, which rests on the obligation of the principal creditor not to waste the surety's security. If the creditor complies with the surety's instructions, there can be no further responsibility. The whole gist of the complaint, as far as the confirmed credit is concerned, is that by not handing the Bills of Lading to the Eastern

(9) (1876) 1 Q. B. D. 669; 46 L. J. Q. B. 218; 35 L. T. 350; 24 W. R. 689.

Bank the respondents failed to satisfy the conditions precedent to their liability and so nullified the confirmed credit. The appellants' description of the drafts as D/A drafts destroys the validity of this complaint. Messrs. Sassoon and Company instructed the respondents to surrender the documents to the acceptors against their acceptance, and this was done. Again, if the obligation of the principal creditor not to deal unreasonably or imprudently with the securities is relied on, the result is the same. All the information given to the respondents by the drawers of the drafts, who, after all, had made their own bargain with the acceptors, pointed to the quite normal intention of giving the buyer of the gunnies control of the goods on the faith of his acceptance to the drafts. This was *prima facie* the intention, in fact, so far as the information given indicated. If the confirmed credit modified this, it was not for the discounting Bank to make guesses or to run risks, but for the drawers to say what their wishes were. Their Lordships cannot say that the conduct of the International Banking Corporation was unreasonable under the circumstances.

No doubt, as soon as Messrs. Sassoon and Company had got a rupee credit for their sterling drafts at $1s. 4\frac{3}{4}d.$, they thought as a matter of business that they had done with the transaction, and it may be disappointing to merchant shippers to find that it nevertheless remained at their risk. It may be also true that, when the Calcutta Banks fell into a course of business, which may be called a good-natured convenience to merchants or a far-sighted development of legitimate business exactly as you please, it would have been better to have intimated to the trade, that the Banks were not undertaking all the burdens of shippers' transactions, however they might turn out, but this is not the present issue. How proof of a custom of bankers and merchants, applicable to these particular facts, would have affected the decision is a matter on which it is not permissible to speculate. It may also be that the case was not as completely presented at the trial as merchants generally might have desired, but with this their Lordships cannot deal. The appellants are not in a position to show that, when they discounted these drafts, they bargained that the transaction should be without recourse, and in order to qualify their direction, given by the letters D/A, and

to limit the respondents' *prima facie* right of recourse against themselves, they must show some contract with them to that effect, or some breach of contract or of duty on their part, which would have that effect in law. No authority has been produced which enables them to do so, and their Lordships cannot say that any legal principle leads to that conclusion. They will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

A. N. A.

Appeal dismissed.

Solicitors for the Appellants:—Messrs. T. L. Wilson & Co.

Solicitors for the Respondents:—Messrs. Sanderson, Lee & Co.

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SINGAPORE).

November 28, 1927.

Present:—Lord Chancellor, Lord Buckmaster, Lord Carson, Lord Darling and Lord Warrington of Clyffe.

SIME, DARBY AND COMPANY LIMITED—
DEFENDANTS—APPELLANTS

versus

THE OFFICIAL ASSIGNEE OF THE ESTATE OF LEE PANG SENG (A BANKRUPT)
—PLAINTIFF—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 56
—*Provincial Insolvency Act (V of 1920), s. 54*—*Singapore Bankruptcy Ordinance, s. 51 (1)*—*Fraudulent preference*—"With a view to prefer"—*Question of fact*—*Dominant motive of debtor*—*Onus of proof*—*Transfer to avert criminal prosecution for breach of trust.*

The question whether a transfer by a debtor is to be deemed fraudulent and void as against the Official Assignee in the bankruptcy depends on the answer to be given to the question, was the transfer made 'with a view of giving a preference over the other creditors'? [p. 234, col. 1.]

The question to be determined is one of fact, namely, was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character? As the solution of this question involves an enquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence. [p. 234, cols. 1 & 2.]

Where the proper inference to draw from the facts is that the dominant motive actuating the debtor was that, in making the transfer to his creditor, he (the debtor) was only doing what he felt himself

bound or compelled to do, and where it must have appeared to him that the alternative to handing over was a prosecution for criminal breach of trust, the case is not one of fraudulent preference within the Statute. [p. 237, col. 1.]

When the Official Assignee in the bankruptcy seeks to establish that a transfer by the debtor is void as a fraudulent preference, the onus of proof is on the assignee to show that the case is within the Statute. [p. 234, col. 2.]

When all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on the question of onus becomes immaterial and the decision must be come to on the whole of the circumstances so ascertained, and the question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it. [p. 234, col. 2.]

Judgment of Lord Dunedin in *Robins v. National Trust Co.* (1), referred to.

Appeal from a judgment of the Supreme Court of Singapore in its appellate jurisdiction, dated the 10th January, 1927, reversing that of the same Court on its Original Side (Deane, J.), dated the 18th August, 1926.

JUDGMENT.

Lord Warrington of Clyffe.—On the 10th June, 1925, Lee Pang Seng, the assignee of whose estate is the respondent to this appeal, transferred to the appellants, to whom he was largely indebted, a quantity of rubber as security for their debt. He was then unable to pay his debts as they became due from his own money. He was adjudged bankrupt on a petition presented within three months after the date of making the transfer. The question in this appeal is whether the transfer is to be deemed fraudulent and void as against the Official Assignee in the bankruptcy.

In Singapore the matter is regulated by s. 51 (1) of the Bankruptcy Ordinance, which is identical with the provision on the same subject in the English Bankruptcy Act.

The result depends on the answer to be given to the question was the transfer to the appellants made "with a view of giving them a preference over the other creditors"?

There is no doubt about the law; this has long since been settled as regards the effect of the English Statute, and it is common ground that the same principles are applicable to the Ordinance in Singapore.

The question to be determined is one of fact, was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character? As the solution

of this question involves an enquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence.

A word or two must be said on the onus of proof. In their Lordships' opinion, the onus is on the assignee—he has to show that the case is within the Statute. A good deal was said in argument as to the shifting of the onus at particular points in the development of the case, but when all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on this point becomes immaterial and the decision must be come to on the whole of the circumstances so ascertained, and the question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it. [See the judgment delivered by Lord Dunedin in *Robins v. National Trust Co.* (1).]

The action in which the present appeal arises was brought by the respondent against the appellants for the purpose of recovering the goods the subject of the transfer. It was tried by Deane, J., in the Supreme Court of Singapore, who on the 18th August, 1926, gave judgment for the appellants with costs. On the 10th January, 1927, this judgment was reversed in the Supreme Court in its appellate jurisdiction by a majority, Sir James Murison, C. J., dissenting.

At the trial the following facts were established to the satisfaction of the learned Judge.

The appellants are a Company carrying on business as merchants at Singapore, Mr. John Middleton Sime being Chairman of the Board of Directors. They have a high reputation amongst the members of the commercial community in the city.

The debtor was a Chinese merchant carrying on business under the firm name of Chin Seng & Co. The business was managed by another Chinese named Lim Soo Yan. The debtor is a son of Lu Choon Guan, now deceased, who was a share-holder in the appellant Company and

(1) (1927) A. C. 515 & p. 520; 96 L. J. P. C. 84; 43 T. L. R. 213; W. N. (Eng.) 1927 p. 59.

a Director thereof. The shares form part of his estate, in which the debtor is interested. Mr. J. M. Sime was on friendly business terms with the father, but, though he knew the son, he had no business relations with him until those which resulted in the present proceedings. In January, 1925, the debtor applied to Mr. Sime for financial assistance. He told him that he was engaged in buying rubber on commission for certain firms in America, and that he wanted advances to enable him to finance these transactions. The business involved no or little risk. The debtor received instructions from the American firm to buy rubber on their behalf. The rubber thus bought in the debtor's name was then shipped to the American purchaser, the amount payable to the debtor was then covered by bills drawn on the American purchaser and discounted by a Bank in Singapore before acceptance, relying, no doubt, on a credit from America. The advances by the appellants were made against each lot of rubber, and the arrangement was that they were to be re-paid within a few days after the receipt of the money from the discounting Bank.

Each transaction was recorded in a letter written by Seng to the appellants. All these letters were in the same form, that of the transaction of the 29th May, 1925, may be set out as an example:—

"Singapore
29th May, 1925.

"Lee Pang Seng
Chin Seng & Co.,
General Merchants,

Messrs. Sime, Darby & Co., Ltd.,
Singapore,

"Dear Sirs,

"In consideration of your having advanced me \$ 87,887 only, being advance on 93,900lbs para rubber purchased by me and stored at basement, Raffles Chambers, I hereby convey the ownership of the said rubber to you and engage to act as your agent and factor in dealing with and shipping said rubber, re-paying you the amount advanced as soon after the said rubber has been shipped and proceeds of drafts received from negotiating bankers.

"I undertake to keep the said rubber fully insured against fire.

Yours faithfully,
(Sd.) Lee Pang Seng."

Advances amounting to a very large sum were made on the security of letters in the above form, and for some time all went well, the advances being duly re-paid out of the proceeds of the bills, but during May, 1925, considerable delay occurred in the payment of the advances and complaints were from time to time made by the appellants, but they did not then decline to advance further sums, and on the 10th June, 1925, there remained outstanding three advances amounting together to \$253,620.06, made respectively on the 29th May, the 5th June and the 9th June. On the evening of the 9th June it came to the knowledge of Mr. Sime that in addition to the business which had been financed by him, the debtor had for some time been speculating in rubber, and Mr. Sime became anxious about his security. He did not, however, then or on the 10th June know more about the actual financial position of the debtor.

On the 10th June he consulted his Company's Solicitors, and as the result wrote the following letter to the debtor:—

"Singapore,
10th June, 1925.

"Messrs. Chin Seng & Co.,
Malacca Street,
Singapore,

"Dear Sirs,

"With reference to the advances made by us to you against your letters of lien dated 29th May, 5th June and 9th June, amounting in all to \$253,620.06 as we are advised by our Solicitors that our security is not adequate, we must ask you to let us have your cheque to-day in re-payment of the advances or deliver to us immediately ample security in the form of rubber to cover the advances.

"Yours faithfully,
"Sime, Darby & Co., Ltd.,
"(Sd.) J. M. Sime."

It will be observed that the letter says that it is the Solicitors who advise that the security is not adequate and requires actual delivery of rubber to cover the advances. It must in their Lordships' opinion have conveyed to the recipient that it was in the nature of the security and not in the value of the rubber purported to be covered by it that the inadequacy consisted, and that what was required was actual physical possession of rubber instead of a mere paper lien

over rubber remaining in the debtor's possession.

About 4 P.M. on the 10th June the letter was delivered at the debtor's place of business and was read by his Manager, Lim Soo Yan. It is now necessary to state the financial position of the debtor on the 10th June as it was known to himself, though not to Mr. Sime.

There is no doubt he was hopelessly insolvent as the result of speculative purchases of rubber sold by him for future delivery. During the few days preceding the 10th June and on that day he had bought from Chinese merchants large quantities of rubber, which had been delivered at his godown, but had not been paid for. He had on the 10th June after banking hours, drawn and signed six cheques for sums amounting to \$92,000. His account was overdrawn and he knew that unless he obtained further credit these cheques, when presented, must be dishonoured and the general collapse of his affairs would ensue. He knew also that in breach of his duty as agent for the appellants he had applied the proceeds of rubber covered by one or other of the letters of lien to his own purposes. Some of the rubber covered by the outstanding letters of lien still remained in store, but a large part of the rubber there was that bought from Chinese merchants and not paid for.

On receiving the letter of the 10th June, Lim Soo Yan rang up the debtor on the telephone and either read the letter to him or told him its contents, asking what he was to do. The answer was there was no alternative but to deliver to Sime, Darby, as he could not pay the money. He told his Manager not to allow them to take more than was necessary, and he asked him whether, if he allowed Mr. Sime to take away the rubber, he would go on advancing. The Manager said he thought he would. Nothing further was said, and the Manager thereupon, on behalf of and in the name of the debtor, wrote to the appellants the following letter:—

"With reference to your letter of even date, as it is not convenient to re-pay you the advances to-day please note that we have given instructions to our storekeeper to deliver to your order sufficient rubber to cover the advances made by you."

Delivery of the rubber began about 5 P.M. and continued during the night until 6 A.M.

on the morning of the 11th June, the debtor's Manager attending to see that no more than the proper quantity was removed.

On the morning of the 11th June, two of the cheques drawn on the 10th were presented and paid, the Bank apparently assuming that an advance would be made by the appellants, as on previous occasions, but about noon Lim Soo Yan was informed by Mr. Sime, on his application for further advances, that further advances would not be made. He immediately informed the Bank Manager. The remaining four cheques were dishonoured and the final crash came.

One further fact should be mentioned. During May arrangements were made for the formation of a limited Company to take over the debtor's business, with Mr. Sime as Chairman. Such a Company was registered, but did not do any business, and nothing came of the scheme.

It was suggested that the last-mentioned fact, coupled with the possession by the father's estate of shares in the appellant Company and the interest of the debtor in that estate, provided a motive for desiring to avoid serious loss on the appellants' part, with the possible diminution of the value of the estate. But no detailed facts were elicited such as were necessary to support such a suggestion, and in these circumstances their Lordships think no importance should be attached to it.

What then, is the proper inference to be drawn as to the dominant motive of the debtor? The learned trial Judge expressed his view as follows:—

"It seems to me that the expression he used that there was no alternative but to hand over did most accurately and realistically represent what must have been in the mind of the debtor. To him, believing that he was bound by the terms of the letter, it must have appeared that the alternative to handing over was a prosecution for criminal breach of trust."

Their Lordships agree that the proper inference to draw from the facts is that the debtor believed, and on the form of the letter reasonably believed, that the appellants were entitled in the events which had happened to have actual possession of the rubber, and to put an end to the possession and power of disposition which he had as their agent, and, further, that as he had wrongly disposed of the proceeds

of some of the appellants' rubber for his own purposes, he would be running grave risks if he failed to deliver rubber of his own in its place. He would be fortified in this view by the information that the demand was made on the advice of Solicitors. Moreover, the Manager said in evidence that he believed:—

"Sime, Darby, under the letter we gave, controlled the rubber, the letter was a sort of security for the money advanced to us, and we thought it bound the firm."

In their Lordships' opinion, the dominant motive actuating the debtor was that, in making the transfer, he was only doing what he felt himself bound or compelled to do.

The possibility of obtaining further advances probably weighed with him also, but if, the above view is correct it is unnecessary further to pursue this matter.

Upon the whole case their Lordships are of opinion that the Official Assignee failed to establish his case under the Ordinance, that the trial Judge rightly dismissed the action, and that this appeal ought, therefore, to be allowed with costs, the order of the Court of Appeal being discharged, and that of the trial Judge restored, and they will humbly advise His Majesty accordingly.

K. J. R.

Appeal allowed.

Solicitors for the Appellants:—Messrs. Mayo, Elder & Co.

Solicitors for the Respondents:—Messrs. Turner & Sons.

Note.—This pronouncement of the Privy Council settles the law, on which there has been considerable conflict of judicial opinion both in India and in England: see the recent judgment of the English Court of Appeal in (1924) 2 Ch. 515; (1924) B. & O. R. 143; 69 S. J. 35 (*In re Cohen; Ex parte Trustee*), where Pollock, M. R., dissented from his learned colleagues, Warrington and Sargant, L. JJ.—K. J. R.

PRIVY COUNCIL.

APPEAL FROM THE RANGOON HIGH COURT.

October 28, 1927.

Present:—Lord Shaw, Lord Sinha and Sir John Wallis.

V. P. R. V. CHOCKALINGAM CHETTY—
PLAINTIFF—APPELLANT

versus

SEETHAI ACHE AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XLI, rr. 20, 33—Suit against two sets of defendants—Dismissal of suit—Appeal—Omission to implead one set—Res judicata—Impleading of parties in appeal—Passing decree under O. XLI, r. 33—Discretion—Interference in appeal—Official Assignee—Sale of properties sold by insolvent—Mere right to sue—Validity of sale—Duty of Official Assignee—Right of appeal—Substantive right.

Sales by an Official Assignee of lands in possession of alienees from an insolvent are, in substance if not in form, nothing more than sales of the right to litigate, and, assuming that they do not come within the prohibition in the Transfer of Property Act against the transfer of a mere right to sue—which has not been contended—they are open to the same objections and are strongly to be deprecated. [p. 239, col. 1.]

It forms no part of the Official Assignee's duties as an officer of the Court charged with the realisation of insolvent estates either himself to prefer frivolous claims unsupported by reliable evidence or to transfer them to others and thus promote unnecessary and useless litigation. [*ibid.*]

The plaintiff instituted a suit for recovery of possession of certain properties from the first defendant and certain persons who had purchased the properties from the first defendant, alleging that the sale in favour of the first defendant was invalid and that the sale in favour of the purchasers was *benami* for the original owner. The sales were upheld and the suit was dismissed. The plaintiff preferred an appeal against the purchasers alone without impleading the first defendant as a party. The lower Appellate Court refused to implead him as a party under O. XLI, r. 20 and to exercise its powers under O. XLI, r. 33, Civil Procedure Code:

Held, (1) that the plaintiff could not be allowed to question the finding that the sale-deeds were valid in the appeal as he had not made the first defendant a party to the appeal; [p. 240, col. 1.]

(2) the first defendant against whom the suit had been dismissed and as against whom no appeal had been preferred and the right to appeal had become barred, was not in the circumstances interested in the result of the appeal against the other defendants within the meaning of O. XLI, r. 20 of the Civil Procedure Code; [*ibid.*]

(3) that the discretion exercised by the lower Appellate Court in refusing to exercise its powers under O. XLI, r. 33 of the Civil Procedure Code could not, in the circumstances of the case, be interfered with in appeal. [p. 240, col. 2.]

The right of appeal is a substantive right of a very valuable kind of which a party should not be lightly deprived. [*ibid.*]

Chockalingam Chetty v. Seethai Ache, 84 I. C. 522, affirmed.

Appeal from a judgment and decree of the High Court, Rangoon (Young and

Baguley, JJ.), dated the 1st July, 1924, reported as 84 Ind. Cas. 522, confirming on appeal the decrees of the District Judge, Pegu, dated the 29th July, 1922.

Messrs. G. R. Lowndes and M. R. Jardine, for the Appellants.

Messrs. A. M. Dunne and E. B. Raikes, for the Respondents.

JUDGMENT.

Sir John Wallis.—The point for decision in these appeals from the High Court at Rangoon is a very short one, but there is one other matter dealt with by the trial Judge to which their Lordships desire to refer in the first place—the transaction by which the plaintiff acquired the right to sue for these and other properties in Burma, now valued by him at three lakhs of rupees, from an Official Assignee in Insolvency in another province for the trifling sum of Rs. 580, which could be of no real advantage to the insolvent estate, having regard to the extent of the liabilities.

The lands in Burma, which are the subject of these two consolidated suits in the District Court of Pegu, were acquired by a joint Hindu family of Nattukottai Chetties, a money-lending community residing with their families in what is now the Ramnad District in the south-east of the Madras Presidency, and carrying on business by their agents in other parts of India, Burma, the Straits Settlements and elsewhere. The family was known in Burma as the K. P. firm, these being the distinctive initials prefixed to all their business signatures according to the practice of the community.

In 1908 K. P. Ramanathan Chetty, a young man who had recently succeeded his father as managing member of the family, finding that the Burma agency was in difficulties, got the other members of the joint family to join with him in executing a deed of trust by which they transferred the properties mentioned in the schedule to the deed to a trustee for the benefit of their creditors. The trustee was empowered, among other things, to sell the scheduled properties and invest purchasers with full proprietary rights therein, but was to act in certain matters with the consent of another person described in the deed as a "co-adjutor."

In 1911 the first defendant's firm, who held two decrees against the K. P. firm for over Rs. 72,000, were pressing for payment, and it was arranged that certain properties

in the Pegu District, included in the trust deed, should be transferred to them in satisfaction of their claim. A deed of transfer was accordingly executed on the 1st December, 1911, in Burma by the duly authorised agents of the trustee under the deed, and K. P. Ramanathan, the managing member of the family.

Satisfaction was duly entered up, and the first defendant took and remained in possession without any question being raised by anyone until some six years later the present plaintiff, V. P. R. V. Chockalingam Chetty, a member of the same community as the K. P. family, who was employed in Rangoon as the agent of another firm, obtained a transfer from the Bank of Bengal of a decree against the K. P. firm for Rs. 90,000, in consideration, the District Judge states, of a payment of Rs. 2,500 and proceeded to attach as the properties of the judgment-debtors the lands which had been conveyed to and were in possession of defendant No. 1. Finding, however, that the attachment proceedings must prove infructuous owing to the fact that the two senior members of the K. P. family had been adjudged insolvents on their own petition in January, 1918, in the Court of the District Judge of Ramnad at Madura, the plaintiff went over from Burma to Madura, and on the 19th October, 1919, presented a petition to the Official Assignee at Madura, alleging that the properties mentioned in a list annexed to the petition, containing some 75 items, had either been sold *benami* for the benefit of the insolvent or obtained in the name of his agent or agents with the same object, and praying that they should be sold by public auction, as there were numerous persons prepared to bid, and in case no one appeared the petitioner was prepared to purchase them himself.

The affidavit filed in support of the petition has not been exhibited, but the petition itself contains no mention of the point chiefly relied on in the suits, that the sale to the first defendant was not in accordance with the trust deed. It was opposed by the first insolvent, who stated that he had no personal knowledge of the transactions of his agents in Burma, and prayed for further enquiry in order that the truth might be ascertained. The next thing that appears is that in December, 1919, the Official Assignee advertised the properties for sale as being part of the

insolvents' estate, and on the 26th January, 1920, there being no other bidders, the plaintiff became the purchaser for Rs. 580 of lands which he stated in his evidence to be worth three lakhs of rupees; the lands now in suit being valued at Rs. 40,000 and the remainder, for which he proposed to institute other suits, at Rs. 2,60,000.

The District Judge found that the plaintiff's allegation that the sales in question in these suits were *benami* for the K. P. family was made recklessly and without any foundation, and described his conduct in this matter as most astounding and repugnant. He also criticized the Official Assignee for not making further inquiry as to whether the insolvents had properties in Burma in the names of their agents, and inferred from the insignificant price which the Official Assignee accepted that he attached very little weight to the plaintiff's case that these valuable properties still formed part of the insolvents' estate. It seems difficult to resist this inference; but, however this may be, their Lordships desire to observe generally that it forms no part of the Official Assignee's duties as an officer of the Court charged with the realisation of insolvent estates either himself to prefer frivolous claims unsupported by reliable evidence or to transfer them to others and thus promote unnecessary and useless litigation. Further sales by an Official Assignee of lands in possession of alienees from an insolvent are, in substance if not in form, nothing more than sales of the right to litigate, and, assuming that they do not come within the prohibition in the Transfer of Property Act against the transfer of a mere right to sue—which has not been contended—they are open to the same objections and in their Lordships' opinion are strongly to be deprecated. In the present case, as already pointed out, there was not even any corresponding advantage to the insolvent estate.

Having obtained the transfer, the plaintiff proceeded to file two suits in the District Court of Pegu, which were tried together, against the first defendant and those claiming through him, in which he not only set up the *benami* character of the transactions, but also contended that the sale to the first defendant was invalid as not in accordance with the provisions of the trust deed.

The plaint in the first suit alleged that the sale to the first defendant was invalid

and inoperative in law; that the sale by the first defendant to the second defendant, the E. N. M. K. firm, on the 20th December, 1919, was *benami* for the K. P. firm, which had been adjudged insolvent; and that the sale of the 1st April, 1920, by the second defendant to P. R. N. Nadesan Chetty, represented by the third and fourth defendants, was also *benami* for the K. P. firm; and that the sales by Nadesan to defendants Nos. 5 to 11, the defendants in possession, were made fraudulently and collusively with a view to defeating the plaintiff's claim, and were invalid and inoperative. The plaint in the second suit was in similar terms and challenged the transfers made to the first defendant and by the first defendant to the second defendant, Singaram Chetty, the defendant in possession. The District Judge rejected all the plaintiff's contentions and dismissed both suits, holding, as already stated, on the admissions and the plaintiff's own evidence, that the allegation that the sales were *benami* was made by the plaintiff recklessly and without any foundation.

The plaintiff filed appeals from these decrees to the High Court at Rangoon, but did not make the defendants Nos. 1 and 2, in the first suit or the defendant No. 1, in the second suit, parties to the appeals.

The learned Judges state in their judgment that when the appeals came on for argument it was pointed out that the foundation of title of all the defendants was the sale-deed to the first defendant; that the decrees of the lower Court declared the sale-deed to be perfectly valid as between the plaintiff and the defendant No. 1; that owing to the failure to make the defendant No. 1, a respondent, there was no appeal from this finding, which had consequently become *res judicata* as between the plaintiff and the first defendant, and must also be regarded as *res judicata* against the respondents, who claimed through the first defendant, or, in other words, as it was put by the learned Judges at the end of the judgment, the finding that the sale to the first defendant was good carried with it a finding that it was also good as between the plaintiff and the purchasers from the first defendant.

As regards this question, their Lordships agree with the learned Judges of the High Court that the plaintiff cannot be allowed in these appeals to question the validity of the sale to the first defendant or to set up in the first suit the *benami* charac-

ter of the purchase by the E. N. M. K. firm from the first defendant so long as the findings in favour of the first defendant and the E. N. M. K. firm stand, and are, therefore, of opinion that as regards this part of the case the plaintiff must fail unless the first defendant and the E. N. M. K. firm are made parties to the appeal. The purchase from the E. N. M. K. firm and the subsequent purchases in the first suit and the purchase from the first defendant in the second suit might stand on a different footing were there any evidence worthy of the name to show that they were made *benami* for the K. P. firm because the first defendant and the E. N. M. K. firm would not be necessary parties as regards these issues, but this contention was not raised either in the Court below or before their Lordships, and may, therefore, be disregarded.

As regards the rest of the case, owing to the plaintiff's failure to make these defendants respondents within the time limited for filing an appeal, these appeals, so far as they are concerned, are *prima facie* barred by limitation, and they are entitled to hold the decrees in their favour, which, as pointed out by their Lordships in a very recent case, is a substantive right of a very valuable kind of which they should not lightly be deprived. When parties are added by the Court after the institution of a suit under O. I, r. 10 (2), s. 22, Limitation Act, provides that the date when they are added is to be deemed to be the date of the institution of the suit so far as they are concerned for purposes of limitation and the rights which they may have acquired under the Limitation Act are, therefore, sufficiently safeguarded. The addition of a respondent whom the appellant has not made a party to the appeal is expressly dealt with in O. XLI, r. 20 on which the plaintiff relied, both, in the Appellate Court and before their Lordships. That rule empowers the Court to make such party a respondent when it appears to the Court that he is interested in the result of the appeal.

Giving these words their natural meaning—and they cannot be disregarded—it seems impossible to say that in this case the defendants, against whom these suits have been dismissed, and as against whom the right of appeal has become barred, are interested in the result of the appeal filed by the plaintiff against the other defendants. It was for the plaintiff-appellant, who ap-

plied to the Court to exercise powers under this rule, to show what was the nature of their interest, and this he has failed to do.

Their Lordships are, therefore, of opinion that the Appellate Court was right in rejecting his application under this rule.

The Appellate Court was then asked to take action under O. XLI, r. 33. That rule empowers an Appellate Court to pass any decree and make any order which ought to have been passed or made, and to make or pass such further decree or order as the case may require, and provides, further, that this power may be exercised notwithstanding that the appeal is as to part only of the decree and, 'may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.'

Here the plaintiff, whose suits had been dismissed against all the defendants, failed to appeal against the decrees in so far as they affected some of them and allowed the appeal as against them to become barred. In these circumstances the Appellate Court, in the exercise of their discretion, refused to take action under the rule so as to deprive these defendants of the very valuable right which they had acquired in consequence of the plaintiff's failure to appeal against the decrees in so far as they affected them. Assuming that under this rule the Court in a proper case might add a defendant as respondent for the purpose of passing a decree against him, their Lordships see no sufficient reason for interfering with the refusal of the Appellate Court to do so in this instance. They are, therefore, of opinion that these appeals fail on both grounds, and will humbly advise His Majesty that they should be dismissed with costs.

A. N. A.

Appeals dismissed.

Solicitors for the Appellant:—Messrs. Custler, Allingham & Ford.

Solicitors for the Respondents:—Messrs. Brammell & Brammell.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 572 OF 1927.

August 12, 1927.

Present:—Mr. Justice Boys and

Mr. Justice Iqbal Ahmad.

HAR PRASAD—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 234, 236, 238—Penal Code (Act XLV of 1860), ss. 411, 413—Charge under s. 413—Conviction for three offences under s. 411—Legality of conviction—Misjoinder of charges—Conviction for minor offence on charge for major offence.

The accused was charged under s. 413 of the Penal Code of being a habitual receiver of stolen property. Some ten or eleven instances of receipt of stolen property were put forward by the prosecution. At the trial the Sessions Judge thought it proper to add charges of three separate offences under s. 411. The three incidents which formed the subject of these charges were three of the incidents relied on by the prosecution to establish the habit of receiving stolen property. The charges under s. 411, though proved, were found by the Judge not a sufficient basis for the finding of habit necessary to a conviction under s. 413, and the accused was convicted of the offences under s. 411.

Held, that the convictions were not illegal inasmuch as the offences under s. 411 were merely minor offences forming ingredients of the main charge under s. 413, for which the accused could be convicted under s. 238 of the Criminal Procedure Code even if separate charges had not been framed, and that ss. 234 and 236, Criminal Procedure Code, had no application to the case.

Criminal appeal from an order of the Sessions Judge of Budaun.

ORDER OF REFERENCE.

Iqbal Ahmad, J.—For the determination of this appeal, it is necessary to decide whether or not ss. 234 and 236 of the Code of Criminal Procedure, are mutually exclusive of each other. It is argued by the learned Counsel for the appellant that they are, and in support of his contention the learned Counsel relies on the case of *Sheo Saran Lal v. Emperor* (1) and *Suja-ud-din Ahmad v. Emperor* (2) and *Faujdar Mahto v. Emperor* (3). The learned Government Pleader contests the proposition of law put forward by the learned Counsel for the appellant and relies on the case of *In re Bal Gangadhar Tilak* (4).

In my opinion, the point is of sufficient importance to merit a discussion before two Judges. Accordingly I refer the case to a Bench of two Judges.

Messrs. Peary Lal Banerji and Kumuda Prasad, for the Appellant.

Mr. Sankar Saran (Government Pleader), for the Respondent.

JUDGMENT.—This was referred to a Bench of two Judges because of the argument raised at the hearing before a Single Judge as to whether ss. 234 etc. were mutually exclusive of each other or could be jointly applied with a resultant increase in the number of offences tried at one trial. The two sections in this case, in regard to which discussion arose, were ss. 234 and 236; but in our view, s. 236 has no application whatever to the particular case.

The accused here was committed to the Court of Session on a charge under s. 413 of the Indian Penal Code of being a habitual receiver of stolen property. Some ten or eleven instances of the receipt of stolen property were put forward by the Crown. At the trial the learned Sessions Judge thought it proper to add charges of three separate offences under s. 411. The three incidents which formed the subject of these charges were three of the ten or eleven incidents stated above to have been relied on by the Crown to establish the habit of receiving stolen property. Such difficulty as there may be in applying s. 236, whether by itself or in combination with another section, e. g., s. 234, turns really on the question whether the doubt referred to in s. 236 is doubt owing to the absence of proof of some fact or facts, or doubt on a question of law. We do not say that this is really any serious difficulty, but it constitutes such difficulty as there is. In this case, there is no question of doubt either as to fact or as to law, and, therefore, no question of the applicability of s. 236 arises.

The situation here is simply this, that there was a charge of an offence under s. 413 of the Indian Penal Code which involved ten or eleven separate incidents of the receipt of stolen property, and several of those at any rate had to be proved before the charge could be established. Each of the incidents would really amount to a separate offence under s. 411, and each of the incidents would involve as its elements a finding that the property was stolen, that the accused was in possession of it, and

(1) 5 Ind. Cas. 896; 32 A. 219; 7 A. L. J. 225; 11 Or. L. J. 235.

(2) 66 Ind. Cas. 322; 20 A. L. J. 320; 23 Or. L. J. 258; A. I. R. 1922 All. 214; 44 A. 540.

(3) 91 Ind. Cas. 815; 24 A. L. J. 239; 27 Or. L. J. 143; A. I. R. 1926 All. 261; 48 A. 236; L. R. 7 A. 32 Or.

(4) 2 Ind. Cas. 277; 33 B. 221; 10 Bom. L. R. 973; 9 Or. L. J. 226; 4 M. L. T. 45.

that there was justification for holding that he must have known it to be stolen property. The charges under s. 411 were only really charges as to three out of the ten or eleven incidents, and were found by the Judge not to constitute a sufficient basis for the finding of "habit" necessary to a conviction under s. 413. The section really applicable is s. 238, according to which in such a case the accused could have been convicted under s. 411 as to the three minor offences, even though he had not been charged with them. A conviction of such minor offences, each of which was an ingredient of the major offence, is clearly not to be regarded as a conviction to which s. 233 is applicable. There has really only been a charge of a major offence constituted by a number of incidents, and three minor offences alone have been found to be proved each of those minor offences being an ingredient of the major offence—the other ingredients of the major offence, viz., the other minor offences, having been found not proved. There is, therefore, no force in the legal objection taken that the accused was tried for more offences than could be joined in one trial.

For the reasons we have given, also no question of the power to apply s. 234 and any other of the cognate sections simultaneously arises.

The merits of appeal were fully argued before the Single Judge who is a member of this Bench, and it is conceded by Counsel here that there is nothing further to be said in favour of the appellants on the merits.

The appeal is dismissed.

A. N. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 575 OF 1927:

October 17, 1927.

Present:—Mr. Justice Dālal.

GAURI SHANKAR—ACCUSED—APPLICANT
versus

SRI KRISHNA—OPPOSITE PARTY.

Criminal Procedure Code (Act V. of 1898), s. 133—Construction of latrine on one's own land—Magistrate's power to order removal of latrine.

The mere construction of a latrine on one's own land cannot be considered a nuisance within the meaning of s. 133 of the Criminal Procedure Code.

A Magistrate has, therefore, no power to make an order under s. 133 of the Criminal Procedure Code directing a person to remove a latrine built by him

on his own land, though he can direct him not to use it in such a way as to cause a nuisance to the neighbours.

Indra Nath Banerjee v. Queen-Empress (1), followed.

Criminal Reference made by the Sessions Judge, Mainpuri.

Mr. G. K. Shinde, for the Applicant.

Mr. S. C. Goyle, for the Opposite Party.

JUDGMENT.—This reference must be accepted. The complaint was that one Gauri Shankar was building a latrine on his own land, and the smell thereof was likely to cause a nuisance. The latrine had not been finished, and the Magistrate ordered the building to be stopped and the materials removed. This order passed under s. 133 of the Code of Criminal Procedure was made absolute under s. 136. Gauri Shankar applied in revision to the learned Sessions Judge, who has rightly pointed out that there was no unlawful obstruction and nuisance, and that the Magistrate had no jurisdiction to interfere. An unlawful obstruction and nuisance may be removed from any way, river or channel, or from any public place. Admittedly the latrine was not being built on any way, river or channel, or in any public place. It was being built on Gauri Shankar's own land. What might happen if the use of the latrine was made in such a way as to be objectionable to the public is not in question here. The ruling in *Indra Nath Banerjee v. Queen-Empress* (1) is in point. There a complaint was made as to a burning ghat and its removal was desired. The Bench held that a Magistrate had no power under s. 133 of the Code of Criminal Procedure to order the removal of a burning ghat from its position but he can direct the proprietor to remove the nuisance, that is, to take such steps as would result in the cremation of corpses ceasing to be a nuisance to the public. The construction of a latrine by Gauri Shankar on his own land cannot be considered a nuisance. There would be a nuisance if on its construction its use was made in such a way as to lead to a nuisance to the neighbours. In that case also Gauri Shankar may be directed to remove the nuisance of the misuse and not to remove the latrine itself.

I set aside both the conditional order and the final order of the Magistrate.

A. N. A.

Order set aside.

(1) 25 O. 425; 2 O. W. N. 113; 13 Ind. Dec. (N. S.) 282.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 552 OF 1927.

October 28, 1927.

Present:—Justice Sir Cecil Henry Walsh, Kt.
GULAB AND OTHERS—ACCUSED—APPLICANTS
versus

EMPEROR—OPPOSITE PARTY.

Co-operative Societies Act (II of 1912), s. 52—U. P. Co-operative Societies (Amendment) Act (III of 1919), s. 2—U. P. Land Revenue Act (III of 1901), s. 146—Liquidation of Society—Heir of deceased member, liability of, to be arrested.

A Liquidator of a Co-operative Society can arrest the heir of a deceased member of the Society for an arrear due from his deceased father.

Criminal Reference made by the Sessions Judge, Benares.

ORDER OF REFERENCE.

This is an application in revision against a judgment of B. Birendra Pratab Sahi, Deputy Magistrate, First Class, sentencing the accused-applicants to pay fines of Rs. 25 each under s. 353, Indian Penal Code, and 225, Indian Penal Code, for *assaulting an Amin and rescuing one Ram Charitr from arrest.*

The application for revision raises the important point whether Liquidator of a Co-operative Bank can arrest the heir of a deceased member of a Co-operative Society for an arrear due from his deceased father. I am in considerable doubt whether under the law he can do so. It appears to me that the Liquidator can proceed only against the assets of the heir, *vide* the new sub-para. 9-A after para. 167. (9) on page 148 of the Manual of Co-operative Society, Vol. I. I am, therefore, of opinion that the heir cannot be made personally liable and that the arrest in the present case was not warranted by law.

I, therefore, forward the record to the Hon'ble High Court with the recommendation that the conviction and sentence passed by the Deputy Magistrate be set aside if the Hon'ble High Court agrees with my views. The Deputy Magistrate is asked to let me have an explanation within a week.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—It seems to me that the Magistrate was right. I reject the reference and direct the record to be returned to the Court below.

A. N. A.

*Reference rejected.***ALLAHABAD HIGH COURT.**

FIRST CIVIL APPEAL No. 49 OF 1923.

May 11, 1927.

Present:—Sir Grimwood Mears, Kt.,
 Chief Justice, and Mr. Justice Lindsay.
NARSINGH DAS—PLAINTIFF—

APPELLANT*versus***GOKUL PRASAD AND ANOTHER—****DEFENDANTS—RESPONDENTS.**

Evidence Act (I of 1872), s. 33—Witness dying before cross-examination—Evidence in examination-in-chief whether admissible.

The incomplete deposition of a witness who dies before he is cross-examined is not admissible in evidence under s. 33 of the Evidence Act. [p. 244, col. 1.]

Boisagomoff v. Nahapiet Jute Co., Ltd. (1), followed.

First appeal from a decree of the Subordinate Judge, Allahabad.

Mr. B. E. O'Connor, for the Appellant.

Messrs. Surendro Nath Sen, Durgā Charan Banerji, Peary Lal Banerji and Narain Prasad Asthana, for the Respondents.

JUDGMENT.—This was a suit originally instituted to recover the value of ornaments alleged to be worth Rs. 5,993 and to recover Rs. 2,007 which was alleged to have been taken out of Court by the defendants, on the ground that they were accountable in both these respects to the plaintiff.

The learned Subordinate Judge dismissed the suit and when this matter came up in argument in first appeal, it became so apparent that complete justice could not be done between the parties if the claim was limited in the manner in which the plaintiff by his plaint had limited it. We, therefore, sent the matter down to the lower Court to consider particularly the state of account in respect of certain *zemindari* property. It was alleged that a lady, *Musammat Chandrawal*, the mother of Narsingh Das, owned *zemindari* property, and that for a period of some eight years, from 1908 to 1916, that *zemindari* property had been managed by the defendants. The findings have been returned to us, and in this Court even wider arguments have taken place on both sides, and in the result we have had, upon very scanty material, to go into the whole of the transactions between these parties to arrive at the best and fairest decision we can.

The first difficulty that we have been met with is this. On the 15th of February, 1922, *Musammat Chandrawal* was examined

on Commission and had on that day concluded her examination-in-chief and had been under cross-examination for a considerable period. Her cross-examination, we are told, occupied some seven pages of print. By that time 9 o'clock in the evening had arrived, and not unnaturally the parties wished to separate. *Musamat Chandrawal* was not well at that moment. There arose a discussion as to when next her cross examination should be continued, and whilst the Pleader for Narsingh Das was willing for the lady to be examined on the next or any of three or four subsequent days, the Pleader for the defendants had other engagements and the matter was left open. In that state of affairs *Musamat Chandrawal* died on the 19th of February, 1922—it is said she died of plague. The plaintiff naturally wished that evidence to be used in the lower Court and here. It was excluded in the lower Court and we have been obliged to exclude it here, being guided by the decision which is reported as *Boisagomoff v. Nakapiet Jute Co., Ltd.* (1) and on a consideration of the terms of s. 33 of the Evidence Act, and we have had to decide that the evidence cannot be received because the evidence was not concluded. That is to say, although her examination-in-chief was concluded, it was open to the defendants to argue that a subsequent cross-examination would have destroyed to a great extent the effect of the evidence-in-chief, and, therefore, one could not take an incomplete deposition of the lady and pay any attention to it. We have no doubt that the argument put forward by the defendants was a good argument, and we did decide to exclude her incomplete statement, and it has not been presented to us.

[Note.—The rest of the judgment is not material for the purposes of this report.—*Ed.*]

A. N. A.

Appeal allowed.

(1) 5 C. W. N. 230n.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 545 AND 546
OF 1925.

June 9, 1927.

Present:—Justice Sir Cecil Henry Walsh,
Kt., and Mr. Justice Ashworth.

HUKUM CHAND AND OTHERS—PLAINTIFFS—
APPELLANTS
versus

SITAL PRASAD AND OTHERS—DEFENDANTS
—RESPONDENTS.

Hindu Law—Widow—Property inherited from husband—Custom conferring absolute power of disposal—Property, whether stridhan for purposes of devolution—Precedents—Assumption of certain view of law, how far binding.

Under the Mitakshara School of Law there is no distinction between the word 'stridhan' and the expression 'property that a woman can deal with at her pleasure.' [p. 246, col. 2.]

Consequently, when a custom is proved as affecting persons otherwise subject to the Mitakshara School of Hindu Law, e. g., the Jains, and that custom is said to confer upon the widow a right to deal with property inherited from her husband, at her will, it must be held to mean that the property is her stridhan and will devolve as stridhan. [*ibid.*]

Per Ashworth, J.—The assumption of a certain view of law in a judgment for the purpose of deciding another question cannot be regarded as a binding decision. It has even less force than an *obiter dictum* for it is not necessary to prove or decide what is admitted. [p. 246, col. 2.]

Second appeal from a decree of the Additional District Judge, Saharanpur.

Mr. Peary Lal Banerji, for the Appellants.

Mr. Dr. K. N. Katju, for the Respondents.

JUDGMENT.

Ashworth, J.—These two appeals arise out of two suits brought by the plaintiffs appellants against the respondents for possession of certain property. The property belonged to one Amolak Ram, who died in 1879, leaving a widow *Musammam Bir Kunwar*. She died in 1881, leaving three daughters. Two of these daughters jointly, in 1882, alienated a portion of the property in suit. The third daughter in 1885 alienated the rest of the property in suit. All three daughters are now dead, and the plaintiffs claim that they are entitled to the property as reversionary heirs of Amolak Ram, and that the alienations mentioned are ineffective against them, now that the daughters are dead. The Appeal No. 546 deals with the Original Suit No. 164 of 1923. In that suit the District Judge held that the alienation

of 1882 by *Musammatt Lachhmi* and *Musammatt Barfi* was for necessity. This was a finding of fact, and the appellants have not been able to show that it was based on any mistake of law. Their suit, therefore, No. 164 must fail, and the appeal fails, in my opinion, on the ground that the question is concluded by a finding of fact. I may mention that it was in this suit that the question of the suit being barred under O. II, r. 2 arose. It does not seem to me necessary to decide this point, but if it had been necessary I would have concurred with the view of my learned brother.

As regards the Appeal No. 545, which is in respect of Suit No. 131, it was necessary for the plaintiffs to prove that, on the death of the last of the three daughters of *Musammatt Bir Kunwar*, they were entitled to the estate of *Amolak Ram*. One amongst other pleas taken by the defendant was that *Amolak Ram* having been a Jain, and this property being his self-acquired property, his widow *Musammatt Bir Kunwar* got an absolute estate in that property by Jain custom. Both the lower Courts have found that the custom was proved, and the extent of the custom as found by the trial Court was this. The custom gave the widow absolute right to transfer the property derived from her husband in her lifetime, but, on the other hand, if not transferred, the property would descend as the estate of her husband and not as the *stridhan* of the widow. The lower Appellate Court accepted this view. It went on, however, to hold that the widow had made a Will conferring an absolute estate on her three daughters. I concur with my learned brother that there was no evidence by which the making of an oral Will, by *Musammatt Bir Kunwar* or the terms of such oral Will if one was made, could be held proved. The document relied upon was the award of an arbitrator, who was appointed by the three daughters of *Musammatt Bir Kunwar* to settle their *inter se* claims on the assumption of a Will. The arbitrator said in his award that he had ascertained by inquiry the terms of the Will. Now if the arbitrator had been alive and had come into Court, it appears to me that his evidence would have been inadmissible as mere hearsay evidence. I cannot think, that, because this hearsay evidence has been expressed by him in an old document it ceases to have to be

regarded as mere hearsay evidence. There are only two questions with which I consider it now necessary to deal in this appeal. One is whether under Jain custom *Musammatt Bir Kunwar* inherited this property as her *stridhan* or whether, for the purposes of succession to her, she must be regarded as only having had a widow's estate notwithstanding that according to the Jain custom she could, before her death, have disposed of it as she liked.

The contention of the appellants is that *Mitakshara* Law makes no distinction between property of which a woman can dispose as she likes and *stridhan* property. It considers the two expressions synonymous. For the respondents it is maintained that it is possible for a widow to have a widow's estate in her husband's property and yet, by reason of a custom such as the one now set up, to have a right of absolute disposal during her lifetime. It is pointed out that, according to the Bombay School, property inherited by a woman from a male may be, if inherited in one way, her *stridhan* and if in another way, not her *stridhan*. Reference is made to *Mulla's Hindu Law*, 5th Edition, page 134. The following decisions have been invoked in favour of each contention, e. g., *Debi Mangal Prasad Singh v. Mahadeo Prasad Singh* (1), *Sheo Shankar Lal v. Devi Sahai* (2) and *Lakshmi Narain Misr v. Sumarni Kuar* (3).

It appears to me that the matter has to be looked at in the following way. The family in question, though a Jain family, was governed by the *Mitakshara* Law except so far as that law was varied by custom. In order to find out the custom set up we must refer to the Privy Council decision in *Sheo Singh Rai v. Dakho* (4). In this decision is set forth at length the evidence on which their Lordships came to the conclusion that the custom now set up was established. On page 700* a representative body of the leading members of the Jain community expressed the opinion

(1) 14 Ind. Cas. 1000; 34 A. 231; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 314; 22 M. L. J. 462; 39 I. A. 121 (P. O.).

(2) 25 A. 468; 7 C. W. N. 831; 5 Bom. L. R. 828; 13 M. L. J. 330; 30 I. A. 202; 3 Sar. P. O. J. 465 (P. O.).

(3) 79 Ind. Cas. 383; 46 A. 439; A. I. R. 1924 All. 731; L. R. 5 A. 312 Civ.

(4) 1 A. 688; 2 C. L. R. 193; 5 I. A. 87; 3 Sar. P. O. J. 807; 3 Suth. P. O. J. 529; 2 Ind. Jur. 396; 1 Ind. Dec. (N. S.) 481 (P. O.).

ion that, in the absence of any son, a Jain widow succeeds to the estate of her husband, moveable and immoveable, in absolute right, (ii) that she can deal with it at pleasure and without restriction and (iii) that she can adopt her daughter's son without the authority of her husband, and that such adopted son would succeed to her deceased husband's estate. The last five words "to her deceased husband's estate" appear to me to be merely descriptive and cannot be invoked to mean that the investigators of the custom considered that the widow would hold the property as her husband's estate. Even if they could be construed as having this meaning, they would merely represent an incidental and not authoritative view, it being no duty of the investigators to determine the implication of the facts they ascertained. On the other hand, in this statement of the custom, a distinction was made between the finding that the widow succeeded in absolute right and the finding that she could deal with the estate at pleasure and without restriction. I should deem the first finding as meaning that the property was taken by her as her *stridhan*. Apart from this, whatever distinction other Schools may make between property with which the widow can deal at her will and property which is her *stridhan*, because the property comes to her in various ways, I am not able to hold, after considering the various decisions brought to my notice, that according to the Mitakshara School any distinction is made between the word '*stridhan*' and the expression 'property that the widow can deal with at pleasure.' The fact that other schools make such a distinction will not affect a consideration of the law according to the Mitakshara School. The *dictum* in various text-books and decisions as to Mitakshara Law "that inherited property is never *stridhan*" is inapplicable to that law when overlaid by a Jain custom such as the one in question, no such custom being in contemplation of these authorities, when expressing the *dictum*. Consequently, when a custom is proved as affecting persons otherwise subject to the Mitakshara School and that custom is said to confer on the widow a right to deal with property at her will, I consider that this must mean that the property is her *stridhan* and will devolve as her *stridhan*. In this view of the case, it is

admitted that the plaintiffs can have no present right in the property. On the death of Musammam Bir Kunwar the property passed to her daughters, and on the death of the last of them it would pass to her grand daughters and not to her grand-sons.

It is said, however, that we are bound by the Privy Council decision reported as *Sheo Shankar Lal v. Devi Sahai* (2) and that that decision decides that under the ordinary rule of inheritance the grandson of a woman holding property as her *stridhan* will succeed in preference to her grand-daughter. Whether this is so, is the second question with which I have to deal. I consider that for the reasons stated in *Ram Kali v. Gopal Dei* (5) the Privy Council decision need not be held to lay down the law on this subject. A reference to the Privy Council decision relied upon will show that their Lordships only considered one question of law. This question they have propounded at pages 468 and 469* in the following words:—

"This involved the question of law, whether according to Benares Law, by which the family was governed, the property on the death of Jagarnath descended as *stridhan* and went to her daughter, or whether it lost its character of *stridhan* and descended according to the ordinary rule of inheritance to her sons the plaintiffs."

It is obvious that the legal question arising might have been equally well stated even if the words "to her sons, the plaintiffs", had been omitted. They were added on the obvious assumption that this was the law. The respondents in that case were not represented, and thus had no opportunity of questioning the proposition involved. Nor does it appear that at any stage of the suit was an issue framed on the matter. If it was, there was no appeal on this issue. The assumption of a certain view of law in a judgment of the Privy Council for the purpose of deciding another question cannot, in my opinion, be regarded as a binding decision. It has even less force than an *obiter dictum*; for it is not necessary to prove or decide what is admitted.

For the above reasons, I would concur with my learned brother in dismissing Appeal No. 546, but on the other hand I

(5) 96 Ind. Cas. 757; 24 A. L. J. 742 at p. 745; A. L. J. 1926 All. 557; 48 A. 648.

*Pages of 25 A.—[Ed.]

do not concur in allowing Appeal No. 545. I would dismiss that appeal also in concurrence with the District Judge but on a different ground.

Walsh, J. concurred.

By the Court.—Appeals Nos. 545 and 546 of 1925 are dismissed with costs.

A. N. A.

Appeals dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1336 OF 1925.

June 28, 1927.

Present:—Mr. Justice Mukerji and Mr. Justice Ashworth.

SIDH GOPAL—DEFENDANT—APPELLANT
versus

BEHARI LAL—PLAINTIFF—RESPONDENT.

Family arrangement—Existence of claims believed to be true, whether necessary—'Bona fide dispute,' meaning of.

The only requisite required to make a family arrangement valid is that it should be a transaction between members of the same family which is for the benefit of the family generally, as, for example, one which tends to the preservation of the family property, to the peace or security of the family and the avoiding of family disputes and litigation, or to the saving of the honour of the family. [p. 248, col. 1.]

It is not necessary that the claim by each party to the settlement must be a claim which that party believes to be justified upon facts and law. [*ibid.*]

The expression 'bona fide dispute' used in this connection means nothing more than that each party must intend to press his claim to the property by litigation or otherwise. [*ibid.*]

Second appeal from a decree of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, Allahabad, reversing that of the Munsif, West Allahabad.

Messrs. A. P. Dube, Ambika Prasad and B. B. Chandra, for the Appellant.

Mr. Rama Kant Malaviya, for the Respondent.

JUDGMENT.

Ashworth, J.—This second appeal arises out of a suit brought by the plaintiff-respondent, Behari Lal, against the defendant-appellant, Sidh Gopal, for recovery of a certain half share in *zemindari* property. The plaintiff was admittedly in possession of the other half share. There were three brothers Behari Lal, the plaintiff, Nandkishore and Hargobind. Nand Kishore is the father of the defendant Sidh Gopal. He died 30 years ago. Hargobind

died only four years ago, and it is the share of the *zemindari* property which he enjoyed during his lifetime that is the subject-matter of the present suit. The plaintiff Behari Lal's case is that Hargobind died separate from the others, and that he, as Hargobind's brother, has a preferential right to the property over his nephew Sidh Gopal. The defence of Sidh Gopal is that the deceased Hargobind and his father (afterwards himself) were joint and that Behari Lal was separate. This plea was rejected by both the lower Courts, and we are precluded by this finding of fact from considering it. Sidh Gopal also pleaded a family arrangement between himself and Behari Lal arrived at the time of Hargobind's death, whereby it was agreed that they should each take a moiety of Hargobind's property. The trial Court found in favour of this alleged settlement. The lower Appellate Court has found against it. The question in this appeal is whether the finding of the lower Appellate Court was a correct one.

The lower Appellate Court has found that on Hargobind's death Behari Lal was claiming the whole of Hargobind's fractional share and Sidh Gopal was also claiming the whole of it. It found that Sidh Gopal had in law no title whatever as the evidence clearly showed that he was separate, from Hargobind. It found, however, that the parties were advised by their community to settle the matter, and agreed to take the property of Hargobind half and half. In pursuance of this agreement they put in an application to the Revenue Court that they should be entered jointly in the revenue papers. The lower Appellate Court was of the opinion that this would have been a family settlement if there had been a *bona fide* dispute and a *bona fide* settlement. It held, however, that there was no *bona fide* dispute because *bona fide* dispute implies a *bona fide* claim by each party, and Sidh Gopal could have no belief in the validity of his claim. It, therefore, refused to acknowledge the settlement as a binding family settlement, and decreed the suit.

In appeal the appellant Sidh Gopal argues that the lower Appellate Court was wrong in considering it necessary that Sidh Gopal's claim should have been based on some valid ground. His Counsel urges that it is sufficient to say that there was

dispute between the parties and that each party was determined to press his claim whatever its merits. With this reasoning I am disposed to agree. The learned Counsel for the respondent has taken the following grounds upholding the decision of the lower Appellate Court. His first ground is that the fact of any agreement is merely based on an application to the Revenue Court, and that application merely asked for the names of both parties to be entered jointly inasmuch as both parties were legal representatives of the deceased. There is no authority for holding that an application to a Revenue Court cannot be good evidence of a preceding settlement. The Privy Council case of *Chokhey Singh v. Jote Singh* (1) was merely authority for holding that a particular application in a particular case was not sufficient proof of any preceding compromise. In the present case the lower Appellate Court has relied not only on the application to the Revenue Court for mutation, but also on the oral evidence and on the surrounding circumstances. I consider that there was material on which the lower Appellate Court could come to the finding that there had been a compromise before mutation, and that in second appeal it is not open to us to set aside this finding. A second point taken was that the evidence of a family arrangement did not disclose any sufficiently precise settlement to justify effect being given to it. It is pointed out that the application to the mutation Court did not specify the shares of the parties, but only asked for an entry that they hold jointly. This application, however, to the Revenue Court had to be read in the light of the previous history of the property and in the light of surrounding circumstances. It could also be read in the light of the oral evidence produced in this Court which was believed by the lower Court. So read, there can be no question that, if there was a compromise at all, it was a compromise that the parties should hold the property of Hargobind in equal moieties. The next point taken up is this. It is said that for a family settlement to be recognised as such there must be a *bona fide* dispute between the parties, and this is interpreted by Counsel to mean that the dispute must

arise out of a *bona fide* claim raised by each party. In this case he urges that the Court below has come to a finding that Sidh Gopal could have had no real belief in the validity of his claim. Consequently his claim was not *bona fide* and could not give rise to a *bona fide* dispute or to a *bona fide* settlement. The expression "*bona fide* dispute" has been used in many decisions as requisite for a family settlement. In my opinion it means nothing more than that each party must intend to press his claim to the property. The word "*bona fide*" indeed will have no meaning except when one of the parties to the dispute is a trustee or qualified owner. In such a case, the trustee or the qualified owner cannot defend a transfer of the property, made to defeat the interest of his beneficiary or a person for whom he stands, by merely alleging that another member of the family claimed the property and that there was a dispute. In such a case, there is really no dispute. The expression "*bona fide*" is not applicable to a case where each party is contending for an advantage to himself in his own right. Every decision relied upon by Counsel for the contention that the dispute must be a *bona fide* dispute deals with a case where one of the parties was a Hindu female with qualified ownership. Nor again do I hold that the claim by each party to the settlement must be a claim which that party believes to be justified both upon facts and law. It is sufficient to point out that there might be an illegitimate son, who as such could have no title to the property and who was not likely to be able to produce evidence to prove his legitimacy. Supposing he claimed to be legitimate and threatened to litigate. If the rest of the family came to an arrangement with him, it could not be said that this failed to be a family arrangement. In other words I would construe a *bona fide* claim merely as a claim which the person making it intended to press by litigation or otherwise. The only requisite required to make valid a family arrangement is that it should be "a transaction between members of the same family which is for the benefit of the family generally, as, for example, one which tends to the preservation of the family property, to the peace or security of the family and the avoiding of family disputes and litigation, or to the saving of the honour of the family" (see the definition of "family

(1) 1 Ind. Cas. 166; 31 A. 73; 11 Bom. L. R. 69; 13 G. W. N. 274; 6 A. L. J. 100; 9 O. L. J. 151; 5 M. L. J. 167; 19 M. L. J. 123; 36 I. A. 38; 12 O. C. 288 (P. O.).

arrangement" in Halsbury's Laws of England, Volume XIV, page 540). In this case it is clear that the community considered that the uncle and nephew should not fight over the matter. There can be no doubt that this arrangement was accepted by Behari Lal for the purpose of avoiding litigation and he cannot be permitted to go back on the arrangement.

For the above reasons, I hold that the lower Court was wrong in finding that this settlement was not valid as a family settlement and prefer the reasoning of the trial Court. I would allow this appeal, and restore the decree of the trial Court.

Mukerji, J.—I agree with my learned brother that the decree of the lower Court should be set aside and the decree of the Court of first instance dismissing the respondent's suit should be restored.

The facts found are very simple. A person died leaving a brother and a nephew. If the deceased person was separate from his relations, the brother would succeed and not the nephew. If the nephew and the deceased were joint, the brother would be excluded. There was a claim for the deceased's property both by the brother and the nephew. The castemen decided that in order to avoid litigation the parties should divide the property equally amongst themselves. Accordingly an application was put before the Revenue Court stating that the names of the claimants should be put down as the heirs of the deceased person. This entry continued for four years. On foot of this entry the plaintiff, the brother of the deceased person, brought two suits for recovery of profits against the defendant. It is clear then that there was a dispute between two male persons about the heirship of the deceased person. That dispute was settled at the instance of castemen in a particular way.

The settlement arrived at was given effect to at the instance of the claimants in the revenue papers, and the plaintiff in this case brought suits for profits in pursuance of that agreement. The question then is whether after all this has happened, the settlement of dispute is to be set aside merely on the ground that there was no "bona fide claim" on the part of defendant, and the settlement of the dispute was of no consequence. I am not prepared to say that any such contention should prevail.

Cases after cases have been quoted before us. It is enough to say that each case was decided on its own peculiar facts. Where parties are *sui juris* and understand their own interest, where each party is prepared to press his claim and where these parties, in order to avoid a litigation, come to an arrangement, I fail to see why that arrangement should not hold good. It is a contract which has been entered into for consideration and it should be binding on the parties. For these short reasons I would hold that the plaintiff's suit was rightly dismissed.

By the Court.—The appeal is allowed with costs, the decree of the Court below is set aside and the decree of the Court of first instance restored with costs throughout.

A. N. A.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 51 of 1925.

November 17, 1927.

Present:—Mr. Justice Sulaiman and
Mr. Justice Ashworth.NAJAF ALI KHAN—DEFENDANT—
APPELLANT

versus

MUHAMMAD FAZAL ALI KHAN AND
OTHERS—PLAINTIFFS AND NARAIN DASS
alias RAMDAYAL—DEFENDANTS—

RESPONDENTS.

Landlord and tenant—Zarpeshgi lease—Instalment bond for lease money—Bond, whether mere security or extinguishes liability under lease—Tests—Intention—Contract Act (IX of 1872), s. 74—Provision to pay high rate of interest on default of instalment—Penalty.

Where a lease is executed and simultaneously, or as part of the same transaction, the lessee purports to pay in advance the lease money by executing a bond making himself liable to pay the lease money in certain instalments, the question, whether the bond is executed as a mere security for the due payment of the lease money or whether it entirely puts an end to the liability of the lessee under the lease, depends on the intention of the parties as indicated by the documents and by the surrounding circumstances. [p. 250, col. 2.]

Where there is no liability to pay interest till default is made, but a high rate of interest is stipulated to become payable on default of payment

of an instalment, the stipulation is in the nature of a penalty within the meaning of s. 74 of the Contract Act. [p. 251, col. 2.]

Avuthani Muthukrishnair v. Shankaralingam Pillai (2) and *Khagaram Das v. Ram Sankar Das Pramanik* (3), relied on.

First appeal from a decision of the Subordinate Judge of Bulandshahar, dated the 4th November, 1924.

Messrs. S. K. Dar and Aziz, for the Appellant.

Dr. K. N. Katju, Messrs. Pearey Lal and Umashankar Bajpai, for the Respondents.

JUDGMENT.

Ashworth, J.—This appeal arises from a suit brought by the plaintiff-respondents against the defendant-appellant on the basis of a bond dated the 23rd January, 1917.

On one and the same day the defendant Najafali Khan signed what purports to be a *zarpeshgi* lease in his favour executed by Narain Das, defendant second party in respect of the *zemindari* rights in certain land. The lease I construe to be a lease of the property in consideration of the execution by the lessee of the bond now sued upon. The bond has not been printed, but both the lease and the bond show that the transaction effected by both the deeds was that the lessee was regarded as having discharged before occupation the total rent due for the whole period of occupation by means of his execution of the bond now sued upon. That bond has not been printed, but was consistent with this interpretation. The lower Court was asked to hold that the two documents in effect, resulted merely in a lease, and not a *zarpeshgi* or advance lease but one requiring lease money in the instalments and on the date fixed by the bond. In other words, it was asked to hold that the effect of the bond was merely to supply the instalments and dates on which the lease money was to be paid which details have been omitted from the lease. It was asked to hold this because the defendant's contention was that he could not be required to pay the lease money since he had lost possession of the leased property by the action or at any rate with the connivance of the plaintiffs. Alternatively it was asked to hold that the rate of interest imposed on failure by the defendant Najafali Khan to pay up any instalment was penal being $3\frac{1}{2}$ percent per month compound interest.

The subordinate Judge repelled both these contentions. He held that the execution of the bond by the defendant was intended to discharge his liability to pay lease money in advance as recorded in the lease. He held that the rate of interest was not exceptional in the District and gave no cause for interference by the Court. He did not specifically consider whether the rate could be required as a penalty or not.

In this appeal both decisions of the lower Court are impugned. As regards the first point, I hold that the lower Court was right. Where a lease is executed and simultaneously or as part of the same transaction the lessee purports to pay in advance the lease money by executing a bond making himself liable to pay the lease money (calculated in advance) in certain instalments the question to be decided is what was the intention of the parties as indicated by the two documents. That intention may be that the bond should only be security for the payment of the lease money. The intention may be that on discharge of the bond the lessee should cease to be liable for lease money that is to say that discharge of liability under the lease is conditional on discharge of the terms of the bond. Lastly it may be that bond entirely puts an end to any liability of the lessee under the lease. In the present case the last named intention appears to me to be abundantly clear from the terms of the documents. It is sufficient to quote the words in the lease printed on page 22 of the printed book: "I have received Rs. 2,250 the amount of the *zarpeshgi* lease aforesaid under a bond of to-day's date executed by Najafali Khan in my favour." We may also invoke for interpreting this document the attending circumstances that is to say the existing facts including the state of the law. If the liability of the lessee were to remain one merely of a lessee and not of a debtor, under a bond, the rate of interest that could have been obtained by suit would have been limited to 12 per cent. per annum, see s. 151 of the *Agre Tenancy Act*, 1901, read with the definition of "tenant" which includes a *thekadar*. At least this may well have been the idea of the lessor Narain Das. That being so we can well understand why he should wish to substitute liability in his favour of a debtor under a bond for the

liability of a lessee under a lease. Nor would such an arrangement, if assented to by the lessee, amount to an evasion of the Tenancy Act which should not be allowed as contrary to public policy. It is only in the case of a lessee or tenant that the rate is restricted by the Tenancy Act. If that tenant likes to substitute a liability under a bond the Tenancy Act cannot be held to protect him.

The meaning of these documents as interpreted by surrounding circumstances being clear I hold that we are not entitled to resort to the subsequent conduct of the parties for the elucidation of the meaning of these documents. The appellant's Counsel cannot, therefore, invoke as he would like to do a subsequent suit brought by the lessor Naraindas in respect of the first instalment under the bond wherein he described the bond as merely by way of security for the payment of the lease money. I accordingly hold that the lower Court was right on this point.

As to the second question whether the Court could and should have reduced the interest the first question to decide is whether the provision for payment of interest was penal. It seems unnecessary to me to refer to the numerous decisions in favour of its being penal. It is sufficient to refer to one of them, namely, *Sundar Koer v. Rai Sham Krishen* (1) and to say that a similar view has been taken by the Bombay and Madras High Courts. There is no recent decision of our Court on the point of which I am aware. It was held in the Calcutta case that the imposition of interest on default of the payment of an instalment even though that interest is only to be reckoned from the date of the failure, nevertheless must be regarded as penal, because it does provide for a further obligation on the part of the debtor, by reason of his failure to fulfil his contract to pay the instalment on the prescribed date. With this reasoning, I concur. A penalty is something imposed on a person by reason of his failure to do something, and it can make no difference whether that something is the payment of interest or any other obligation, giving rise to pecuniary loss. I am not aware that the Privy Council has anywhere expressed a contrary

view. Doubtless it has expressed the view that the imposition of an excessive rate of interest by itself cannot justify a finding of undue influence under ss. 16 and 19 (a) of the Contract Act. But it has never held so far as it has been brought to our notice, that the imposition of such interest cannot be regarded as a penalty.

The next question is whether this interest should be reduced under s. 74 of the Contract Act. Having regard to the fact that 37 per cent. is a very high rate, in our opinion, and that the object of the person requiring it was to evade restriction of interest by the Tenancy Act to 12 per cent. I consider that this is a case where the Court may interfere and would reduce the interest to interest at 12 per cent. per annum. I see no reason for refusing compound interest.

For the above reasons, I would allow this appeal in part and give a decree on the bond sued upon for the principal with 12 per cent. compound interest in lieu of the contract rate. I would allow costs of this appeal and of the lower Court according to success and failure.

Sulaiman, J.—I concur in the order proposed. Having regard to the stipulations contained in the lease and in the bond, it is clear that the intention was to make the defendant-appellant liable under the bond for the payment of the instalments and to give to Narain Das respondent the right to recover the amount through the Civil Court.

I agree that where a high rate of interest is stipulated to become payable only on default of payment of an instalment, the stipulation is in the nature of a penalty within the meaning of s. 74 of the Contract Act. There is no liability to pay interest until default is made, and, therefore, the liability is a punishment for the breach. The explanation to the section indicates that where there is an increase of rate of interest on default of payment the stipulation may be penal. On the same principle, when no interest is payable originally and some interest becomes payable only on default, the agreement would be penal. There is plenty of authority in support of this view, *vide Avathani Muthukrishniah v. Sankaralingam*

(1) 34 C. 150; 34 I. A. 9; 11 C. W. N. 249; 5 C. L. J. 106; 4 A. L. T. 109; 9 Bom. L. R. 304; 17 M. L. J. 43; 2 M. L. T. 75 (P. C.)

Pillai (2) and *Khagaram Das v. Ram Sankar Das Pramanik* (3).

I also agree that the rate of interest fixed was exorbitantly high.

By the Court.—The appeal is allowed in part and the claim decreed for the principal with interest at 12 per cent. per annum compounded annually upto the date of the suit, and thereafter at 6 per cent. per annum simple till realization. The parties are to receive and pay costs in both Courts according to success and failure. The costs in this Court will include fees on the higher scale.

A. N. A. *Appeal allowed in part.*

(2) 18 Ind. Cas. 417; 36 M. 229; 13 M. L. T. 20; 24 M. L. J. 135.

(3) 27 Ind. Cas. 815; 42 C. 652; 21 C. L. J. 79; 19 C. W. N. 775.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 489 OF 1924.

November 29, 1927.

Present:—Mr. Justice Sulaiman
and Mr. Justice Kendall.

Goshain SHEO GHULAM PURI—

PLAINTIFF—APPELLANT

versus

*SHIAM LAL BHAGAT—*DEFENDANT

—RESPONDENT.

Religious institutions—Dasnami Goshains—Succession to private property—Devolution of property in spiritual line, whether raises presumption that property belongs to institution.

In the case of a *mahant* belonging to an order the members of which have to sever their relationship altogether with their natural family, the mere circumstance that certain properties have for several generations devolved in the spiritual line does not lead to any presumption that the properties are trust properties and not the private properties of the *mahant*. [p. 253, col. 2.]

Indar Singh v. Fateh Singh (2), distinguished.

First appeal from the decision of the Additional Subordinate Judge, Ghazipurat Ballia, dated the 26th September, 1924.

Dr. Sen, Messrs. B. Malick and Ajudhia-nath, for the Appellant.

Mr. A. P. Pantley, for the Respondent.

JUDGMENT.—First Appeals Nos. 489 of 1924 and 141 of 1925 arise out of two distinct suits which were tried together. The plaintiff in both the suits claimed to be the disciple and the spiritual successor of

the late Goshain Rup Puri who was the *mahant* of the *math* of Sawdhari Puri. His case is that the deceased under two sale deeds, dated the 21st of October, 1919, and the 13th of January, 1922, transferred the property in dispute in these cases to the contesting defendant and his wife in order to pay off certain amounts due to previous mortgagees, that these properties were part of the *math* property and there was no legal necessity for their transfer. The defendant contested the claim by denying that the plaintiff was the *chela* of the deceased and denying that the property was trust property. There was also a plea that there was legal necessity for the alienation.

The learned Subordinate Judge has found most of the issues in favour of the plaintiff. He has held that it has been proved that the plaintiff is the lawful *chela* of the deceased Goshain, that the sale was for consideration and without any legal necessity and that there was no force in the defendant's plea that the suit was barred by s. 42 of the Specific Relief Act. He has, however, held that it is not shown that the property belonged to the *math* or appertained to it and that it was the trust property which the deceased could not transfer. On these findings he has dismissed both the suits.

The main point before us is whether the properties covered by the sale deeds were part of the trust property belonging to the *math*. There was some oral evidence led in the Court below consisting of statements of witnesses based mainly on hearsay to the effect that these properties belonged to the *math*. The first witness was plaintiff Sheo Ghulam Puri himself who was an interested party. The second witness Ram Subhag Singh was a person of ordinary status, a cultivator in the village, whose deposition did not show that he had any intimate knowledge of the previous history of this estate. Similarly Debi Dayal Tewari's statement also appears to have been based on what he might have heard in the village about the origin of these properties. The same remarks apply to the evidence of Dipa Singh, another cultivator. One of the defendant's witnesses Jagannath Misir was a previous mortgagee of some of the properties and those properties have to be taken out of his possession by redemption. His statement also appears to have been based on

a mere opinion. The learned Subordinate Judge who heard these witnesses did not believe that their evidence satisfactorily established that the properties were trust properties. Having examined that evidence we agree that it is not possible to place implicit reliance on the evidence of these witnesses and hold that by their statements they have established that these properties were trust properties.

The learned Advocate for the appellant has next contended that having regard to the fact that these properties have descended from *guru* to *chela* for several generations and that it is found that there is some nucleus of trust property, it should be presumed that the succession in the spiritual line took place because these properties were trust properties.

The *mahants* of this *math* are Puris and belong to one of the Dasnami Goshains and order founded by the famous Shankaracharya. As pointed out in the case of *Ramdhan Puri v. Dalmir Puri* (1) before a person is taken into this order finally a number of ceremonies are performed, e.g. the taking off of *janeo*, the cutting off of his *chotia* (tuft of hair) and his performing his own *saradh*. All these indicate that his connection with his natural family and the secular life is altogether severed, and he belongs completely to this order. This would suggest that after he has been taken into the order finally no tie of relationship remains between him and his natural relations, and neither can succeed to the private property of the other. No authority has been cited before us to show that the private property which a *mahant* of this order might acquire can descend to his natural relations in preference to his spiritual *chelas*. *Prima facie*, one would imagine that the devolution of both the trust property and the private property would be in the spiritual line. It cannot be doubted that the rules of succession and devolution prevailing in a particular *math* are governed by particular customs applicable to it. It cannot be denied that a *mahant* might acquire private property with his own money, but such property also could not be inherited by the members of his natural family. In this view of the matter there is no significance attached to the mere

circumstance that the devolution of these properties has for several generations been in the spiritual line. Great reliance has been placed by Dr. Sen on the case of *Indar Singh v. Fateh Singh* (2). But it was assumed in that case that there could be devolution on the natural heirs and it was then held that when it was shown that property had descended from one *mahant* to another to the exclusion of the natural heirs there was a presumption that the property was trust property. In this particular case we are unable to hold either on the evidence or any authority that even the private property of any *mahant* could have been inherited by his natural heirs.

On the one hand, we have the circumstance that these properties were in the possession of persons who were the *mahants* of this *math*, on the other, we have the undoubted fact that between the years 1874 and 1922 there had been various transfers in the form of usufructuary mortgages made by the spiritual great grandfather, grandfather and the father of the present plaintiff. These *mahants* had been treating these properties as their own properties as if over them they had full disposing power. In the sale-deeds which are disputed in this case, Rup Puri asserted that these properties belonged to him and he was competent to transfer them. We have, therefore, the assertions of private ownership made by these *mahants* for so long a period, and we also have their course of conduct during all this time. In the absence of any evidence to the contrary it must be assumed that they were dealing with properties which belonged to them as owners. There is no presumption that they were trust properties and the plaintiff has, therefore, failed to prove that they were part of the trust properties belonging to the *math*. We accordingly dismiss these appeals with costs including fees in this Court on the higher scale.

A. N. A.

Appeals dismissed.

(2) 59 Ind. Cas. 734; 1 Lah. 540; 64 P. W. R. 1920; 49 P. L. R. 1921.

(1) Ind. Cas. 335; 14 C. W. N. 191.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 271 CF 1924.

November 8, 1927.

Present :—Mr. Justice Sulaiman
and Mr. Justice Ashworth.KIRTARATH RAI AND OTHERS—DEFEND-
ANTS—APPELLANTS
versusSRIPAT RAI AND OTHERS—PLAINTIFFS AND
RAM SURAT RAI *alias* SURAT RAI—
DEFENDANTS—RESPONDENTS.*Specific Relief Act (I of 1877), s. 27—Specific performance against subsequent transferee for value—Burden of proof of want of notice—Practice—Evidence adduced on both sides—Question of onus of proof immaterial.*

Per Ashworth, J.—Where a plaintiff is seeking to take advantage of s. 27 of the Specific Relief Act, it is for him to show that he is entitled under every word of that section to the relief claimed. [p. 256, col. 1.]

Where a person has to prove that notice has been given to another person, the mere fact that the transaction in question might have been known to a considerable number of people will not amount to the necessary proof. [*ibid.*]

Per Sulaiman, J.—In a suit to enforce specific performance against a transferee for value, the burden of proving want of notice in the first instance lies on the defendant transferee. But, as he can do this by merely denying the fact on oath, the question of burden of proof loses much of its importance. [p. 256, col. 2.]

The question of burden of proof is merely one of procedure and where both parties have led evidence the question loses all its importance. [*ibid.*]

First appeal from a decision of the Subordinate Judge, Ghazipur, dated the 25th April, 1924.

Dr. Sen, Messrs. Umashanker Bajpai and A. P. Pandey, for the Appellants.

Mr. Kamlakant, for the Respondents.

JUDGMENT.

Ashworth, J.—This appeal arises out of a suit for specific performance of a contract to sell certain property by the plaintiffs-respondents Sripat Rai and others, the owners of the property.

The suit was brought by the plaintiffs on the allegation that Ramsurat Rai had executed an agreement to sell the property in suit on the 18th of January, 1923. The alleged agreement was that the property would be sold within 10 days for a consideration of Rs. 5,099 set off against previous debts which the vendee would pay at all events and for Rs. 99-15-9 earnest money. There is some contradiction in the terms of this agreement, because in one part it is stated that the whole consideration was Rs. 5,099 whereas reading the deed as a whole it would appear to be Rs. 5,099 plus

Rs. 99-15-9 earnest money. This discrepancy, however, does not appear to me to be of any importance. The plaintiff went on to state that on the 28th of August, 1923, Ramsurat Rai had sold this property and other property to the defendant Kirtirath Rai and others for a cash payment of Rs. 2,500. In this case it appears that the vendees were to take the property with the risk of any encumbrances attaching to it. The reason given in the plaint for the owner of the property selling the property to Kirtirath Rai in spite of having agreed to sell it to the plaintiffs is said to be a desire to cause the plaintiffs and other creditors loss. Although it is difficult to demonstrate positively that the sale to Kirtirath Rai was more valuable to Ramsurat Rai than the sale which the plaintiffs allege was agreed upon by him, on general considerations it is probable that the sale impugned by this suit must have been considered by the vendor more to his advantage. The vendor was at least getting Rs. 2,500 in cash, whereas under the agreement he would only get Rs. 99 in cash. It is true that the property for which he was getting Rs. 2,500 exceeded the property for which he would get Rs. 99 in cash, but it would appear probable that this extra property was encumbered. It is unlikely that the vendor would have acted against his agreement unless he obtained a better price than he could by that agreement.

The suit was resisted on two grounds. One ground was that the agreement was a forgery in the sense that it was never executed by the defendant Ramsurat Rai. He made the usual allegation that he signed a blank paper. The blank paper he said was to have contained a mere bond for Rs. 20 odd. It is obvious that before such a story can be accepted on the part of the defendant there must be very cogent evidence. In this case little reliance has been placed on this plea by the appellants, and I am not disposed to accept it.

The other ground on which the decision of the Subordinate Judge is contested is that the appellant, that is to say, the vendee under the second deed, had no notice of the former deed, and this is the real question in this appeal.

On this point the Subordinate Judge has used the following language in his judgment, "I have no doubt the vendees had knowledge of the agreement when they got the sale-deed executed. The evidence on

the plaintiffs' side shows this. On the other side the statement on this point is that of Raja Ram alone. The burden of want of knowledge lay on the defendants. In my opinion the defendants had knowledge of the agreement with the plaintiff. Now the evidence on which the Subordinate Judge based the remarks is as follows:—The plaintiffs through the mouth of Sakhray Rai, one of them, stated that he was told of the proposed sale to Raja Ram by two persons Maheshwar Rai and Raghunayak, and thereupon took the agreement executed in his favour to Raja Ram and showed it to him. Raja Ram said then that he would not proceed with obtaining the sale-deed. In cross-examination Sakhray said that Raghunayak and Maheshwar gave him the information *severally*, and that there was no third person present on either occasion. He did not remember the date when they told him. Now, ordinarily, I should hold that when a plaintiff suing for specific performance under s. 27 of the Specific Relief Act stated in the proceedings that he had given notice to the defendant vendee it was for that vendee to shake his statement by cross-examination. In this case, however, it appears to me abundantly clear that Sakhray Rai has attempted by his answers to certain preliminary questions in the cross-examination to make it impossible for the vendee to cross-examine effectively on this point. He says that his two informants came separately and no third person was there. He only put up one of these informants as a witness named Maheshwar. He did not remember the date when they told him. His evidence seems to suggest that he straight away went to object to the vendor. It may be assumed, therefore, that the day that he gave notice to the vendor was the same date as that on which he was spoken to by Raghunayak and Maheshwar. He did not remember this date. Every thing seems to have been said by him with a view to exclude cross-examination. In the circumstances I hold that the vendee cannot be prejudiced by not having asked in cross-examination questions to shake the affirmative statement of Sakhray Rai. On the other hand, Raja Ram came into the witness box and denied that he had received notice. It is necessary, however, to point out that it is not only Sakhray Rai who alleged having given notice to the vendee. His witness Maheshwar Rai states that the vendee came to him and asked

him to join him in the purchase, and he refused because he knew of the agreement in favour of the plaintiff. But this witness appears open to the objection that no reason whatever has been shown why he should be requested by the vendee to join him in the purchase. He had to admit in cross-examination that he had not joined Raja Ram in any other transaction, and gave no reason why he should be especially asked to join him in this case. In these circumstances I am of the opinion that the plaintiff's evidence to show notice is of a very unreliable kind and would be sufficiently met by the denial of Raja Ram on oath. I should ordinarily have felt disposed to give considerable weight to the Subordinate Judge's estimate of the evidence inasmuch as he actually heard the witnesses, but the Subordinate Judge has not stated that the demeanour of the witnesses impressed him one way or the other. He seems to have thought that because two persons on behalf of the plaintiffs spoke of notice and only one person on the side of the defendant denied notice, the plaintiff must succeed on the point. This argument is not in any case of much weight but in this particular case, as remarked above, the two persons on behalf of the plaintiffs spoke of totally different proceedings. So neither could be tested against the other by cross-examination. Moreover, one of them is open to the objection that he has by his answers precluded all chance of being shaken in cross-examination and the other one is open to the objection that he alleges an improbable thing, namely, that he was asked to join the vendee in the sale without giving any satisfactory reason, indeed any reason whatsoever, for such an improbability taking place. I would note that the judgment in this case by the Subordinate Judge was recorded a month and a half after the evidence was recorded, and this is an additional reason for my not giving much weight to the apparent impression made on him by the witnesses. The only reason for holding that the witnesses did make an impression on him is that he decided the case in favour of the plaintiffs. But the language in the judgment seems to ascribe this decision to another reason, namely, the fact that two witnesses spoke for the plaintiffs and only one for the defendant, a reason which, I have already answered.

The Counsel for the respondents has addressed to us an argument not adopted by the Subordinate Judge. It is that in a village like the one where this transaction took place the agreement by the vender in favour of the plaintiffs could not have taken place without being known to other persons. The village appears from the Gazetteer to have had over 12,000 inhabitants in 1908. The houses of the respective parties appear to be separated by an arm of the river and the two portions of the village bear different names, one being called the main village and other the small village. In these circumstances little force will attach to this argument. Apart from this, it is quite clear to me that where a person has to prove that notice has been given to another person, the mere fact that the transaction in question might have been known to a considerable number of people will not amount to the necessary proof. It has also been contended by the appellant's Counsel that the Subordinate Judge was quite right in placing the burden of proof on the respondents. There is no doubt considerable authority of the Courts in India is in support of this view. Personally I hold that where a plaintiff is seeking to take advantage of s. 27 of the Specific Relief Act it is for him to show that he is entitled under every word of that section to the relief claimed. In the present case the matter is of no great importance as there has been evidence adduced on both sides and it is not a question of an initial burden of proof.

Taking this view of the case I consider that for me to refuse to dissent from the finding of the lower Court as to notice merely on the ground that the lower Court heard the evidence, would in effect amount to hold that there can be no first appeal on a matter of fact.

For the above reasons I would allow this appeal and dismiss the suit with costs throughout.

Sulaiman, J.—I concur in the conclusion.

As regards the question of burden of proof, it seems to me that under s. 27, sub-cl. (b) of the Specific Relief Act a contract can be enforced not only against a party thereto but also against any other person claiming under him by a title arising subsequently to the contract. There is, however, an exception in favour of a transferee for value who has paid his money

in good faith and without notice of the plaintiffs' contract. From the language of this section it is clear that any person who wishes to bring himself within the exception must in the first instance show that he is entitled to that exception. I expressed the same view in my dissenting judgment in First Appeal No. 183 of 1919, decided on the 25th of May, 1923, where I quoted cases of all the High Courts in support of that view. Out of these I may only refer to the case of *Naubat Rai v. Dhaunkal Singh* (1). Since then these rulings have been followed in several other cases. In this view of the matter it is correct to say that the burden of proving want of notice in the first instance, lies on the defendant transferee. But this he can do by merely denying the fact on oath, and, therefore, the question of burden of proof loses much of its importance.

In this particular case no specific ground has been taken in the memorandum of appeal that the burden was laid on the wrong party. The question of burden of proof is merely one of procedure and it is significant that the plaintiff in the lower Court did not insist on the defendant leading the evidence in the first instance but he himself led evidence to prove the giving of notice. Both parties have, therefore, led evidence before the Court and the question of mere burden of proof has lost almost all its importance. We have to weigh the evidence as it stands and come to conclusion whether the fact of notice has or has not been established.

By the Court.—The appeal is allowed and the plaintiffs' suit stands dismissed with costs throughout.

A N. A.

Appeal allowed.

(1) 32 Ind. Cas. 953; 38 A. 184; 14 A. L. J. 111.

**BOMBAY HIGH COURT.
FULL BENCH.**

SECOND CIVIL APPEAL No. 148 of 1926.

August 26, 1927.

Present:—Sir Amberson Marten, Kt.,
Chief Justice, Mr. Justice Crump and Mr.
Justice Blackwell.

GANPAT TUKARAM MALI—

PLAINTIFF—APPELLANT

versus

SOPANA TUKARAM MALI—DEFENDANT.

—RESPONDENT.

*Negotiable Instruments Act (XXVI of 1881), s. 80—
Promissory note payable on demand—No provision for
interest or place of payment—Maker's liability to pay
interest at 6 per cent. from date of note.*

In a suit brought after demand made on a promissory note payable on demand which is silent as to interest and specifies no place of payment, interest is recoverable under the Negotiable Instruments Act from the maker of the note at six per cent. per annum from the date of the promissory note. [p. 265, col. 1.]

Framroz Eduljee Dinshaw v. Mahomed Essa (1)
and *Bishun Chand v. Audh Bihari Lal (3)*, followed.

Best v. Haji Muhammad Sait (2), dissented from.

Per Marten, C. J.—Section 80 of the Negotiable Instruments Act gives interest as a matter of right in cases to which it applies. [*ibid.*]

Second appeal from the decision of the District Judge, Poona, in Appeal No. 7 of 1925, varying the decree of the Joint Second Class Subordinate Judge at Poona, in Civil Suit No. 1006 of 1923.

The case came on for hearing before Marten, C. J., and Crump, J., and their Lordships made the following

**ORDER OF REFERENCE TO A
FULL BENCH.**

Marten, C. J.—This second appeal raises a short but important point, *viz.*, whether in a promissory note payable on demand but not at a specified place interest can be awarded under s. 80 of the Negotiable Instruments Act from the date of the promissory note, or only from the date of actual demand or else from the date of suit. The trial Court awarded interest from the date of the promissory note. The lower Appellate Court varied that decision and awarded interest from the date of actual demand. The plaintiff appeals. The respondent does not appear.

The promissory note itself is dated September 8, 1920, whereby the promisee promised to re-pay Rs. 2,600 "whenever you demand either in this country or in any other country." It was executed apparently at Bombay where the promisee resides. Nothing was said in the instrument about

interest. We hold that on the true construction of this note there is no specified place of payment within the meaning of ss. 64 and 69 of the Act. A specific demand for payment was made on July 4, 1923. The suit was brought about September 4, 1923.

Turning next to s. 80, that section, as modified by s. 2 of Act XXX of 1926, runs:—

"When no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of six per centum per annum from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs."

The question then is what is the date at which the suit promissory note "ought to have been paid" by the defendant within the meaning of s. 80. In this respect s. 80 may be contrasted with s. 79 which provides:—

"When interest at a specified rate is expressly made payable on a promissory note or Bill of Exchange, interest shall be calculated at the rate specified, on the amount of the principal money due thereon, from the date of the instrument, until tender or realization of such amount, or until such date after the institution of a suit to recover such amount as the Court directs."

There is, therefore, a contrast, as pointed out by my brother Crump, in the wording of these two sections, s. 80 providing for interest from the date when the money ought to have been paid, and s. 79 from the date of the instrument itself.

Mr. B. G. Rao who has assisted the Court by bringing several authorities to our attention, whether they tell in his favour or against him, naturally relies on *Framroz Eduljee Dinshaw v. Mahomed Essa (1)*, where Sir Norman MacLeod and Mr. Justice Coyajee held that in such a case interest is payable from the date of the instrument. They expressly differed from *Best v. Haji Muhammad Sait (2)*, where a Division Bench of that Court held the

(1) 94 Ind. Cas. 21; 50 B. 266; 28 Bom. L. R. 141;
A. I. R. 1926 Bom. 241.

(2) 23 M. 18; 8 Ind. Dec. (N. S.) 407

contrary. There is another authority in *Bishun Chand v. Audh Bihari Lal* (3), where Mr. Justice Mullick and Mr. Justice Atkinson held, in a judgment delivered by the latter, that interest ran from the date of the instrument. We were also referred to *Brojendro Kissore v. Hindustan Co-operative Insurance Society* (4), where Sir Lancelot Sanderson in a case on limitation held that time ran from the date of the instrument. A further authority was cited, viz., *D. N. Shaha & Co. v. Bengal National Bank, Ltd.* (5), a decision of Mr. Justice Mookerjee, with respect to s. 9 of the Act on an overdue bill. Reference was also made to some observations by their Lordships of the Privy Council in *Ameer-con-nissa v. Moorad-con-nissa* (6), showing that in certain classes of cases a demand may be necessary and in others not.

Now if I may be excused for any charge of egotism, it so happens that this particular point is one which has frequently come before me on the Original Side and for which I have been awaiting an opportunity for many years to have argued and finally settled. It came before me in a case *Mathuradas v. Maganlal*, Original Civil Jurisdiction Suit No. 1848 of 1919, on October 11, 1919. I then made an examination as best I could of the available authorities, and the uncorrected notes of my judgment should, I think, be kept and be available to the present parties for assistance in argument. I then came to the conclusion (which of course will be open to revision) that as far as English Law was concerned, it was clearly settled by two different lines of authorities: (1) that in the case of a promissory note payable on demand interest runs from the date of demand, or if no demand is made, from the date of the writ or its service; and (2), that as a promissory note payable on demand is payable at once, the Statute of Limitations runs from the date of the note and no demand is necessary before action is brought. I there referred, *inter alia*, to *Norton v. Ellam* (7), *In re George Francis*

v. Bruce (8); *In re Brown's Estate*, *Brown v. Brown* (9) and *Edwards v. Walters* (10) as showing that a demand prior to writ is not essential; that the writ itself is a demand; and that the note itself matures as soon as it is made and delivered to the payee. *Norton v. Ellam* (7) is cited by Sir Lancelot Sanderson in his judgment in *Brojendro's case* (4), which I have already alluded to.

There is, however, another line of authority beginning with *Vernon v. Cholmondeley* (11): also *Blaney v. Hendricks* (12), *Upton v. Lord Ferrers* (13), *Lowndes v. Collens* (14), *Webster v. British Empire Mutual Life Assurance Co.* (15) and *Pierce v. Fothergill* (16). In this last case the head-note runs:—

"On a promissory note payable on demand, where there is no proof of any agreement for interest, the plaintiff is only entitled to interest from the day of issuing the writ of summons."

Then there is another case in *In re East of England Banking Co.*, (17). That was a case where some notes were payable at Norwich and others at the London and Westminster Bank in England, and it was held that if the note required to be presented at a particular place, it must, of course, be presented at that place. As to the more general proposition, Vice Chancellor Mallins in *In re East of England Banking Co.* (18) in the Court below (with whom the Judges in the Court of Appeal agreed) said (page 375*):

"Where a note is payable on demand which on the face of it does not carry interest, it is perfectly well-known that it carries interest only from the time when the demand is made."

The law is similarly stated in Halsbury's Laws of England, Vol. II, page 524.

(8) (1890) 44 Ch. D. 627; 59 L. J. Ch. 709; 63 L. T. 49; 38 W. R. 617.

(9) (1893) 2 Ch. 300; 62 L. J. Ch. 695; 3 R. 463; 69 L. T. 12; 41 W. R. 440.

(10) (1896) 2 Ch. 157 at p. 166; 65 L. J. Ch. 557; 74 L. T. 396; 44 W. R. 547.

(11) (1722) Bunbury 119; 145 E. R. 617.

(12) (1770) 2 Black. W. 761; 3 Wils. 205; 96 E. R. 445.

(13) (1801) 5 Ves. Jun. 801; 31 E. R. 866; 5 R. R. 167.

(14) (1810) 17 Ves. Jun. 27; 31 E. R. 11.

(15) (1850) 15 Ch. D. 169; 49 L. J. Ch. 769; 43 L. T. 229; 28 W. R. 818.

(16) (1835) 2 Bing. N. C. 167; 132 E. R. 66.

(17) (1869) 4 Ch. A. 14; 38 L. J. Ch. 121; 19 L. T. 299; 17 W. R. 18.

(18) (1868) 6 Eq. 368.

*Page of (1868) 6 Eq.—[Ed.]

(3) 40 Ind. Cas. 350; 2 Pat. L. J. 451; 1 P. L. W. 615; (1917) Pat. 279.

(4) 39 Ind. Cas. 705; 44 C. 978 at p. 989; 25 C. L. J. 238; 21 C. W. N. 482.

(5) 60 Ind. Cas. 940; 47 C. 861; 33 C. L. J. 541.

(6) 6 M. L. A. 211; 1 Sar. P. C. J. 211; 19 E. R. 79.

(7) (1837) 2 M. & W. 461; 1 M. & H. 69; 1 Jur. 423; 6 L. J. Ex. 121; 46 R. R. 646; 150 E. R. 839.

Those two lines of authorities must, therefore, be, I think, carefully considered. They do not appear to have been considered in the Indian cases at present cited to us. Of course, apart from what the English Law is or even mercantile custom, we have to consider primarily what is the true construction of the Indian Act, viz., the Negotiable Instruments Act, by which we are governed. In *Mathuradas v. Maganlal*, Original Civil Jurisdiction Suit No. 1848 of 1919, I had not got to decide this precise point because the note there was payable at a specified place. I held on the evidence that a demand had been made at the specified place at some date prior to the plaint, but as that date was not proved I only awarded interest from the date of the plaint.

There is a subsidiary point, as to whether s. 80 applies to a case where no interest is mentioned at all. But that has been decided in the Indian cases, that is to say, both in *Best v. Haji Muhammad Sait* (2), and *Bishun Chand v. Audh Bihari Lal* (3), as well as in *Framroz Eduljee Dinshaw v. Mahomed Essa* (1), that s. 80 does apply to such a case.

Under all the circumstances we think this is a case where the matter ought to be decided finally by a Full Bench. We will, accordingly, refer the question to a Full Bench.

It is unfortunate that the respondent does not appear in the present case, and, therefore, we have been without the benefit of any argument on his behalf. If the same unfortunate position should arise before the Full Bench, possibly it may be arranged that some member of the Bar will act as *amicus curiæ*, and assist the Bench by a legal argument in support of the view taken by the lower Appellate Court.

I should have added that the other provisions as to interest will be found in the Interest Act of 1839, and s. 34 of the Civil Procedure Code. But the present claim for interest is not made under either of those Acts but under the Negotiable Instruments Act.

The precise question for the consideration of the Full Bench will be, as framed by my brother Crump, viz.,—

"A suit is brought after demand made on a promissory note payable on demand. The note is silent as to interest and speci-

fies no place for payment. Is interest recoverable? If so, from what date and at what rate?"

The reference was heard by a Full Bench composed of Marten, C. J., and Crump and Blackwell, JJ.

Mr. B. G. Rao, for the Appellant.

Mr. B. J. Wadia, *Amicus Curiae*, for the Respondent.

JUDGMENT.

Marten, C. J.—The question submitted to this Full Bench runs as follows:—

"A suit is brought after demand made on a promissory note payable on demand. The note is silent as to interest and specifies no place for payment. Is interest recoverable? If so, from what date and at what rate?"

I will first consider whether interest can be claimed under the Negotiable Instruments Act, 1881. This depends primarily on two points arising on the construction of s. 80, viz., (1) whether the section includes cases where as here no interest at all is mentioned in the instrument, or whether it is confined to cases where interest is mentioned in the instrument, but not the actual rate, and (2) what is the date at which the amount due on the instrument ought to have been paid by the party charged. It is important to observe that the party charged in the present case is the maker, and not an indorser. Throughout this case, therefore, we are dealing only with the liability of a maker of a promissory note.

As regards the first point the section provides that "when no rate of interest is specified in the instrument, interest on the amount due thereon" shall be calculated, etc. On the true construction of this section I would hold that if no interest is mentioned at all, then "no rate of interest" is mentioned, and consequently the section applies. This, I think, is the ordinary meaning of the language used, and I see no reason to cut down what seems to me its plain meaning. In fact, cases where interest is mentioned, but not the rate, are rare cases, on the other hand, where no interest is mentioned at all, are quite common. It is true that s. 79 deals with cases where interest at a "specified rate" is made payable in the instrument. But I do not think that it follows from this that s. 80 ought to be construed as referring only to cases where interest at an unspecified rate is mentioned. The Legislature intend,

ed, I think, by s. 80 to provide for all the other cases generally.

The above view has been the one adopted either expressly or by assumption in the Indian authorities on the point. As regards *Best v. Haji Muhammad Sait* (2) where the Court expressly adopted that construction and reversed the decision of the trial Judge to the contrary, I would only mention that I do not rest my opinion on the law merchant prior to the Act, but on the plain words of the Act itself. In this respect I would refer to what Lord Herschell has said in *Bank of England v. Vagliano* (19) to the effect that the proper way of construing an Act is in the first place to examine closely the language of the Act itself, and not to start with inquiring how the law previously stood, and then to base the construction of the Act on that.

Turning next to the second point, this is the crux of the case. It depends on the meaning to be given to the words "be calculated" from the date at which the same "ought to have been paid by the party charged." When then is the amount on a promissory note like this due, and when ought it to be paid? This throws us back on the earlier sections of the Act. Section 19 provides that a promissory note in which no time for payment is specified is payable on demand. The Act contains no definition of the words on "demand." But s. 21 provides that the expressions "at sight" and "on presentment" mean on demand; whereas the expression "after sight" means, in a promissory note, after presentment for sight. Next comes an important section, viz., 22, which provides that the maturity of a promissory note is the date at which it falls due. Then it provides for days of grace, except in the case of promissory notes payable on demand.

Next, turning to another important section, viz., 32, this provides that "in the absence of a contract to the contrary, the maker of a promissory note and the acceptor... are bound to pay the amount thereof at maturity according to the apparent tenor of a note... In default of such payment as aforesaid, such maker... is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default." This section has clearly a material

bearing on the meaning of the word "ought" in s. 80.

Next, s. 64, which deals with presentment for payment, provides that "where a promissory note is payable on demand, and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof." Section 74 provides that a negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder. This, I take it, must be subject to the exception in s. 64. Section 76 provides that no presentment for payment is necessary, and the instrument is dishonoured at the due date for presentment in certain cases e. g., sub-s. (b) "as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment." Then follow ss. 79 and 80, which I have already referred to. Section 81 provides that any person liable to pay, and called upon by the holder thereof to pay, the amount due on a promissory note, is, before payment, entitled to have it shown to him. It will be noted that this section contemplates two contingencies, viz., (1), a liability to pay, and (2) a request to pay. Section 92 provides that a promissory note is said to be dishonoured by non-payment when the maker of the note makes default in payment upon being duly required to pay the same. The above, I think, are the more material clauses for our consideration.

In my opinion, the first essential to determine is what is the maturity of the suit promissory note, for under s. 32 this is the date at which the maker has to pay it. Now under s. 22 the maturity of this note is the date at which it falls due. We have no further guidance in the Act as to the meaning of maturity in the case of the suit promissory note. Nor, as I have already said, is there any definition in the Act of the words "on demand" which are mentioned in s. 19 and elsewhere. But it is well-settled law in England that a promissory note payable on demand becomes payable at once. A leading case on the subject is *Norton v. Ellam* (7). In that case there was a note payable with interest on demand, and the question was from what time the Statute of Limitations began to run. Baron Parke, in giving judgment, said (page 464*) :—

"I entertain no doubt at all on this point. It is the same as the case of money lent payable upon request, with interest, where no

(19) (1891) A. C. 107 at p. 144; 60 L. J. Q. B. 145; 64 T. 353; 39 W. R. 657; 55 J. P. 676.

*Page of (1831) 2 M. & W.—[Ed.]

demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan. Where money is lent, simply, it is not denied that the Statute begins to run from the time of lending. Then is there any difference where it is payable with interest? It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand, and the Statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference, except that thereby the debt is continually increasing *de die in diem*."

That decision has often been followed. I may refer, for instance, to *In re George : Francis v. Bruce* (8), where Mr. Justice Chitty held that a promissory note payable on demand with interest from the date thereof, is a present debt, and "at maturity" as soon as given. This decision was approved by the Court of Appeal in *Edwards v. Walters* (10), where Lord Lindley says (page 166*):—

"A promissory note payable on demand is payable at once without any demand, and may be sued upon accordingly. Such a note, therefore, 'matures' within the meaning of s. 62 as soon as the note is made and delivered to the payee (see *In re George, Francis v. Bruce* (8))."

Lord Lopes says (page 169*):—

"Unders. 62, for a renunciation to be effectual the note must be mature. A note such as this—a note payable on demand—is at maturity immediately it is made, and therefore that portion of the section is complied with."

In *In re Brown's Estate, Brown v. Brown* (9) Mr. Justice Chitty applied this principle, to a case where there was a covenant by a father and son in a mortgage to pay "on demand," and also "in the meantime from the date hereof" to pay interest. The father was surety for the son. There the learned Judge said (page 304†):—

"I am not satisfied that the distinction attempted to be made between the law merchant and the general law with regard

to the meaning of the words 'pay on demand' can be supported."

Then after citing a part of the above passage from *Norton v. Ellam* (7), he proceeded (page 304*):

"That is a general proposition and not one based upon the law merchant; and, without going through the whole of the cases to which I have referred in the course of the argument, it is plain that a distinction has been taken and maintained in law, the result of which is, that where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of the action. But it is otherwise on a promise to pay a collateral sum on request, for then the request ought to be made before action brought."

The learned Judge then held, on the construction of the particular deed before him, that the father was only liable as a surety and that a demand should be made before bringing any action on the father's covenant.

As far as the Indian authorities are concerned, the English Law on this particular point has been followed in *Bishun Chand v. Audh Bihari Lal* (3), a decision of Mr. Justice Mullick and Mr. Justice Atkinson, and in *Framroz Eduljee Dinshaw v. Mahomed Essa* (1), a decision of Sir Norman Macleod and Mr. Justice Coyajee. These two cases do not, however, refer to another line of English authorities which lay down that though an action may be brought without a prior demand, no interest will be awarded in a case like the present except from the date of demand (if any) or alternatively from the date of suit. These other authorities I will deal with later. Further, as regards *Framroz Eduljee Dinshaw v. Mahomed Essa* (1), I notice that there the note was payable "in Bombay". It does not appear to have been discussed whether by these words the note was payable "at a specified place" within the meaning of s. 69. If so, then a demand was necessary as I held in an unreported case of *Mathuradas v. Maganlal*, Original Civil Jurisdiction Suit No. 1848 of 1919, decided by Marten, J., on October 11, 1919. But it is unnecessary to discuss that question in the present case, and I give no opinion on it. I would only refer in that connection to a case I previously followed, *viz., In re East of*

*Page of (1896) 2 Ch.—[Ed.]

†Page of (1893) 2 Ch.—[Ed.]

*Page of (1893) 2 Ch.—[Ed.]

England Banking Co. (17), which I will deal with later.

On the main point I am dealing with Sir Lancelot Sanderson in *Brojendra Kissore v. Hindustan Co-operative Insurance Society* (4), in deciding a case of limitation, stated (page 988)*:—

"The promissory note being payable on demand, there was a present debt, which was payable without any demand."

Then after citing *Norton v. Ellam* (7), above mentioned, the learned Chief Justice proceeded (page 989)*:—

"This is the English Law, and in my judgment it is the same here, and this is recognised by the provision in the Statute of Limitations, Art. 73, which provides that in the case of a promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue, the period of limitation begins to run from the date of the note".

So, too, in *Secretary of State for India v. Radhika Prasad Bapuli* (20), the trial Judge, Mr. Justice Coutts Trotter, stated (page 276†):—

"The result of the English cases is clearly this that where you merely have 'on demand' without its being a necessary factor in the determination of the time of payment it means nothing more than the money is to be paid unconditionally as in the ordinary cases of promissory notes 'on demand I promise to pay,' the 'on demand' does not import that it is a condition precedent to the liability arising that a demand should be made; but where demand is necessary to fix some subsequent date or where the obligation is collateral and, therefore, a contingent liability, so that until the demand is made the person said to be liable does not know that his liability has come into being then demand is a condition precedent to a successful claim".

On appeal Sir Walter Schwabe said (page 288†):—

"According to the Law of England when money is payable on demand and nothing further is said, it is payable at once and without demand and time under the Statute of Limitations begins to run at once. The

most common instances of the application of that principle are of money lent repayable on demand or at request, and promissory notes payable on demand".

The learned Chief Justice then referred to *Tarinee Parshad Ghose v. Pran Kishen Banerjee* (21), where it was held that the principle of the English Common Law did not apply to cases in the *Mofussil*. That case, however, was long before the present Negotiable Instruments Act. And it would appear that the notes or bonds in *Secretary of State for India v. Radhika Prasad Bapuli* (20) were not promissory notes within the meaning of the Indian Limitation Act (see page 269*). The eventual decision was that a demand was necessary because the instruments were payable at a particular place and in some cases in a particular manner (page 290*).

In *D. N. Shaha & Co. v. Bengal National Bank, Ltd.* (5), a case on a promissory note, Mr. Justice Mookerjee said (page 864†):—

"As explained in *Norton v. Ellam* (7)... no demand is necessary before bringing an action upon a note payable on demand, because its payment is a duty which attaches the moment the loan is given and the note is made. To put the matter differently, the creditor cannot extend the period of limitation by omission to make a demand and time runs against him from the date of the note, on the principle that the cause of action arises instantly on the loan and the contract on the note is in a state of being broken perpetually".

Counsel also cited to us *Ram Chunder Ghosaul v. Juggutmonmohiney Dabee* (22). This was the case of a mortgage-deed where the money was expressed to be paid on demand, and there Sir Richard Garth and Mr. Justice Markby differed as to whether a demand was necessary.

I may also state that in *Madhavbhai Shivbhai v. Fattesing Nathubhai* (23) it appears that Sir Michael Westropp had in an earlier case on the Original Side followed the English Law as to a demand not being necessary before suit brought. But in a case then before the Court from the *Mofussil*, the learned Judge was not pre-

(20) 74 Ind. Cas. 785; 46 M. 259; 44 M. L. J. 685; 18 L. W. 210; A. I. R. 1923 Mad. 667.

*Pages of 44 C.—[Ed.]

†Pages of 46 M.—[Ed.]

(21) 14 W. R. 224; 6 B. L. R. 160.

(22) 4 C. 283; 3 C. L. R. 336; 2 Shome L. R. 2; 2 Ind. Dec. (N. S.) 180.

(23) 10 B. H. C. R. 487.

*Pages of 46 M.—[Ed.]

†Page of 47 C.—[Ed.]

pared to say that that necessarily applied to *Mofussil* cases.

Reference may also be made to *Amceroon-Nissa v. Moorad-oon-Nissa* (6), where at page 229* their Lordships recognise that the "authorities show that there may be cases where an action would not lie except where a request or demand is made, and others where such demand is not necessary".

The clear trend then of the cases above mentioned, at any rate the more modern ones, is to accept the English view on the subject. In *Best v. Haji Muhammad Sait* (2) the opposite conclusion was arrived at. But that decision turned on the following sentence in the judgment with relation to the application of s. 80: "The notes being payable on demand, it is not the date of the making, but the date of demand, that must be taken as the point from which to calculate interest". Accordingly, interest was only given from the respective dates of demand. With all respect to the learned Judges this conclusion was arrived at without any express reference to the Negotiable Instruments Act, nor as to the meaning usually given in a Court of Law to the words "on demand". Under these circumstances, and with all respect, I am unable to follow the decision.

So far as the Indian Limitation Act is concerned, it will be seen from Art. 73 that on a promissory note payable on demand, time runs from the date of the note. So, too, under Art. 59 where money is lent under an agreement that it shall be payable on demand, time runs from the date when the loan is made. On the other hand, if money is deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker, then under Art. 60 time runs from the date when the demand is made. And as my brother Blackwell has pointed out, a demand may be necessary in certain other cases, apart from the Indian Limitation Act, *e. g.*, where the cause of action is in detinue or in trover. [See *Clayton v. Le Roy* (24), a decision of the Court of Appeal].

A main point for the respondent which we have considered very carefully is that under English Law interest only runs from the date of demand under a promissory note (24) (1911) 2 K. B. 1031; 81 L. J. K. B. 49; 104 L. T. 419; 75 J. P. 229; 27 T. L. R. 206.

*Page of 6 M. I. A.—[Ed.]

like the present. Curiously enough this point does not appear to have been considered in the Indian cases so far reported. But the proposition itself is clear in English Law from the long line of authorities cited in the referring judgment.

Thus in *Pierce v. Fothergill* (16) the head-note runs:—

"On a promissory note payable on demand, where there is no proof of any agreement for interest, the plaintiff is only entitled to interest from the day of issuing the writ of summons".

So, too, in *In re East of England Banking Co.* (18), Vice Chancellor Malins said (page 375*):—

"The law is perfectly well-known and distinct, that with regard to all negotiable instruments, by the law merchant, every Bill of Exchange and promissory note carries interest from the date of its maturity. Where a note on demand, having no period of payment, is intended to bear interest, the usual course is to say 'I promise to pay on demand so much money with interest at a certain rate', otherwise it will carry no interest until the demand is made. But where a note is payable on demand which on the face of it does not carry interest, it is perfectly well-known that it carries interest only from the time when the demand is made. The notes in respect of which interest is here claimed were common Bank notes, I presume in the usual form. The Banker promises to 'pay bearer on demand'".

That case went on appeal, and it would appear from the arguments and judgments that the notes were to be presented either at the Company's bank at Norwich or at the London and Westminster Bank in London [see *In re East of England Banking Co.* (17)]. It was held on appeal that a demand was, therefore, necessary, but that in fact such demands had been made at the proper places.

The above general proposition is stated to the like effect in Halsbury's Laws of England, Vol. II, page 524. It is now embodied in s. 57 of the Bills of Exchange Act, 1882. We have, therefore, in the English Act a clear provision that presentment is necessary so far as a claim to interest is concerned. But we have no corresponding section in the Indian Act. On the contrary, s. 80 awards interest from the time when the money due ought to have been paid. But if we once

*Page of (1868) 6 Eq.—[Ed.]

arrive at a clear opinion as to the true construction of the Indian Act, then we cannot be influenced by the circumstance that the English Act contains an equally clear provision to the contrary. It may be unfortunate that there should thus be a difference between Indian and English Law as to the effect of a particular class of negotiable instruments. But this is a matter for the Legislature to remedy, if remedy is needed, and not for us.

It was strenuously argued by Mr. Wadia that the words "on demand" in the promissory note and in s. 19 ought to be given their popular meaning, and that consequently the maker was under no obligation to pay until he received a demand as was indeed held in *Best v. Haji Muhammad Sait* (2) already cited. The argument further ran that there was no "injuria", and, therefore, no cause of action until a demand had been made and refused; and that to hold otherwise would be to give a legal cause of action without a legal injury having been suffered. But as regards the meaning to be attributed to the words "on demand", in a negotiable instrument, I think, they have become too crystallised by mercantile usage and judicial decisions to be given now a different meaning. We are really invited to hold that a promissory note payable on demand does not fall due within the meaning of s. 22 at its date and ought not to be paid at once. This I find myself quite unable to do. The argument is really in the teeth of the main decisions to the contrary in England and India, and its acceptance would certainly cause considerable confusion in the mercantile community, and incidentally lead to other difficulties in the construction or application of the Act which I need not consider.

As regards the absence of an "injuria" it must be taken that the "injuria" is the non-payment of the promissory note at the date thereof. No doubt parties do not usually intend that the money should be re-paid the instant it is advanced. But clearly in law the promisee may, if he likes, make an immediate demand for the money. Therefore, the corresponding legal position as regards the promisor is not so illogical as it might at first sight appear.

Nor is there anything really inequitable in arriving at this conclusion. A man who borrows money and gives a promissory note can hardly expect that the lender is a philanthropist, and will not charge any

interest. And if the interest the borrower has to pay is confined to six per cent, as it is by s. 80, then he may think himself lucky to get off with that rate and not to have to pay a substantially higher rate, as is more usually the case in present-day money transactions in India.

The real explanation is that the words "on demand" are only a sort of label to identify a particular form of document, and that to ascertain the rights and obligations of the parties under a document in that particular form one has to turn to the provisions of the Act itself, as explained by settled authority on the point.

As regards the criticisms of Austin on Jurisprudence as to this particular principle of the English Common Law, it may be answered that if a plaintiff brings a suit on a promissory note without any prior demand, he may be able to maintain the suit. But, on the other hand, if the litigation is really unnecessary and vexatious and brought without any previous warning, it is conceivable that the Court might refuse him any costs [*Walter v. Steinkopff* (25)]. In that event the result of the writ might have little more effect than a demand in writing, assuming the defendant at once tendered the amount.

After careful consideration then of the Act, and of the numerous authorities in India and in England that have been cited to us, I would hold that a promissory note like the one we have here matures and falls due within the meaning of s. 22 at the date when it is made. Consequently, under s. 32 the maker is bound to pay it at that same date, and presentment for payment is unnecessary having regard to s. 64. In my judgment, therefore, the date at which the suit note "ought to have been paid by the party charged" within the meaning of s. 80 is the date of the note itself. In the present case the party charged is the maker. If he had been the indorser, different considerations would arise, for, under the explanation to s. 80, the indorser would be liable to pay interest only from the time that he received notice of dishonour.

In this connection I am not prepared, on the construction of this particular Act, to draw a distinction between the words "are bound to pay" in s. 32, and the words

(25) (1892) 3 Ch. 489 at p. 501; 61 L. J. Ch. 521; 67 L. T. 184; 40 W. R. 599.

"ought to have been paid" in s. 80. I think in this Act they mean substantially the same thing, and that if the maker of a note was "bound to pay" it at maturity, then he "ought to have paid" it at maturity.

In the result, therefore, I would hold that in the present case the promissory note became payable immediately on its execution, that that was the date at which it ought to have been paid within the meaning of s. 80, and that accordingly as against the maker, the promisee is entitled to interest at six per cent. per annum from the date of the note. I would, therefore, answer the specific question submitted to us as follows: "Yes, under the Negotiable Instruments Act, 1881, from the maker of the promissory note at six per cent. per annum from the date of the promissory note."

As then, in my judgment, the promisee is entitled to interest, I think it is unnecessary to consider the effect of the Interest Act, 1839. For there the matter depends on the discretion of the Court, and if the debt is not payable "at a certain time", then interest would only run from the date of a demand giving notice that interest would be claimed. So, too, as regards s. 34 of the Civil Procedure Code, that is also discretionary, and only applies to interest from the date of the suit. On the other hand, s. 80 of the Negotiable Instruments Act gives interest as a matter of right in cases to which it applies.

In conclusion, I would like to acknowledge the assistance given to the Court by the able arguments of Mr. Rao and Mr. Wadia, and to say that the latter's argument as *amicus curiae* has been none-the-less valuable because in the result we have decided in favour of the appellant. We have thereby had an advantage which the Court in *Framroz Eduljee Dinshaw v. Mahomed Essa* (1) and in some other cases did not have, *viz.*, arguments on both sides of the question.

Crump, J.—I agree and have nothing to add.

Blackwell, J.—I agree.

The Division Bench passed the following judgment on the merits.

Marten, C. J.—Having regard to the decision of the Full Bench, the interest payable under the promissory-note runs from the date of the note itself, *viz.*, September 8, 1920, and not, as found by the lower Appellate Court, from the date of demand. The appeal, consequently, must

be allowed on that point. Further, the learned Judge has not awarded any costs to the successful plaintiff, and his order must be varied in that connection also.

That being so, our order will be: Appeal allowed. Orders in both Courts below set aside. Decree that the defendant do pay to the plaintiff Rs. 2,600 with interest at six per cent. per annum from September 8, 1920, to the date of to-day's judgment, and costs throughout in all Courts with further interest from the date of this judgment at six per cent. per annum on the balance of the principal sum of Rs. 2,600 and costs for the time being remaining unpaid. The said amount to be recoverable from and to be paid by the defendant in equal annual instalments of Rs. 400 each, the first of the same to be paid on November 30, 1927. On failure of the defendant to pay any two instalments, the plaintiff is to be at liberty to recover the whole amount outstanding.

A. N. A.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 798 OF 1925.

July 21, 1927.

Present:—Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump.
SAKHARAM BALA NIKAM—PLAINTIFF
—APPELLANT

versus

THAMA BALA NIKAM AND OTHERS

—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Surrender—Alienation by widow—Subsequent surrender to next reversioner—Validity of surrender.

A Hindu widow who has parted with her property to the extent of her estate or interest as a widow cannot thereafter make a valid surrender to the next reversioner. [p. 267, col. 1.]

A Hindu widow made a gift of estate inherited by her from her husband to her husband's brother's son. She then made a gift of the same to her daughter, the next reversioner, and again, made an adoption. The adopted son sued the daughter for possession:

Held, that the gift to the daughter was invalid inasmuch as the widow had put it out of her power to make a valid surrender by the earlier gift. [*ibid.*]

Second appeal from the decision of the Assistant Judge, Satara, in Appeal No. 27 of 1925, reversing the decree of the Subordinate Judge at Satara, in Civil Suit No. 139 of 1923.

Mr. Ambedkar (with him Mr. B. G. Modak),
for the Appellant.

Mr. K. N. Koyajee, for the Respondents.

JUDGMENT.

Marten, C. J.—In this case a Hindu widow Thama defendant No. 1 passed two deeds of gift, viz., (1) on September 23, 1918, Ex. 23, in favour of Rama, and (2) on August 20, 1921, Ex. 20, in favour of her own daughter and reversioner, Sau, defendant No. 2. Then on January 22, 1922, she adopted the plaintiff. The present contest is between the daughter Sau claiming under the deed of gift of August, 1921, Ex. 20, and the plaintiff, the adopted son. The trial Court decided in favour of the adopted son. The lower Appellate Court decided in favour of the daughter. The adopted son appeals.

The daughter bases her claim on this that there was a valid surrender by the deed of August, 1921, of the mother's life-interest in favour of the daughter and reversioner, whereby the reversion became accelerated and the life-interest of the widow extinguished. On the other hand it is contended by the adopted son that the widow could not in August, 1921, pass her whole interest in the property because she had already purported to convey it to Rama by the earlier deed of gift of 1918.

The question, therefore, becomes one of law as to what are the essential conditions to enable a Hindu widow effectually to surrender her interest to the reversioner. Now fortunately their Lordships of the Privy Council have laid down the essentials to such a surrender in *Rangasami Gounden v. Nachiappa Gounden* (1), where it is stated (page 34*):

"The result of the consideration of the decided cases may be summarized thus: (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner."

In my judgment, having regard to the earlier deed, Ex. 23, of September, 1918,

(1) 50 Ind. Cas. 498; 46 E. A. 72; 21 Bom. L. R. 640 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 1 U. P. L. R. (P. C.) 66 (P. C.).

*Page of 46 I. A.—[Ed.]

the widow had put it out of her power to surrender her whole interest in the whole estate in favour of the nearest reversioner. It is true that by that earlier deed there was a small portion of the property that was not conveyed to Rama, viz., some two acres, so we are told. But apart from those two acres, the whole estate consisting, we are informed, of some eighteen acres and a house, was conveyed to Rama, who was her nephew.

We have been referred to various authorities, but none of them appear to be precisely on all fours with this case, although one in *Prafulla Kamini Roy v. Bhabani Nath Roy* (2) comes close to it. There unfortunately the learned Judges differed in their opinion, and consequently I take it that so far as that High Court is concerned, the matter must be regarded as an open question. That was not a case of adoption. It was a case where a widow had made a gift of a part of her estate to T, and had subsequently purported to surrender the whole of her estate to her next reversioner. It was held by Mr. Justice Page that the reversioner became immediately entitled to recover possession of the property given to T, and that his right in that behalf was not postponed until after the widow's death. Mr. Justice Walsmely took the opposite view. Now I quite appreciate the observations which Mr. Justice Page has made there as to the nature of a Hindu widow's interest. As has been pointed out by their Lordships of the Privy Council it is not an interest which can be specifically described in terms of western law as a life-estate or any other particular estate. But in so far as one follows the analogy of life-estates, it would be perfectly clear that if a tenant for life assigns his life interest to A, then he would be unable to surrender that life-interest to the next remainderman. There could be, as far as the English Law is concerned, no merger either in law or equity. If, on the other hand, the surrender was by A of his life-interest to the remainderman, then it would follow that the life-interest would ordinarily be merged in the reversion, as is shown in the well-known taxing case of *Attorney-General v. Beech* (3) (Cf. Halsbury's Laws of England, Vol. XIII, page 187).

(2) 91 Ind. Cas. 897; 52 C. 1018; A. I. R. 1926 Cal. 121.

(3) (1899) A. C. 53; 68 L. J. Q. B. 130; 63 J. P. 116; 47 W. R. 257; 79 L. T. 565; 15 T. L. R. 85.

If then, in the present case, the widow has parted with the property so far as she can—to the extent at any rate of her estate or interest as a widow—then it would seem to be erroneous to say that notwithstanding that she can still surrender that whole interest to the reversioner. I quite appreciate that a widow's interest may be determined in various ways: by her natural death, by her re-marriage, by adoption, or by a valid surrender. But if it is to be a surrender, then it is essential that she should comply with certain conditions. It seems to me that here she does not comply with those conditions, as she has put it out of her power so to do by an earlier document.

Under those circumstances I arrive at the conclusion that the decision of the learned trial Judge was correct, and that it ought to be restored.

There is another point, viz., that the second deed contains a provision for the maintenance of the widow, and so is not an absolute surrender, and that it cannot possibly be said that this was a case of compromise by a widow or anything of that sort, as was the case in *Sureshwar Misser v. Maheshrani* (4). I, however, do not think it necessary in this case to go into that question; but would only refer to a subsequent case in the Privy Council of *Man Singh v. Nawlakhbati* (5) and a decision of our own Court in *Rama Nana Babar v. Dhondi Murari Tarade* (6). Personally I express no opinion on that point.

In the result, I would hold that this appeal ought to be allowed, and the judgment of the trial Judge restored, with costs here and of the lower Appellate Court.

Crump, J.—I agree with the judgment now pronounced by the learned Chief Justice, and upon the first point I do not desire to add anything, for the ground of my decision is precisely that which has already been stated.

Upon the second question as to whether the provision in the second deed for the

maintenance of the widow would make the surrender inoperative, I also agree that it is unnecessary for the purposes of this case to pronounce any decision. But I will only say this much that it seems to me a matter of some doubt whether their Lordships of the Privy Council in *Sureshwar Misser v. Maheshrani* (4) intended to differ from what had been said in the previous decision in *Rangasami Gounden v. Nachiappa Gounden* (1) or indeed to distinguish that decision upon the question of the effect of the provision for maintenance in a deed of this description. In the former of these cases, *Sureshwar Misser v. Maheshrani* (4), it is said that the provision of a small portion of the land for the maintenance of the widow was not objectionable, and it is that principle which we find is applied by this Court in *Rama Nana Babar v. Dhondi Murari Tarade* (3) a decision to which I was a party. Whether it is correct to say that in *Sureshwar's case* (4) the judgment upon that point rested upon the fact that there was a compromise, is a matter upon which I feel some doubt. The question of compromise was, no doubt, discussed by their Lordships of the Privy Council in that case, but, as I understand it, it was rather upon the point whether the surrender was or was not *bona fide*, or a device to divide the estate between the widow and the reversioner. But, as I have already said, it is unnecessary in the present case to specifically decide that point because I am quite clear from the first ground that the decision should be as stated by the learned Chief Justice.

Per Curiam.—Appeal allowed. Decree of trial Judge restored. Respondents to pay costs of this appeal and in the lower Appellate Court.

A. N. A.

Appeal allowed.

(4) 57 Ind. Cas. 325; 47 I. A. 233; (1920) M. W. N. 472; 39 M. L. J. 161; 28 M. L. T. 154; 2 U. P. L. R. (P. C.) 128; 12 L. W. 461; 18 A. L. J. 1069; 25 C. W. N. 194; 48 C. 100; 41 O. L. J. 433 (P. C.).

(5) 94 Ind. Cas. 830; 53 I. A. 11; 28 Bom. L. R. 841; A. I. R. 1926 P. C. 2; 24 A. L. J. 250; 50 M. L. J. 332; 43 O. L. J. 259; (1926) M. W. N. 332; 7 P. L. T. 223; 5 Pat. 290; 31 C. W. N. 49 (P. C.).

(6) 76 Ind. Cas. 607; 47 B. 678; 25 Bom. L. R. 361; A. I. R. 1923 Bom. 432.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 282 OF 1926.

September 27, 1927,

Present:—Sir Amberson Marten,
Kt., Chief Justice, and

Mr. Justice Crump.

**HUCHANGOUDA RUDRAGOUDA AND
OTHERS—PLAINTIFFS—APPELLANTS**

versus

**KALLAVA KALLAPPA AND OTHERS—
DEFENDANTS—RESPONDENTS.***Bombay Hereditary Offices (Amendment) Act (Bom. Act V of 1886), s. 2—Female member of watan family—Exclusion from inheritance—Conditions—Mere descent from common ancestor, whether sufficient.*

In order that a female member of a *watan* family may be postponed in the order of succession to the male members of the family under s. 2 of the Bombay Hereditary Offices (Amendment) Act it is not sufficient for the male members to show that they are descended from a common ancestor. It must further be shown that the common ancestor was a holder of the *watan*. [p. 268, col. 2.]

Bai Laxmi v. Maganlal Jamietram (1), followed.

First appeal from the decision of the Joint First Class Subordinate Judge at Dharwar, in Suit No. 175 of 1922.

Mr. A. G. Desai, for the Appellants.

Mr. G. N. Thakor (with him Mr. Nilkant Amaram), for the Respondents.

JUDGMENT.

Crump, J.—The plaintiffs in this suit seek to recover possession of certain properties which are *patilki inam* land assigned for the remuneration of the office of Patil in the village of Kotbagi. It is common ground that there are two families holding these *patilki inam* lands, and that they hold them half and half. The plaintiffs are the sisters of one Kallangouda who succeeded to a half share of the property in that family some thirty years ago. Kallangouda died in 1885 leaving a widow Yellava, and Yellava held the property, having the ordinary Hindu widow's interest therein, till the date of her death in 1917, and upon that event the succession opened to the deceased Kallangouda. The two plaintiffs are the sisters of Kallangouda, and it is not disputed that under the Hindu Law they would be entitled to succeed. But, the property being *watan* property, it is necessary to consider the provisions of s. 2 of Bombay Act V of 1886 which lays down a special rule of succession in such cases. For the purposes of the present appeal that section runs as follows:—

"Every female member of a *watan* family [I here omit certain exceptions which are not relevant to this case] shall be postponed

in the order of succession to any *watan*, or part thereof,...devolving by inheritance after the date when this Act comes into force to every male member of the family qualified to inherit such *watan*, or part thereof...".

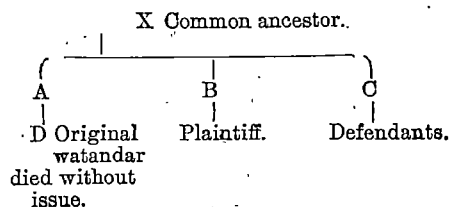
The question, therefore, is whether the plaintiffs are excluded by the operation of this Statute. And that gives rise at once to the question whether the plaintiffs and defendants are members of a *watan* family. The word "family" is defined in s. 4 of the Hereditary Offices Act, 1874, and the definition is as follows:—

"'Family' includes each of the branches of the family descended from an original *watandar*."

The meaning to be attached to this definition has been explained in *Bai Laxmi v. Maganlal Jamietram* (1). The following passage from the judgment of Scott, C. J., may be cited (page 684*) :—

"The learned District Judge in dealing with the definition of 'family' observes that it is inclusive and not exclusive, that is to say, that it does not exclude the application of the ordinary meaning of the word 'family'. Now the Dictionaries of Webster and Murray are both agreed in giving as one of the meanings of the word 'family', (which would be an appropriate meaning in the present connection) 'those descended (really or putatively) from a common progenitor'. In the case of a '*watan* family', taking the expression family in the ordinary non-technical sense it does not appear to be unreasonable to assume that the common progenitor must be a *watandar*".

Thus, in order that the defendants may show that the plaintiffs are postponed to them in the order of succession they must show that there was an original *watandar* from whom these two families were descended. It is not sufficient to show that there was a common ancestor. Let us assume that there is a family as in the subjoined pedigree.



(1) 42 Ind. Cas. 450; 41 B. 677; 19 Bom. L. R. 730.

*Page of 41 B.—[Ed.]

In that case on the death of *D* the original *watandar*, the estate would go half and half to his uncles *B* and *C* from whom the two supposed existing branches are descended. And in such a case, as explained in the case cited, the female heirs in the one branch would not be excluded by the male heirs in the other. Many similar cases could be put, but, of course, they are all conjectural. I merely seek to illustrate the position that it is not sufficient for the defendants to show that there was a common ancestor from whom these two families are descended. They must also show that that common ancestor was a holder of this *watan*.

The first point, therefore, would be whether there is evidence going to show that these persons with whom we have to deal are descended from a common ancestor. Now we have here two families of the same caste living in the same village holding half and half *patilki inam* lands. And in the typical case those persons would in all probability be descended from the same person. Ordinarily the grant of a *watan* is to an individual, and it is held by his descendants, and may be divided between them in the course of family partitions. That, I say, is the typical case. There may be cases where a portion of the *watan*, before the date of the legislation prohibiting the alienation of *watan*, has gone out of the original family into another family. But that is a less common case. The evidence with which we have to deal must be considered in that light. It is impossible in matters of this kind, where the grant is an ancient one, and there have been many degrees in the family since the date of the grant, to expect direct evidence of the precise relationship. But if there is evidence, whether what is ordinarily called "hearsay" evidence or otherwise, that two families so holding a *watan* half and half are related to one another, and if that relationship shows that they are, to use a vernacular term, *bhaubands*; then it is by no means a violent inference that they are descended from a common ancestor. And there is evidence in the present case which points to some such conclusion.

[His Lordship referred to the evidence and proceeded as follows:—]

That is a summary of the evidence upon this question of relationship, and upon that evidence I should be inclined to hold that

it is established that these two families are in reality different branches of one and the same family. And seeing that the relationship having regard to the terms used implies male descent, it is not an unreasonable inference that these persons are in all probability descended from a common male ancestor. To that extent, I think that the lower Court has perhaps not fully appreciated the weight of the evidence.

But when that is said, it is absolutely impossible to say how remote that common ancestor was. Nor is it possible to say whether he existed before or after the acquisition of this *watan*. It was urged upon us that upon this latter point some light could be derived from other documents in the case bearing upon the history of a *watan* as distinct from the holders thereof.

[His Lordship referred to the documents and continued:—]

Thus when all is said and done, we come back to this position. At some remote period there probably was a common ancestor of these two families. At some unknown period some member of the family acquired the *watan*, that is, assuming that there was a grant by the Peshwas' Government to one individual, but whether the acquisition was made by the common ancestor or before his time or after his time is a matter of the merest conjecture. If then reference be made once more to the conjectural pedigree which I set out at the beginning of this judgment, it would be seen that though there may be an original *watandar* from whom these persons are descended, there may just as well have been a collateral who was the original *watandar* from whom the two existing branches of the family inherited this property. And there are a variety of other hypotheses consistent with the facts of this case which it is unnecessary to enumerate. It follows, therefore, that there is a fatal obstacle to the defendants' success, and that they have failed to show that plaintiffs, the nearest heirs under Hindu Law, are excluded by the operation of s. 2 of Bombay Act V of 1886.

There is one further point to which reference was made in the course of argument, that is, whether in these circumstances it can be said that the defendants are persons qualified to inherit under the Hindu Law. Now here we are entirely in the dark, because we do not know how remotely they

are connected with the plaintiffs, assuming the connection to be established, and therefore without a clear knowledge of the facts, it is somewhat difficult to endeavour to apply legal principles. The question whether any remoteness of descent would exclude a *samanodaka* has been considered in several cases. We have a decision of our own Court in *Bai Devkore v. Amritram Jamaitram* (2), and that decision lays down that the word *samanodaka*, meaning literally those participating in the same oblation of water, includes descendants from a common ancestor more remotely related than the thirteenth degree from the propositus. Such cases are of very rare occurrence, but so far as this Court is concerned, that decision is still an authority. And if it be followed, however remote the descent might be, the result would be that the defendants would be qualified to inherit.

But in *Rama Row v. Kuttiya Gounden* (3) the Madras High Court has taken a different view. And they have dissented from the Bombay decision. They say there that the general tendency is to confine the relationship to the fourteenth degree. In *Kalka Prasad v. Mathura Prasad* (4), the matter incidentally came for consideration before their Lordships of the Privy Council. But the judgment does not contain any decision upon the exact point. It appears to have depended upon their Lordships' view of the facts of the particular case, and, therefore, so far as I understand it, that decision furnishes no guide. But upon the facts of this case it is unnecessary to decide that point, because there is, as I have indicated, in any view, a fatal obstacle in the way of the defendants. It follows that this appeal must be dismissed with costs.

Marten, C. J.—I agree. The learned Pleader for the appellants has taken us carefully and in detail through all the documents, and facts which tell in favour of his clients. He has clarified the position by giving numbers to the various parties appearing in the rival pedigrees produced before the Inam Commission in 1844, *viz.*, the pedigree, Ex. 92, produced by the branch of the defendants

and the pedigree, Ex. 93, produced on behalf of the plaintiffs' branch. The necessity for this will be seen by the paucity of names in this family. There are no less than three Kallangoudas who play an important part in this story. It was Kallangouda No. 13 who produced the pedigree, Ex. 92. It was Kallangouda 4-F who produced the pedigree, Ex. 93. It was the latter's grandson Kallangouda 4-H, who died in 1885 and whose widow Yellava died in 1917, and thus opened the succession which is now in dispute.

On the merits of the case there are several interesting points that have been raised, but the crux of the case seems to me to be whether the defendants can show that they were not merely descendants of a common ancestor with the plaintiffs, but that both the plaintiffs and the defendants were descended from a common *watandar*. That is the effect of the decision of this Court in *Bai Laxmi v. Maganlal Jamietram* (1). There Sir Basil Scott laid stress on the meaning of the word *family*, *viz.*, descent from a common ancestor and held that under the Hereditary Offices Act, the common progenitor must be a *watandar*. In *Balai Shidli Jogati v. Subba Santu Mahar* (5) Mr. Justice Patkar accepted the interpretation put by Sir Basil Scott on the meaning of the word *family*, and held that the particular person in that case was a descendant from the common *watandar*. On the other hand, in Sir Basil Scott's case the parties were not descended from the common *watandar*, because as is shown at page 731* of the report in *Bai Laxmi v. Maganlal Jamietram* (1) the original *watandar* was one Gopinath, and on his death collaterals succeeded to the property. No doubt there were separate *sanads* granted by Government on Gopinath's death in that case but apart from that the case is an illustration of what might easily have happened in the present case in days long gone by in the absence of any positive knowledge on the point.

As to whether the parties in the present case were descended from a common ancestor, it may well be that the learned Judge went too far in holding that even that point was not proved. But we have stopped Counsel for the respondents on his argument on that and other points in the case.

(5) 101 Ind. Cas. 135; 29 Bom. L. R. 246; A. I. R. 1927 Bom. 191.

*Page of 19 Bom. L. R.—[Ed.]

(2) 10 B. 372; 5 Ind. Dec. (N.S.) 636.

(3) 34 Ind. Cas. 294; 40 M. 654; 3 L. W. 331; 19 M. L. T. 275; 30 M. L. J. 514.

(4) 35 I. A. 166; 10 Bom. L. R. 1088; 30 A. 510; 5 A. L. J. 701; 18 M. L. J. 424; 8 C. L. J. 447; 13 C. W. N. 1; 11 Q. C. 362; 4 M. L. T. 380 (P. C.).

Accordingly, speaking for myself, I do not propose to give a definite finding on the point. I am prepared to assume for the sake of argument that the defendants were descended from the same common ancestor as the plaintiffs were.

But assuming that, in my judgment, the next step, which I regard as the crux of the case, is fatal to the defendants. After carefully considering all the documents and matters laid before us, and after giving due consideration to the presumptions which we are entitled to make under s. 114 of the Indian Evidence Act, I am quite unable to say that it is any more likely here that the original *watandar* was a common ancestor of both branches than that those branches acquired the *watan* by collateral descent. In 1844 before the Inam Commission the respective parties who gave evidence and produced those pedigrees, I mean Kallangouda No. 13 and Kallangouda No. 4-F, were unable to say who the original *watandar* was. In 1880 when the defendants' branch sought to acquire the land now in dispute, *viz.*, that held by the plaintiffs, they were unable to satisfy the trial Judge as to their genealogy, and their right to succeed even if they had been able to prove that the then succession by Kallangouda No. 4-H was not a rightful succession. In fact they failed on the latter point.

If then in 1845 and in 1880 the defendants were unable to prove successfully their exact heirship, it is not strange that the present defendants are in no better position. I appreciate what Mr. Desai for the appellants has forcibly urged upon us that the *watan* lands have been equally divided over a long series of years, into eight and a half *mars* for each branch, a *mar* being said to be about seventeen acres. I also appreciate that it does not necessarily follow that because a *watan* has been partitioned, it is thereby split up into two distinct *watans*. The contrary has been held in *Yeshwant v. Satyanna* (6). But from that it seems to me a long step to go to hold that the original *watandar* must have been a common ancestor whose descendants subsequently partitioned the *watan*, and that it is unreasonable to hold that there may have been a collateral succession from the original *watandar*.

That being so, this point, as I have already intimated, seems to me to be fatal in any event to the defendants.

Consequently, in my judgment it is unnecessary to go into the point raised by my brother Crump as to whether the defendants, being further remote in degree than the thirteen degrees, could claim in any event to succeed to this property. If it was necessary the case in Madras and the case in the Privy Council would have to be considered along with the decision in *Bai Devkore v. Amritram Jamaitram* (2).

I should have mentioned that certain pedigrees, Exs. A, B and C, were not relied on to any great extent by Counsel for the defendants. Even so far as they are admissible, they do not carry the matter much further on what I have described as the main point of the case. I should also state that I fully appreciate that it has been held that the definition of *family* in the Watan Act is an inclusive definition and not an exclusive definition. But, notwithstanding that, on the authorities of this Court, it does not absolve the parties from the necessity of proving that the original *watandar* was an ancestor of the parties. In the result, therefore, I agree that this appeal must be dismissed with costs.

As to the question of interest on costs, the learned Judge should not have awarded interest at twelve per cent. The maximum fixed by s. 35 (3) of the Civil Procedure Code is six per cent., but as he has considered this to be a case where interest on costs ought to be given, we will let his order in that respect stand subject to substituting six per cent. for twelve per cent.

A. N. A.

Appeal dismissed.

BOMBAY HIGH COURT.FIFTH CRIMINAL SESSIONS CASE No. 25
OF 1927.

November 25, 1927.

Present:—Mr. Justice Fawcett.

EMPEROR—PROSECUTOR

versus

MAHOMED HASAN GHANCHI

—ACCUSED.

Coroners' Act (IV of 1871), s. 20—Statement of accused on oath before Coroner, admissibility of.

A statement made by an accused before a Coroner in the course of inquest proceedings, after due warning that he is not bound to make any statement and that if he did so, it may be used against him in his trial, can be admitted in evidence against him at his trial and the mere fact that the statement was made on oath does not render it inadmissible.

*Emperor v. Ramnath Mahabir (2), followed.**Emperor v. Kazi Dawood (1), not followed.*

Mr. Kanga, Advocate-General (with him Mr. Binning), for the Prosecution.

Mr. Oliveira, for the Accused.

JUDGMENT.—The Coroner of Bombay, in an inquest upon the deceased Ahmed, allowed the accused to make a statement after warning him that he was not bound to make any statement and that if he did so, it might be used against him in the High Court. The statement was taken on oath. Mr. Oliveira for the defence objects to this statement being put in evidence and relies upon the ruling of Mr. Justice Taraporewala in *Emperor v. Kazi Dawood (1)*. He contends that s. 19 of the Coroners' Act of 1871 makes it clear that the accused should not be examined on oath, as if he were a witness, because it enacts that "the Coroner shall be bound to receive evidence on behalf of the party (if any) accused of causing the death of the deceased person," and does not mention any evidence being given by the accused himself. The statement having been made on oath is, he contends, inadmissible in evidence, in spite of the provisions of the last paragraph of s. 20 under which, for the purposes of s. 26 of the Indian Evidence Act, 1872, a Coroner shall be deemed to be a Magistrate. Shortly after Mr. Justice Taraporewala gave his decision on this point, I had the same question before me, when presiding in this Court, and Mr. Justice Taraporewala's decision was cited to me, but I differed for reasons given in *Emperor v. Ramnath*

Mahabir (2). After hearing what Mr. Oliveira has to say, I still adhere to that opinion. I have given reasons there for my view, which I do not think it necessary to repeat. As regards the point I have mentioned about s. 19, it is, I think, to be noted that the first paragraph of that section is restricted to the taking of evidence, and it naturally says that all evidence given under the Act shall be on oath. The subsequent words that "the Coroner shall be bound to receive evidence on behalf of the (suspect) party," to put the thing briefly, is natural, having regard to the fact that the paragraph is dealing with the question of evidence. Therefore, it naturally says "evidence on behalf of the party (if any) accused" instead of including "evidence by any party", because there is nothing in the section to prevent the accused giving evidence on his own behalf, just as a plaintiff or a defendant in a civil suit is allowed to give evidence on his own behalf. It must be remembered that an inquest is not the same thing as a trial before a Court, where under a special provision of the Criminal Procedure Code the accused is not to be examined on oath. Accordingly, in the absence of any similar provision in the Coroners' Act, I am inclined to say that a person, who is accused of causing the death of the subject of the inquest, can give evidence on his own behalf. But, even supposing that this view is wrong, in my opinion, there is nothing in the Act to prevent such an accused being allowed to make a statement after due warning, as was done in this case; and supposing that an oath ought not to have been administered, the mere fact that such additional sanction has been given to the statement does not, in my opinion, exclude the statement from those that can be made to the Coroner as a Magistrate in accordance with the provisions of s. 20 of the Coroners' Act. The statement, which is in question here, contains some incriminating admissions in regard to the charge against the accused and so comes under the provisions of s. 26 of the Indian Evidence Act. For these reasons I hold that the statement is admissible in evidence.

A. N. A.

Order accordingly.

(2) 93 Ind. Cas. 690; 28 Bom. L. R. 111; A. I. R. 1924 Bom. 151; 50 B. 111; 27 Cr. L. J. 466.

(1) 93 Ind. Cas. 225; 28 Bom. L. R. 79; A. I. R. 1926 Bom. 144; 27 Cr. L. J. 433; 50 B. 56.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 742 OF 1926.

October 31, 1927.

Present:—Mr. Justice Harrison.

MATWAL DAS AND ANOTHER—DEFENDANTS
—PETITIONERS

versus

NAND LAL AND ANOTHER—PLAINTIFFS

Musammam GANGO BAI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Punjab Courts Act (VI of 1918), s. 44—Revision—Error of law—Wrong interpretation of document, whether ground for revision—Provincial Small Cause Courts Act (IX of 1887), Sch. II, para. 8—'House rent,' whether includes shop rent.

Where there are two possible views of the meaning of the words used in a document and the lower Courts have accepted one, it is not open to the High Court to interfere in revision whether it agrees with that view or not.

A wrong decision on a point of law is no ground for interference in revision.

Amir Hassan Khan v. Sheo Baksh Singh (1), followed.

The words 'house rent' as used in para. 8, Sch. II, Provincial Small Cause Courts Act, cover and include shop rent.

Petition for revision of a decree of the Senior Subordinate Judge, Multan, dated the 5th May, 1926, affirming that of the Subordinate Judge, Fourth Class, Multan, dated the 6th February, 1926.

Mr. Faqir Chand, for the Petitioners.

Mr. B. P. Khosla, for the Respondents.

JUDGMENT.—This revision was admitted on the question of the interpretation to be placed on a certain document. The suit was between certain landlords and their tenants, the remaining landlords being impleaded as defendants. The agreement in question which ended the previous litigation provided for the raising of the rent from a certain date and immediately after the sentence which made this provision the words are to be found that repairs would be done on behalf of the landlords by one Haji Karim Bakhsh before that date. The contention of the defendants has been throughout that the raising of the rent was conditional on the previous carrying out of the repairs. The view taken by both the trial Court and the lower Appellate Court was that the two conditions were independent and that the raising of the rent was not dependent upon the previous performance of the repairs. I have been referred to the standard authority *Amir Hasan Khan v. Sheo Baksh Singh* (1) and also to *Shew Prosad*

(1) 11 O. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C. No. 33; 5 Ind. Dec. (N. S.) 760 (P. C.).

Bungshidhur v. Ram Chunder Hari Bux (2) and on the other side reliance has been placed upon *Satish Chandra Bhattacharjee v. Sri Jogunnessa Bibi* (3). It appears to me that this is essentially a case governed by *Amir Hassan Khan v. Sheo Baksh Singh* (1). There are two possible views of the meaning of the words used in the document but the trial Court and the Appellate Court have taken one, and whether I agree with that view or not, it is not open to me to take the question up in revision and the petition should not have been admitted by me in the first instance for I am of opinion that it is a revision and not a second appeal and that the words 'house rent' as used in para. 8 of the Second Schedule of Act IX of 1887 cover and include shop rent. If it be conceded in the first instance that the interpretation of this document is a question of law and not a finding of fact on the intention of the parties similar to that explained in *Diwan Chand v. Sundar* (4) and even if it be further conceded that the question of law has been wrongly decided no revision can be entertained as laid down in *Amir Hassan Khan v. Sheo Baksh Singh* (1).

The further point about the suit in this form not being maintainable is again a question which has been decided wrongly but with complete jurisdiction.

The petition is dismissed with costs.

R. L.

Petition dismissed.

(2) 23 Ind. Cas. 977; 41 C. 323.

(3) 78 Ind. Cas. 958; 51 C. 690; 28 C. W. N. 559; 39 O. L. J. 434; A. I. R. 1924 Cal. 633.

(4) 36 Ind. Cas. 199; 68 P. R. 1916; 182 P. W. R. 1916; 77 P. L. R. 1917.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2703 OF 1926;

November 24, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice,
and Mr. Justice Bhide.ALLAN ROBERT SHAW—PLAINTIFF—
APPELLANT

versus

MRS. EMILY MAY SHAW—DEFENDANT—
RESPONDENT.

- Divorce—Petition for dissolution of marriage on ground of adultery—Unreasonable delay, effect of.
- A petition for dissolution of marriage on the ground of adultery is liable to be dismissed if the applicant is guilty of unreasonable delay in presenting the petition.

First appeal from a decree of the District Judge, Rawalpindi, dated the 28th April, 1926.

Mr. Anant Ram, for the Appellant.

JUDGMENT.—The District Judge of Rawalpindi has dismissed the petition of one Allan Robert Shaw, for dissolution of his marriage with his wife, on the ground that, while the adultery of the wife had been established, the husband has been guilty of unreasonable delay in presenting the petition. The evidence on the record shows that the offence complained of was committed in the summer of 1921, and that it came to the knowledge of the husband shortly afterwards. He did not, however, make the application for divorce until after the expiry of five years. It is not disputed that there was unreasonable delay in presenting the petition, and the explanation offered by the husband to account for the delay has been considered by the trial Judge and found to be unsatisfactory.

The learned Counsel for the appellant has again put forward the explanation which has already been rejected by the District Judge, but we do not think that any ground has been established, such as would justify our dissent from the conclusion of the trial Judge. We accordingly dismiss the appeal, but as there is no appearance by or on behalf of the respondent we make no order as to costs in this Court.

R. L.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1000 OF 1927.

September 27, 1927.

Present:—Mr. Justice Addison.

BABU SINGH—DECREE-HOLDER—

APPELLANT

—versus—

S. GURBAKSH SINGH—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 69, 84—Sale outside Court precincts—Power of officer conducting sale to adjourn sale—Bidder withdrawing from sale, liability of—Subsequent sale conducted after fresh proclamation, effect of—Order refusing to hold defaulting purchaser liable—Appeal.

Where an execution sale is not being conducted in or within the precincts of the Court house, the officer

conducting the sale has a discretion to adjourn the sale to the following day.

Where a bidder at a sale refuses to deposit the one-fourth amount of the bid, and a re-sale is effected after a fresh proclamation, the bidder cannot be held liable for any deficiency in the purchase-money inasmuch as the second sale cannot be said to be held 'forthwith' within the meaning of O. XXI, r. 84, Civil Procedure Code.

An order refusing to hold a defaulting bidder liable for the deficiency of price in such a case is open to appeal.

Sit Ram v. Janki Ram (1), followed.

First appeal from an order of the Senior Sub-Judge, Amritsar, dated the 8th January, 1927.

Mr. Shamair Chand, for the Appellant.

Dr. Gokal Chand Narang, for the Respondent.

JUDGMENT.—The decree-holder-appellant attached certain immoveable property of his judgment-debtors and the auction sale was fixed for the 23rd August, 1926. On that day no bid was obtained and the sale was continued to the 24th when certain bids were obtained. It was again continued to the 25th when the last bid was one of Rs. 4,200 made by the decree-holder. The sale, however, was continued till the morning of the 26th at the request of the judgment-debtor. That day the last bid was of Rs. 4,400 by one Gurbaksh Singh a Vakil of this Court. When the property was going to be knocked down to him, however, he refused to sign his bid and said he withdrew from it. He also refused to deposit one-fourth of the amount of his bid. The Nazir who was auctioning the property did not close the sale but reported the matter to the Executing Court for orders. The Court instead of ordering a re-sale forthwith at the risk of Gurbaksh Singh, commenced the usual dilatory investigation. On the 2nd of October it ordered a re-sale to take place after a fresh proclamation and the property was sold to the decree-holder for Rs. 4,025 on the 17th of November. Before the Executing Court Gurbaksh Singh admitted that he gave the bid but explained that he withdrew it, this of course being no explanation. The Executing Court refused to make him pay the difference of price amounting to Rs. 425 on the ground that the auctioneer should not have adjourned the sale till the 26th and on a further ground that the auctioneer should have proceeded with the sale and should not have concluded the auction. Against this decision the judgment-debtors and decree-holder have appealed.

Both the reasons given by the Executing Court are wrong. The sale was not conducted in or within the precincts of the Courthouse and the officer conducting it had discretion to adjourn the sale to the 26th under O. XXI, r. 69, Code of Civil Procedure. Further, the officer conducting the sale did not close the auction but reported the matter for the orders of the Executing Court and it gave no order as it should have done. The order it should have given was that the property be re-sold forthwith under O. XXI, r. 84, Code of Civil Procedure. Unfortunately this appeal cannot, however, be accepted as the re-sale did not take place forthwith within the meaning of O. XXI, r. 84. If it had, Gurbakhsh Singh would have been liable for the deficiency on the re-sale under O. XXI, r. 71, Code of Civil Procedure.

It was contended that no appeal lay. This is clearly wrong, as it was held in the Full Bench Allahabad case, *Sita Ram v. Janki Ram* (1), that such an order was appealable. In that case the highest bidder failed to deposit 25 per cent of the purchase money and in consequence the property was re-sold next day. It was held that the re-sale had been held forthwith within the meaning of O. XXI, r. 84, Code of Civil Procedure, and the first purchaser was liable to make good the deficiency of the purchase-money. In the present case the official conducting the sale could have gone on with the re-sale, but instead of doing so he reported the matter to the Executing Court which also could have passed the necessary order for re-sale forthwith. Had this been done Gurbakhsh Singh could have been held liable. He seems to have been trying to raise the bid made by the decree-holder, and when the decree-holder did not give another bid he promptly refused to ratify his own bid by depositing the 25 per cent. Such conduct of a Vakil of this Court is most regrettable. For the reasons given, however, I dismiss this appeal but leave parties to bear their own costs.

R. L.

*Appeal dismissed.***LAHORE HIGH COURT.**

SECOND CIVIL APPEAL No. 1314 OF 1927.

November 10, 1927.

Present :—Mr. Justice Zafar Ali.*Musammat* PLUNGUN—DEFENDANT—

APPELLANT

*versus**Musammat* JASODHAN—PLAINTIFF—

RESPONDENT.

Co-owners—Partition—Presumption of partition of entire property.

Where co-owners are proved to have effected a partition the presumption is that the entire joint property has been partitioned.

Second appeal from a decree of the Additional Judge, Kangra at Dharamsala, dated the 25th of February, 1927, reversing that of the Subordinate Judge, Fourth Class, Kangra, dated the 3rd December, 1926.

Mr. Gullu Ram, for the Appellant.

Mr. Qabul Chand Mital for Mr. Shamair Chand, for the Respondent.

JUDGMENT.—The parties in this case are the widows of the brothers who were co-owners of a holding. When the holding devolved on the widows it was partitioned between them and the partition was given effect to in the Revenue Records. One of the widows now sued for partition of the residential house. The defendant pleaded that the joint house was partitioned along with the land and that the house in her possession had been constructed by herself. Neither party having produced any evidence the trial Court dismissed the plaintiff's suit. On appeal the learned Senior Subordinate Judge reversed the order of the trial Court and decreed the plaintiff's suit.

Now, it is clear that in view of the partition of the holding that took place in 1902 the presumption was that the house also had been partitioned along with the land. As there was no evidence to rebut this presumption the plaintiff's suit must fail. I, therefore, accept the appeal, set aside the order of the lower Appellate Court and restore that of the trial Court with costs throughout.

R. L.

Appeal allowed.

(1) 65 Ind. Cas. 813; 44 A. 266; 20 A. L. J. 105; A. I. R. 1922 All. 200.

LAHORE HIGH COURT.MISCELLANEOUS FIRST CIVIL APPEAL No. 1698
OF 1927.

November 18, 1927.

Present:—Mr. Justice Zafar Ali.

S. JAI DEV SINGH—DEFENDANT—
APPELLANT
versusS. JAI SINGH AND ANOTHER—PLAINTIFFS—
RESPONDENTS.*Civil Procedure Code (Act V of 1908); O. XXXVIII, rr. 5, 6, O. XLIII, r. 1 (g)—Attachment before judgment, unconditional order of, when justified—Appeal.*

An order for attachment before judgment which is unconditional must be deemed to be an order under O. XXXVIII, r. 6 of the Civil Procedure Code even though it is stated to be passed under r. 5, and is appealable under O. XLIII, r. 1 (g).

An unconditional attachment before judgment can only be ordered under r. 6 of O. XXXVIII, Civil Procedure Code, when the defendant has failed to comply with an order made under r. 5 of the said Order.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Rawalpindi, dated the 18th May, 1927.

Bhagat Gobind Das, for the Appellant.

Mr. Har Gopal, for the Respondents.

JUDGMENT.—This is a miscellaneous first appeal against the order for attachment before judgment made by the Senior Subordinate Judge of Rawalpindi. The order runs thus:—

“.....under the circumstances I think that it is necessary to attach the *kothi* before judgment under O. XXXVIII, r. 5 of the Civil Procedure Code and I order it accordingly.”

Now, an order under the said r. 5 is not appealable while O. XLIII, r. 1 (g) of the Civil Procedure Code gives the right of appeal against an order under r. 6. In the present case, however, though the learned Senior Subordinate Judge purports to have acted under r. 5, that rule has no application. That rule contains three clauses and the Court while calling upon the defendant to furnish security etc., under cl. (1) may also order conditional attachment of his property. The learned Senior Subordinate Judge having made an order under cl. (1) could make none under cl. (3).

Further under cl. (3) “the Court may also in the order (made under cl. (1) direct the conditional attachment.....”. But the attachment ordered by the Senior Subordinate Judge was not conditional. An unconditional attachment can only be

ordered under r. 6 when the defendant fails to comply with an order made under r. 5.

Counsel for the respondent concedes that the order is irregular but contends that it is not appealable. He further urges that it cannot be revised. He contends that the order should be amended by this Court and should not be set aside.

On the other hand, the Counsel for the appellant argues that the order is irregular and illegal but all the same it is an order under r. 6 because there is no other provision in the Civil Procedure Code empowering a Court to order attachment before judgment.

As unconditional attachment could be ordered under r. 6 only and as the attachment was unconditional it may be taken that the order was under r. 6. But it was irregular and illegal because the circumstances under which it could be made did not exist.

I, therefore, accept the appeal and set aside the order with costs.

R. L.

Appeal accepted.

A. N. A.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2721 OF 1922.

April 10, 1926.

Present:—Mr. Justice Martineau and
Mr. Justice Dalip Singh.DURGA DATT-JAGAN NATH—
PLAINTIFFS—APPELLANTS

versus

GANESH DAS-ISHAR DAS—DEFENDANTS
—RESPONDENTS.*Contract—Sale of goods by shipments—Construction of contract—Damages for breach, measure of—Time for performance, whether date of actual arrival of goods or date on which they ought to have arrived.*

The defendants agreed to sell to the plaintiffs goods of certain shipments. The contract stipulated that patterns and invoices were to be delivered when they arrived, that the defendants were to give intimation to the plaintiffs of the arrival of the goods, that when the goods arrived the plaintiffs were to take delivery on payment to the Bank, and that they would be liable for godown rent if they did not take delivery at once. In a suit for damages for breach of contract:

Held, that, upon a proper construction of the contract, the time for performance was the time of the actual arrival of the goods, and that damages must accordingly be calculated with regard to the rates prevailing on the actual dates of the arrival of the goods and not those prevailing on the dates on which the goods might reasonably have been expected to arrive, [p. 277, col. 2.]

Appeal from a judgment of the Senior Sub-Judge, Delhi, dated the 31st July, 1922.

Messrs. *Sardha Ram* and *B. Narain*, for the Appellants.

Bakhshi Tek Chand and *Mr. Mehr Chand Mahajan*, for the Respondents.

JUDGMENT.—The parties are cloth merchants of Delhi. On the 1st December, 1916, the defendants agreed to sell to the plaintiffs 75 cases of white shirting D. 1 of R. J. Wood & Company's Office of the November, December and January, February, March and April shipments. They did not deliver 37 cases of the February, March and April shipments and the plaintiffs have accordingly sued for damages for breaches of contract, together with interest claiming Rs. 18,394-2-3 in all. The defendants deny liability, pleading that they did not receive 33 out of the 37 cases from the persons from whom they had bought them, and that the plaintiffs did not demand the goods.

The Subordinate Judge found for the plaintiffs, but has given decree for only Rs. 1,418-12-0 calculating the damages with reference to the market rates prevailing at the times when the goods might have been reasonably expected to arrive, which he takes to be three months after shipment. The plaintiffs have appealed.

There is nothing in the contract to show that the delivery of the goods by the defendants to the plaintiffs was contingent on the defendants receiving them from their own sellers and we agree with the lower Court's finding on this point.

On the question of demand the lower Court held that as the defendants had undertaken to send invoices and patterns and to report the arrival of the goods to the plaintiffs, it was not incumbent on the latter to make a demand for the goods. It is unnecessary to discuss this point, as we think that the making of the demand has, as a matter of fact, been sufficiently proved by the evidence of the plaintiffs' agent *Jhandu Mal* (P. W. No. 13), who states that they made several demands and that he went personally also to make them. The defendant *Ishar Das*, though he went into the witness-box, did not contradict *Jhandu Mal's* statement on that point and we, therefore, see no good reason for rejecting it.

It is argued for the defendants that the plaintiffs have not proved that they were ready and willing to perform their part

of the contract, but we must decline to go into this question as although an issue was framed by the lower Court on the point the defendants did not raise it in their pleas. They pleaded that the plaintiffs did not tender the money but that is a different matter.

Similarly, we cannot entertain the arguments that the goods contracted for did not arrive, as the plaintiffs distinctly stated in the third paragraph of their plaint that the goods arrived and specified the periods during which the several shipments arrived; and these allegations were not denied by the defendants in their pleas.

The main question in the case is whether the dates for the performance of the contract were the dates on which the goods might reasonably have been expected to arrive in Delhi as held by the lower Court, or the actual dates of their arrival, as contended by *Mr. Sardha Ram* on behalf of the appellants. It was stipulated in the contract (page 7 of the paper-book) that patterns and invoices were to be delivered when they arrived, that the defendants were to give intimation to the plaintiffs of the arrival of the goods, that when the goods arrived the plaintiffs were to take delivery on payment to the Bank, and that they would be liable for godown rent if they did not take delivery at once. This shows that the time for performance was to be the time when the goods actually arrived. The learned Subordinate Judge thinks that if the goods after having been shipped at the proper time, arrived after great delay the buyers would not have been bound to take them up. We have, however, merely to construe the contract from its terms, and we are of opinion that the appellants' interpretation is the correct one, notwithstanding that in other cases decided by this Court [see *Civil Appeals No. 3259 of 1921* and *Prag Das Budhsen v. Munni Lal* (1).] relating to contracts of a similar nature, a different view has been taken as to the due date for performance. We hold that for the calculation of the damages regard has to be had to the actual dates of arrival of the goods and not to the dates on which the goods might have been expected to arrive.

It is stated in the plaint that the February shipment arrived from September to December and the April shipment from September, 1917, to March, 1918. The

dates of the various months are given in Ex. P. W. No. 1/1, page 8 which is proved by Mr. Shariff, has Manager of R. J. Wood & Co.'s Office and has been prepared from his registers. The last dates are the 4th October, 1917, for the February shipment, the 7th December, 1917, for the March shipment and the 4th March, 1918, for the April, 1917, shipment. These are the dates of the arrival of the Railway receipts, and ten days may reasonably be added for the time which it would take for the goods to reach Delhi from Bombay. Thus the due dates for the February, March and April shipments, respectively, would be the 14th October, 1917, the 17th December, 1917, and the 14th March, 1918.

The rates prevailing on these dates are given in entries in the account books produced by P. W. Nos. 4 and 11, the rate on the 14th October, 1917, being Rs. 21-4-0 per piece (page 19 of the paper-book); the rate on the 17th December, 1917, Rs. 24-3-0 (page 36) and the rate on the 14th March, 1918, Rs. 25 (page 20).

It is contended for the respondents that the rates have not been proved as the witnesses in whose books they are shown have stated nothing more than that the copies which they produced are true translations of the entries. It would appear, however, that the defendants did not really dispute the correctness of the entries in the books, for they made no attempt to cross-examine the witnesses in regard to them; so that, although the examination of the witnesses was defective, we think that in the circumstances the rates given in the books may be taken to be the correct rates. A further contention is that it has not been shown whether the rates covered were the rates for ready goods or for forward goods, but on this point also there was no cross-examination, and we think the argument has little force. We, therefore, take the rates shown in the books to be those prevailing on the due dates. A deduction of 4-annas per piece has, however, to be made as the rates entered are the retail rates, and it is in evidence (see statement of D. W. No. 1) that goods sold wholesale are 4 annas per piece cheaper. The contract rate, including the seller's profit and the expenses payable by the buyers, was Rs. 16 per piece. The difference between the contract rate and market rate is thus Rs. 8 per piece for

the February shipment, Rs. 15 for the March shipment, Rs. 8-12-0 for the April shipment. But the plaintiffs claimed damages in respect of the February shipment at the rate of only Rs. 7-11-0 and they must be limited to that.

The damages for the non-delivery of the 12 cases (*i. e.*, 600 pieces, of the February shipment, 12 cases of the March shipment and 13 cases of the April shipment come to Rs. 612-8-0, Rs. 762-8-0 and Rs. 687-8-0 respectively. The total to which the plaintiffs are entitled for damages, is, therefore, Rs. 15,062-8-0. We do not think that any interest should be allowed.

We accept the appeal and give the plaintiffs a decree for Rs. 15,062-8-0 with proportionate costs in both Courts.

A. N. A.

Appeal accepted.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 226 OF 1922.

April 10, 1926.

Present:—Mr. Justice Martineau and

Mr. Justice Dalip Singh.

GANESH DAS-ISHAR DAS—PLAINTIFFS

—APPELLANTS

versus

BASHESHA LAL-BANSI DHAR—

DEFENDANTS—RESPONDENTS.

Contract—Sale of goods by shipments—Condition for informing purchaser of date of arrival of goods and for removal of goods on that date—Time for performance—Damages.

Where a contract for sale of goods by shipments provided that as soon as goods were received the defendants were to inform the plaintiffs, who were to remove the goods on payment of the money to the Bank, that if the plaintiffs were to remove the goods after "due date" they would be liable for interest and godown rent, and that the plaintiffs were to pay the godown rent from the time when the goods arrived:

Held, that the time for performance was the time when the goods actually arrived, that the due date mentioned in the contract could only mean the date of arrival and that, consequently, damages had to be calculated with reference to the market price on the date of the arrival of the goods and not the date on which the goods might reasonably have arrived. [p. 279, col. 1.]

First appeal from a decree of the First Class Sub-Judge, Delhi, dated the 26th October, 1921.

Messrs. Sardha Ram and Jagan Nath Bhandari, for the Appellants.

Moti Sagar R. B. and Messrs. Nanwan Mal for Mr. Raj Krishna, for the Respondents.

JUDGMENT.—The parties are cloth merchants of Delhi. On the 21st November, 1916, the defendants agreed to sell to the plaintiffs 75 cases of white shirting D-1, of the Office of R. J. Wood & Co., of the November, December, January, February, March and April shipments. The plaintiffs sued for damages for non-delivery of 33 cases of the February, March, and April, 1917 shipments, and for interest in addition, claiming Rs. 17,300 in all. The defendants said that the 33 cases not delivered comprised 5 of the November shipment, 4 of December, 4 of February, 8 of March, and 12 of April. They pleaded that as the persons who had agreed to sell the goods to them did not supply them, the plaintiffs were not entitled to damages, and they also denied that the plaintiffs had suffered any loss.

The lower Court, while finding that the contract between the parties was not contingent on the receipt of the goods by the defendants from their sellers, has dismissed the suit on the ground that the plaintiffs did not suffer any damage, inasmuch as the rates prevailing on the dates of the breach of contract were less than the cost price. The plaintiffs have appealed.

In the contract printed on page 7 of the paper-book the defendants mentioned that they had bought in the market the goods which they sold to the plaintiffs, but there is nothing to show that it was intended that they were not to be liable to supply the goods to the plaintiffs unless they themselves received the goods from their own sellers, and we agree with the lower Court's finding on this point.

The first question is what were the due dates for the performance of the contract. The lower Court has held that they were those on which the goods ought to have been received in the ordinary course. Mr. Sardha Ram, for the plaintiffs-appellants, contends that the due dates were the dates on which the goods actually arrived in Delhi, and he lays stress on the conditions in the contract that as soon as goods were received the defendants were to inform the plaintiffs, who were to remove the goods on payment of the money to the Bank, that if the plaintiffs were to remove the goods after "due date" they would be liable for interest and godown rent, and that the plaintiffs were to pay the godown rent from the time when the goods arrived.

Mr. Moti Sagar, for the defendants respondents, argues that these conditions indicate only the way in which the contract was to be performed, but, in our opinion, the agreement, that when the goods arrived the defendants were to send intimation to the plaintiffs who were then to pay for them and take them away and were to be liable for godown rent from the time of the arrival of the goods, shows that the time for performance was to be the time when the goods actually arrived and the due dates expressly mentioned in the contract can only mean the dates of arrival. The argument that the buyers would not be bound to take up the goods if they arrived after much delay is of no avail in construing the contract, which has to be taken as it stands and we are of opinion that appellants' interpretation is the correct one. We hold, therefore, that for the calculation of the damages regard has to be had to the actual dates of the arrival of the goods; and not to the dates on which the goods might have been expected to arrive.

The next question is on what dates the goods arrived. We have the evidence of Mr. Grey, the General Manager of Messrs. R. J. Wood & Co., who has filed a statement, P. W. No. 1/1 prepared from his godown book showing the dates of arrival of the Railway receipts of the various shipments, and we see no good reason for not accepting that statement. It is contended that the plaintiffs have not proved when the goods were shipped, but Mr. Grey was not questioned in regard to the dates of the shipments, and we think that the goods of the particular shipments mentioned in his register should, in the absence of evidence to the contrary, be taken to have been shipped at the proper time. The Railway receipts for goods of the February shipment are shown in the statement put in by Mr. Grey as having arrived from the 2nd July to the 4th October, 1917, the Railway receipts for goods of the March shipment are shown as having arrived from the 3rd September to the 7th December, 1917; and those for the goods of April shipment from the 3rd September, 1917, to the 4th March, 1918. Allowing ten days, as the lower Court has done, for the goods to reach Delhi from Bombay we take the 14th October, 1917, to be the due date so far as the February shipment is concerned, the 17th December, 1917, to be the due date for the March shipment, and the 14th March

1918 to be the due date for the April, 1917 shipment.

The number of cases of the several shipments in respect of which the plaintiffs are entitled to compensation has then to be determined. The lower Court is wrong in thinking that the plaintiffs ultimately cancelled the contract for the February shipment. In their letter, page 19, dated the 29th June, 1917, they cancelled, not the contract but eight cases, for which the defendants had sent them an invoice and pattern, on the ground that they were late. In the invoice D. 18, sent to them by the defendants on the 25th June while the shipment was mentioned as the February shipment, the goods of which had under the contract to be shipped by the 10th March, the date of the Bill of Lading was given as the 13th April. On the face of the invoice, therefore, the goods had been shipped late. We cannot agree with the argument that the plaintiffs were bound to accept them as goods of the April shipment, seeing that the defendants had appropriated them to the February shipment, and we must hold that the plaintiffs were justified in rejecting them and are entitled to damages for non-delivery for all the twelve cases of the February shipment. Out of the March shipment four cases were delivered to the plaintiffs, and they are entitled to damages in respect of the remaining eight. Admittedly none of the goods of the April shipment were delivered.

It remains to assess the damages. The contract price per piece was 17s. 3d. which at the rate of a 5-1/32d. per rupee (the rate of exchange current from the 29th August, 1917 to the 31st March, 1918 (see page 13 of the paper-book A) was equivalent to Rs. 12-2-6. To this has to be added Rs. 1-3-5 for expenses which the buyers had to bear under the contract, and Rs. 2 for the sellers' profit, making a total of Rs. 15-5-11. The market rate on or about the due date in respect of each shipment is shown by entries in the books produced by P. Ws. Nos. 3 and 9 who have stated that they keep regular books.

The market rate on the 12th October, 1917, two days before the due date for the February shipment, is shown as Rs. 24-4-0 per piece (page 15). Deducting Rs. 15-5-11 from this the plaintiffs' loss comes to Rs. 8-14-4 per piece. On the 12 cases of the February shipment, each of which contains 50 pieces, the loss amounts to Rs. 5,328-2-0.

The market rate on the 16th December, 1917, the day before the due date for the March shipment, was also Rs. 24-4-0 (page 22). The plaintiffs' loss in respect of eight cases of this shipment amounts to Rs. 3,582-1-4.

The market rate on the 14th March 1918, which was the due date for the April shipment, was Rs. 25-1-0 (p. 16). The plaintiffs' loss is Rs. 9-11-1 per piece and on 12 cases it amounts to Rs. 5,316-10-0.

The damages to which the plaintiffs are entitled in respect of the shipments of February, March and April, 1917 thus amount to Rs. 14,695-13-4. They have, however, limited their claim in appeal to Rs. 11,500.

We accordingly accept the appeal and give the plaintiffs a decree for Rs. 11,500 with full costs in this Court and proportionate costs in the lower Court.

A. N. A.

Appeal accepted.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 994 OF 1923.

November 22, 1927.

Present:—Mr. Justice Broadway and Mr. Justice Jai Lal.

PIR BAKHSH—DEFENDANT—APPELLANT
versus

Musammat GHULAM BIBI AND ANOTHER
—PLAINTIFFS AND Musammat RAHMATE
—DEFENDANT—RESPONDENTS.

Custom — Succession — Self-acquired property — Daughters, whether exclude collaterals — Punjab Colonization of Government Lands Act (V of 1912), s. 20 as amended by Punjab Act (III of 1920), application of — Devolution of tenancy.

The general rule of Customary Law of Amritsar District and, in fact, that of the Punjab is that daughters exclude collaterals in succession to self-acquired property. [p. 281, col. 2.]

Section 20 of the Punjab Colonization of Government Lands Act provides only for the devolution of a tenancy in cases where after the commencement of the Act any original tenant dies. In other cases it is the general rule of custom by which the parties are governed which determines devolution. [*ibid.*]

First appeal from a decree of the Senior Subordinate Judge, Lyallpur, dated the 18th April, 1923.

Mr. Abdul Ghani Khan, for the Appellant.

Messrs. Mehr Chand Mahajan and Faqir Chand, for Lala Moti Sagar, R. B., for the Respondents.

JUDGMENT.

Broadway, J.—This is an appeal by Pir Bakhsh against a declaratory decree

passed by the Senior Subordinate Judge of Lyallpur declaring that the plaintiffs, the daughters of one Nathu, were entitled to succeed to the land in dispute after the death of their mother *Musammāt Rahmate*. The learned Senior Subordinate Judge has written a lengthy judgment in which all the points have been carefully discussed. It appears that the original tenant of this land was one Nathu who was granted the holding as an *abadkar* and subsequently acquired occupancy rights therein. He died in 1908 leaving him surviving a widow *Musammāt Rahmate* and two daughters *Musammāt Ghulam Bibi* and *Mehtab Bibi*. *Musammāt Rahmate* attempted to dispose of this tenancy but her attempt failed as the Revenue Authorities declined to sanction the alienation proposed by her. Later on she made a gift in favour of her daughters. When this gift was placed before the Revenue Authorities for sanction Pir Bakhsh protested urging that he was the ultimate heir to this property as a collateral of the deceased Nathu. The Revenue Authorities accordingly declined to enter up the gift and referred the parties to a Civil Court. Thereupon the two daughters (both of them married) of Nathu brought a suit for a declaration of their rights as the heirs of Nathu, impleading *Musammāt Rahmate* widow of Nathu and Pir Bakhsh as defendants. *Musammāt Rahmate* admitted the claim while Pir Bakhsh contested it.

It has been urged before us that the suit is governed by the provisions of Act V of 1912 as amended by Act III of 1920. This appears to have been the position taken up by both parties in the Court below. In the grounds of appeal to this Court it was alleged that Act V of 1912 did not apply. The learned Advocate for the appellant appears to have been in a somewhat of a quandary as to the line he was prepared to take in this Court for at one time he said that he was prepared to give up that ground and urged that the parties were governed by the Act of 1912. It seems to me, however, that that Act does not afford any assistance in this matter. The succession in this case is clearly succession to Nathu and s. 20 of Act V of 1912 as amended by Act III of 1920 provides for the devolution of a tenancy in cases where after the commencement of the Act any original tenant dies. Admittedly in the present case Nathu died in 1908 and succession to his rights, therefore, is clearly not governed by this section. In

order to ascertain who his successor is recourse must be had to the ordinary custom by which the parties are governed. The general rule of custom as laid down in para. 23 of the Digest of Customary Law by Sir William Rattigan, is that daughters exclude collaterals in succession to self-acquired property. Admittedly this estate is the self-acquired or non-ancestral property of Nathu and, therefore, by the general custom the plaintiffs in this case would exclude collaterals. An attempt was made by Pir Bakhsh to establish a custom to the contrary and certain evidence was led in support. That evidence has been carefully examined by the learned Senior Subordinate Judge and it has been pointed out that the instances given by the witnesses have no real application to the facts before us whereas the instances relied on and proved by the plaintiffs, support their claim. So far as the Customary Law of the Amritsar District, (from which district Nathu originally migrated to Lyallpur), shows the general trend of opinion was that daughters succeed to non-ancestral property to the exclusion of agnates. In every respect, therefore, the claim of the daughters appears to me to be superior to that of Pir Bakhsh and I would, therefore, dismiss this appeal with costs.

Jai Lal, J.—I agree.

E. L.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2232 OF 1923.

November 10, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Zafar Ali.

NARAIN SINGH AND ANOTHER—CREDITORS
—APPELLANTS

versus

GURBAKSH SINGH, MINOR, PER
ISHAR SINGH, SON AND REPRESENTATIVE
OF RAM SINGH, DECEASED, INSOLVENT, AND
THE OFFICIAL RECEIVER, LYALLPUR
—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXII,
r. 4—Appeal by creditors against adjudication of
insolvency—Death of insolvent—Abatement of ap-
peal.*

An appeal preferred by the creditors against an order adjudicating a debtor as an insolvent abates on the death of the insolvent and cannot be continued against his sons.

Hardian Singh v. Sham Sundar (1), followed.

Miscellaneous first appeal from an order of the District Judge, Lyallpur, dated the 9th May, 1923.

Mr. V. H. Sethi, for the Appellant.

Dewan Mehr Chand, for the Respondents.

JUDGMENT.—One Ram Singh applied to be declared insolvent and his application was accepted by the trial Court and he was adjudicated an insolvent. Some of his creditors preferred the present appeal against the order of adjudication, but during the pendency of the appeal Ram Singh died, and the creditors seek to implead his minor son as his legal representative for the purposes of the appeal.

Now it has been held by a Division Bench of the Punjab Chief Court in *Hardian Singh v. Sham Sundar* (1) that an appeal preferred against the adjudication of an insolvent abates on his death as the right to sue does not survive within the meaning of s. 378 of the Civil Procedure Code (corresponding to O. XXII, r. 4) on the death of respondent insolvent in an appeal by creditors against an order adjudging him to be an insolvent. Such an order is purely personal to the insolvent. The learned Counsel for the appellants has not invited our attention to any judgment which lays down the contrary rule. It is true that as enacted in s. 17 of the Provincial Insolvency Act if a debtor, by or against whom an insolvent petition has been presented, dies, these proceedings in the matter shall, unless the Court otherwise directs, be continued so far as may be necessary for the realization and distribution of his property. It must be remembered that the object of the section is that the death of the debtor should not affect the realization and distribution of his assets but it has no bearing upon the question before us.

We must accordingly hold that the appeal has abated. The appellants must pay the costs for the appeal.

R. L.

Order accordingly.

(1) 69 P. R. 1883.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 301 OF 1927.

November 10, 1927.

Present:—Mr. Justice Zafar Ali.

WALI MUHAMMAD—DEFENDANT—

PETITIONER

versus

FAZL DAD—PLAINTIFF, FATEH KHAN
AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. V, r. 20
—Substituted service—Plaintiff giving several different addresses of defendant—Inference—Service by proclamation.

Before substituted service can validly be effected all reasonable efforts must be made to find out the whereabouts of the defendant in order to effect personal service. [p. 283, col. 1.]

Where the plaintiff gives several addresses of the defendant and every time a different one it may be inferred that the defendant's address is not correctly known to the plaintiff and an order for substituted service should not be made. [*ibid.*]

Where the defendant is not in his village service by proclamation of the date of hearing is of no avail. [*ibid.*]

Petition for revision of an order of the District Judge, Rawalpindi, dated the 28th January, 1927, affirming that of the Subordinate Judge, Fourth Class, Gujjar Khan, District Rawalpindi, dated the 12th October, 1926.

Mr. Muhammad Rafi, for the Petitioner.

Mr. Aziz Ahmad, for the Respondents.

JUDGMENT.—The trial Court as well as the lower Appellate Court having refused to set aside the *ex parte* decree in a money suit that had been passed against the defendant-petitioner, he has come up to this Court with an application in revision, and his learned Counsel contends (1) that the trial Court was not justified in ordering substituted service of summons on the defendant, and (2) that the substituted service ordered had not been duly effected.

The suit was instituted on the 2nd of January, 1926, and the first date of hearing fixed was the 19th January, 1926. The summons issued to the defendant for that date was returned unserved, the process-server having made no attempt to serve it. A fresh summons, therefore, ought to have been issued in the ordinary way but the trial Court sent one by post in a registered envelop. (It may be noted here, that according to the rule added by this Court to O. V, r. 10 of the Civil Procedure Code the Court was bound to have service effected in accordance with the provisions of the said Order, of the Civil Procedure Code, if the defendant should have failed

to put in an appearance after receiving the summons by post.) The envelope however, came back with the report that the addressee could not be found. Then a summons was issued through a process-server whose return was that the defendant was absent in Montgomery. No real attempt was made to find out the whereabouts of the defendant and from the fact that the plaintiff gave each time a different address of the defendant it follows that his correct address was not known to him. There was no ground for assuming that the defendant was keeping out of the way to avoid service of summons. The Court, therefore, before ordering substituted service should have had reason to be satisfied that service of summons could not be effected in the ordinary way. It is difficult to say in the present case that the trial Court had sufficient reason to be satisfied. In *Bhowanidas Ramgovind v. Pannachand Luchmipat* (1) it was held that before substituted service can validly be effected all reasonable efforts must be made to find out the whereabouts of the defendant in order to effect personal service. Similarly in *Kassim Ebrahim Saleji v. Johudmull Khemka* (2) it was laid down that proper inquiries and real and substantial effort should be made to find out when and where the defendant is likely to be found. In the present case as the defendant was not in his village service by proclamation of the date of hearing in that village was of no avail.

The petitioner's application to have the *ex parte* decree set aside was within time and from the fact that he made his appearance in Court with this application some 20 days after the *ex parte* decree, it cannot be inferred that he had been wilfully keeping out of the way previously.

In view of all that has been stated above I come to the conclusion that the contention No. 1 of the Counsel for the petitioner is well-founded, and accordingly accepting this petition and reversing the order of the Courts below I set aside the *ex parte* decree and direct that the case be proceeded with by the trial Court according to law. No order as to costs of the proceedings in this Court.

R. L.

Revision allowed:

Case remanded.

(1) 88 Ind. Cas. 929; 52 C. 453; A. I. R. 1925 Cal. 801.

(2) 34 Ind. Cas. 799; 43 C. 447; 23 C. L. J. 183; 20 C. W. N. 173.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1542 OF 1923.

October 20, 1927.

Present :—Mr. Justice Fforde and
Mr. Justice Zafar Ali.

RALLIA SINGH—DEFENDANT—APPELLANT
versus

PARSHOTAM SINGH—PLAINTIFF

—RESPONDENT.

Appeal—Court refusing to entertain plea not taken in grounds of appeal—Second appeal—Interference.

When the lower Appellate Court in the exercise of its discretion has refused to entertain a plea not taken up in the grounds of appeal, the High Court will not interfere with this exercise of discretion by entertaining that plea where the discretion has not been exercised improperly or unjudicially.

Second appeal from the decree of the District Judge, Amritsar, dated the 13th April, 1923, affirming that of the Senior Subordinate Judge, Amritsar, dated the 29th June, 1916.

Mr. Chandar Gupta for Mr. Fakir Chand, for the Appellant.

Lala Badri Das, R. B., and Mr. Kishen Dayal, for the Respondent.

JUDGMENT.—Mr. Chandar Gupta for the defendant-appellant has sought to challenge the judgment of the lower Appellate Court on grounds which were not raised in the memorandum of appeal to that Court.

He urges that the agreement in question cannot be enforced on account of uncertainty. The point was not taken in the appeal to the District Judge.

He further urges that the decree went beyond the plaint, in which the plaintiff stated his readiness to pay costs of registration which have been wrongly imposed upon the defendant by the decree. That is a point which was not raised before the learned District Judge in the memorandum of appeal to his Court and the learned District Judge for that reason refused to entertain that ground when the appeal came before him for hearing. The learned District Judge in refusing to allow that point to be taken was exercising his discretion and it cannot be said that he exercised that discretion improperly or unjudicially. That being so, no second appeal lies against that exercise of discretion.

Another point which Mr. Chandar Gupta now seeks to argue is that there was no consideration for the original sale contract of 1903. That matter has been determined by the decision of the High Court in a judgment delivered on the 27th of

October, 1921, and is now not open to the appellant.

There is no other point raised before us and accordingly, as the other questions are concluded by the findings of the learned District Judge, this appeal must be dismissed with costs.

R. L.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 1299 of 1927.

October 19, 1927.

Present:—Mr. Justice Dalip Singh.

GOPAL SINGH AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

MANGAL SINGH—DEFENDANT—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 23—Remand order purporting to be under O. XLI, r. 23, but really under inherent powers—Appeal.

Right of appeal is determined by what the Court purports to do and not by what the Court should have done. Therefore, where the Court purports to remand under O. XLI, r. 23, Civil Procedure Code, an appeal is competent from the remand order, even though the order is really one passed under s. 151 of the Civil Procedure Code.

Miscellaneous second appeal from an order of the Senior Subordinate Judge, Amballa, dated the 11th April, 1927, reversing that of the Subordinate Judge, Fourth Class, Rupar, District Ambala, dated the 26th January, 1927.

Lala Faqir Chand, for the Appellants.

Mr. Sunder Das, for the Respondent.

JUDGMENT.—In this case the Appellate Court remanded the case under O. XLI, r. 23, Civil Procedure Code, in a judgment, which is perfectly impossible for me to follow.

So far as the Counsel for the respondent has been able to support it, he says that certain persons have not been made necessary parties to the suit and that the question is whether the relationship of landlord and tenant is proved and that there are certain documents which are to be legally proved and others whose admissibility is in question.

So far as the necessary parties are concerned there is no reason why they should be considered necessary parties at all. The other reasons given are questions of fact or law, which the Appellate Court

decided without any question of remand arising. It has been urged by Counsel for the respondent that the remand is not under O. XLI, r. 23, but under s. 151 and, therefore, no appeal lies. But the right of appeal is determined by what the Court purported to do, and not by what the Court should have done and, therefore, this objection has no force.

I accept the appeal. The respondent will pay the costs of this hearing. The case is sent back to the learned Senior Subordinate Judge to dispose of according to law.

R. L.

Appeal accepted.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 297 of 1927.

November 30, 1927.

Present:—Mr. Justice Zafar Ali.

Musammat RAJO—PLAINTIFF—PETITIONER
versus

ALI AND OTHERS—DEFENDANTS—

RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 164—Application to set aside ex parte decree—Onus of proving date of knowledge of decree.

In an application for setting aside an *ex parte* decree the onus of proving that the applicant became aware of the decree within 30 days and not before lies on him.

Petition for revision of an order of the Subordinate Judge, Fourth Class, Phalia, District Gujrat, dated the 14th March, 1927.

Mr. S. L. Puri for Mr. M. L. Puri, for the Petitioner.

Mr. Mohsin Shah, for the Respondents.

ORDER.—The *ex parte* decree in question was passed on the 6th November, 1925 and the application to have it set aside was filed on the 23rd March, 1926. The Court below held, therefore, to determine first of all whether the application was within limitation and the onus of proving that the applicant became aware of the decree within 30 days before the application and not before was upon him. The question of limitation, however, does not appear to have occurred to the Court below at all and without going into that question it set aside the *ex parte* decree. I, therefore, accept this petition for revision, set aside the order of the Court below and direct that the application be decided afresh in the light of the observations made above.

R. L.

Petition accepted.

LAHORE HIGH COURT.CRIMINAL REVISION No. 1383
OF 1927.

December 13, 1927.

Present :—Mr. Justice Dalip Singh.
DEVI DIAL AND OTHERS—ACCUSED—
PETITIONERS
*versus***Musammat RATTAN DEVI—COMPLAINANT**
—RESPONDENT.*Criminal trial—Warrant case—Accused reserving right of cross-examination—Charge framed for offence triable as summons case—Procedure relating to summons case, legality of adopting—Accused's right to re-cross-examine prosecution witnesses.*

Where a case is tried as a warrant case and the accused reserves his right of cross-examination, he is entitled to have the prosecution witnesses summoned for cross-examination after the framing of the charge even if the charge is framed for an offence triable as a summons case.

Case reported by the District Magistrate, Gujranwala, with his No. 2124 of 24th August, 1927.

Facts appear from the following report of the District Magistrate :—

REPORT.—*Musammat Rattan Devi* complainant lodged a complaint under ss. 147, 323, 354, 504, Indian Penal Code, against *Devi Dial* and others. The case was sent to the Bench of Honorary Magistrates, Gujranwala, exercising Second Class powers. The Court issued summons under s. 323, Indian Penal Code. The prosecution witnesses were examined, but the complainant and one or two other prosecution witnesses were not cross-examined at all by the accused, evidently because the case was proceeded with as a warrant case and they knew that they had a right to re-cross-examine the prosecution witnesses in case a charge was framed against them. However, at this stage the Court ordered that the case should be treated as one under s. 352, Indian Penal Code, i. e., a summons case and that the accused should produce their defence. On this the accused applied that the prosecution witnesses should be summoned for re-cross-examination as they had reserved their right to re-cross-examine them; but this application was refused by the Court and now the accused have applied to me for the revision of the said order.

I have perused the file and I find that the complainant was not cross-examined at all and there was practically no cross-examination of another prosecution witness also. I certainly think the refusal of the Court to summon these

witnesses for re-cross-examination cannot be considered justifiable and the order of refusal is prejudicial to the interests of justice. The accused party must have an opportunity to cross-examine them.

As I cannot pass the order myself, I submit the case to the Hon'ble Judges of the High Court with the recommendation that the order of the Court, dated 6th July, 1927, may be revised and the Court directed to re-summon the prosecution witnesses whom the accused want to re-cross-examine.

Mr. Partab Singh, for the Petitioners.

JUDGMENT.—This case has been reported by the District Magistrate, Gujranwala, under s. 438, Criminal Procedure Code. The facts are that on a complaint by *Musammat Rattan Devi* the case was being tried by a Bench of Honorary Magistrates as a warrant case under s. 323, Indian Penal Code. Some of the prosecution witnesses were cross-examined, the complainant was not cross-examined at all and a charge was framed against the accused. At this stage the Bench of Honorary Magistrates ordered that the case should be treated as one under s. 352, Indian Penal Code, that is to say, as a summons case and refused to allow the accused to further cross-examine the prosecution witness. It is obvious that the accused may have been considerably prejudiced by this and in the circumstances I direct that the Bench of Honorary Magistrates allow the accused to cross-examine all the prosecution witnesses that they may wish to and then the case will be disposed of according to law.

The reference is accepted accordingly.

R. L.

Reference accepted.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 665 OF 1927.

November 11, 1927.

Present :—Mr. Justice Agha Haidar.
GULAB AND ANOTHER—ACCUSED—**APPELLANTS***versus***EMPEROR—RESPONDENT.***Criminal Procedure Code (Act V of 1898), s. 489—Reference—Enhancement of sentence—Reference by District Magistrate for enhancement, legality of—Proper procedure.*

A reference for enhancement of sentence by a District Magistrate direct to the High Court is irregular and unwarranted by law. The proper course for a District Magistrate to adopt is to instruct the law officers of the Crown in the High Court to file an application for revision asking for the enhancement of sentence.

Criminal appeal from an order of the Magistrate, First Class, exercising enhanced powers under s. 30, Criminal Procedure Code, Attock at Campbellpur, dated the 30th May, 1927.

Mr. Abdul Ghani Khan, for the Appellants.

Mr. B. H. Beven Petman, for the Government Advocate, for the Respondent.

JUDGMENT.—Three persons, namely, Gulab, Dalli and Shah Sufaid, had been chalaned by the Police under s. 397 of the Indian Penal Code. Dalli has been acquitted by the learned trying Magistrate and Gulab and Shah Sufaid have each been convicted under s. 394 and sentenced to a term of 'five years' rigorous imprisonment and a fine of Rs. 100. They have appealed to this Court through Mr. Abdul Ghani Khan.

The District Magistrate, Campbellpur, has made a reference to this Court for the enhancement of the sentence of the appellants by convicting them under s. 397 of the Indian Penal Code. The procedure adopted by him appears to be irregular and not warranted by law. The proper course for him to adopt would have been to instruct the law officers of the Crown in the High Court to file an application for revision asking for the enhancement of the sentence. However, a learned Judge, of this Court was pleased to issue notice on the 28th of July, 1927, to the accused to show cause why the sentence which has been passed upon them, should not be enhanced. The notice has been duly served. Both the appeal and the reference are before me for disposal.

[Note.—The rest of the judgment is not necessary for the purposes of this report.—*Ed.*]

R. L.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1462 OF 1927.

November 18, 1927.

Present:—Mr. Justice Addison.

EMPEROR—PETITIONER

versus

MUHAMMAD AKBAR—ACCUSED—

RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 118, 123 (2)—Security not furnished—Reference to Sessions Judge—Magistrate's power to accept security pending reference—Effect of accepting security.

Where an accused fails to furnish security under s. 118, Criminal Procedure Code, and a reference is made to the Sessions Judge under s. 123 (2) of the Code the Magistrate does not become *functus officio*. Notwithstanding such a reference he can accept security if one is offered before the decision of the reference by the Sessions Judge and when security is accepted by the Magistrate the reference to the Sessions Judge automatically comes to an end, and the right of the accused to appeal which was in abeyance revives.

Case reported by the Sessions Judge, Delhi, with his No. 744 of 1927.

Facts appear from the following report of the Sessions Judge:—

REPORT.—Muhammad Akbar was sent up by the Police for security under s. 110, Criminal Procedure Code. Chaudhri Surat Singh, Magistrate First Class, Delhi enquired into the case and under s. 118 Criminal Procedure Code, the learned Magistrate ordered Muhammad Akbar to give security for good behaviour for three years and furnish a bond in the sum of Rs. 5,000 to that effect with two sureties for a like sum jointly and severally responsible. (See his order dated 5th of August, 1927.) Muhammad Akbar failed to furnish security and the learned Magistrate referred the case to this Court under s. 123, sub-s. (2), Criminal Procedure Code, by his order dated 15th of August, 1927. A notice was issued to Muhammad Akbar to appear on 29th of August, 1927, and to show cause why the order of the learned Magistrate requiring him to give security to be of good behaviour for three years should not be confirmed. On 29th of August, 1927, it was brought to my notice that Muhammad Akbar gave security in the Court of the learned Magistrate and was released by his order on 19th of August, 1927. I sent for the record of the proceedings in which the security was accepted by the learned Magistrate. Section 123, sub-s. 2 runs as follows:—

"When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if

such person does not give such security as afore-said, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge or, if such Magistrate is a Presidency Magistrate, pending the orders of the High Court; and the proceedings shall be laid, as soon as conveniently may be, before such Court".

I am of opinion that the learned Magistrate could accept the security before the reference had been made to this Court but as soon as the reference was made to the Sessions Judge the learned Magistrate became *functus officio* and the Sessions Judge was seized of the case. The learned Magistrate had no jurisdiction to accept security after he had issued a warrant directing Muhammad Akbar to be detained in prison pending the orders of the Sessions Judge. After the reference was made the Sessions Judge was the only person who could make such orders as he thought proper in the case. The proceedings of the Magistrate accepting the security after the reference had been made to this Court were without jurisdiction and void. Muhammad Akbar the person who was called upon to give security is no longer under detention and under the circumstances, I am unable to decide the reference on the merits till the proceedings taken by the Magistrate after he had made the reference to this Court are set aside by the High Court and Muhammad Akbar was ordered to be re-arrested and to be detained in prison. I submit the record of the proceedings of the learned Magistrate to the High Court with the recommendation that the proceedings of the learned Magistrate accepting the security be quashed and Muhammad Akbar be ordered to be re-arrested and detained in prison pending the order of the Sessions Judge. The hearing of the reference on the merits will be postponed till the order of the High Court is received on this recommendation.

Mr. C. H. Carden Noad, Government Advocate, for the Petitioner.

Mr. Bishen Narain, for the Respondent.

JUDGMENT.—This is a case reported by the Sessions Judge of Delhi. One Muhammad Akbar was ordered by a Magistrate of the First Class under s. 118 of the Criminal Procedure Code to give security for his good behaviour under s. 110 of the Criminal Procedure Code for a period of three years. Muhammad Akbar failed to furnish security then and there and he accordingly

was ordered to be detained in prison, pending the orders of the Sessions Judge, in accordance with the provisions of s. 123 (2) of the Criminal Procedure Code. A day or so later he offered security to the Magistrate who accepted it and he was released from Jail. This came to the notice of the learned Sessions Judge when he was hearing the reference. The learned Sessions Judge was of the opinion that the Magistrate had no jurisdiction to accept the security after making the reference to him and he had accordingly forwarded the proceedings of the Magistrate to this Court with the recommendation that the Magistrate's order accepting the security be quashed and Muhammad Akbar be ordered to be re-arrested and detained in prison, pending the orders of the Sessions Judge on the reference.

Sub s. (1) to s. 123 of the Criminal Procedure Code directs that in cases where security is demanded up to the limit of one year and security is not given the person ordered to give security shall be committed to prison until the security is given or the period fixed expires. Sub s. (2) provides that where a security for a period exceeding one year is demanded from a person the Magistrate shall, if security is not given, issue a warrant directing him to be detained in prison, pending the orders of the Sessions Judge before whom the proceedings shall be laid. Sub-s. (3) lays down that the Sessions Judge after examining the proceedings may pass such orders as he thinks fit. Finally sub-s. 4 is to the effect that if security is tendered to the officer-in-charge of the Jail he shall forthwith refer the matter to the Court or Magistrate who made the order and shall wait the orders of such Court or Magistrate.

The argument of the learned Government Advocate was that it follows from the fact that sub-s. (4) comes after both sub-ss. (1) and (2) and that it is left to the Magistrate who made the order to deal with the security offered in both cases when such security is tendered to the officer-in-charge of the Jail. What corresponded to sub-s. (4) in the old Code of 1882 came to the end of what is now sub-s. (1). According to him the change effected in the later Code was a clear indication that it was intended that the Magistrate should still take security even though the matter had been referred to the Sessions Judge if such security was offered before the Sessions

sions Judge dealt with the case. The matter is not free from difficulty and it must be said that there is nothing in the Act, clearly indicating what should be done if security is offered to the Magistrate after he has referred the matter to the Sessions Judge and before the latter has heard the reference. It must be a common occurrence that sureties are only available a day or two later. In my judgment, therefore, a reasonable view of the matter should be taken. The purpose of the security sections is not that the persons proceeded against should be sent to or kept in Jail but that that should only be done when they are unable to give security. I do not think that it was intended that persons should remain in Jail possible for months until the Sessions Judge owing to pressure of work was unable to deal with these cases. It must have been meant that they could offer security to the Magistrate when they are able to procure it and in this way get out of Jail. That implies that the reference to the Sessions Judge, if not disposed of, would automatically come to an end when security is taken. In my judgment this is the most reasonable and convenient view to take, seeing that there is no specific provision of the Code dealing with this matter. At the same time it follows that the right of appeal given under s. 406 of the Criminal Procedure Code to the person from whom security is demanded revives once he has given security and in the present case if an appeal is preferred the fact that Muhammad Akbar has been engaged in these proceedings should be taken into account by the Court or Magistrate hearing the appeal if one is preferred.

For the reasons given I decline to set aside the proceedings of the Magistrate accepting security and hold that the reference to the Sessions Judge automatically ended when Muhammad Akbar gave security to the Magistrate a day or two after he was ordered so to do, and the same time that the right of appeal which was in abeyance by reason of the reference revived when he gave security.

R. L.

*Reference rejected.***LAHORE HIGH COURT.**

CRIMINAL REVISION No. 1492 of 1927.

November 11, 1927.

*Present:—Sir Shadi Lal, Kt., Chief Justice.***BATAN SINGH—ACCUSED—PETITIONER***versus***EMPEROR—RESPONDENT.***Wild Birds and Animals Protection Act (VIII of 1912), s. 4—Offence under the Act, what constitutes.*

To convict a person under the Wild Birds and Animals Protection Act, 1912, it is necessary to prove that he has either killed or attempted to kill one of the animals or birds mentioned in the Schedule to the Act.

Merely wandering about with a gun round a reserved nursery does not constitute an offence under the Act.

Case reported by the Sessions Judge, Jullundur, with his No. 323-J of the 7th September, 1927.

Facts appear from the following report of the Sessions Judge:—

REPORT.—At about 5 P.M. on the 13th July, 1927, the Superintendent of Police Jullundur and the Superintendent of Police Training School Phillaur, heard the sound of a shot fired, and proceeding in that direction discovered the accused Batan Singh with a loaded gun wandering round the reserved Nursery of Phillaur. He was seized and made over to Jhangir Khan Constable, who is the only prosecution witness in the case.

From the evidence of Jhangir Khan it would appear that he has no personal knowledge of the facts. The Magistrate in his judgment, convicting the accused, has stated that the accused pleaded guilty, but this is not a fact. To convict the accused under the Wild Birds and Animals Protection Act, it was necessary to prove that he had either killed or attempted to kill one of the animals or birds mentioned in the Schedule. But there is no evidence to show that he had actually fired at any bird or animal, much less one mentioned in the Schedule of the Act. It is no offence for a person holding a license to go about with a loaded gun in his possession.

I accordingly forward the record of the case to the High Court with a recommendation that the conviction be quashed and the sentence of fine set aside.

Mr. Din Dayal, for the Petitioner.

ORDER.—For the reasons recorded by the learned Sessions Judge, I set aside the conviction and the sentence and direct that the fine, if realised, be refunded to the accused.

R. L.

Revision allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1402 OF 1924.

August 10, 1927.

Present:—Mr. Justice Curgenven and
Mr. Justice Ananthakrishna Ayyar.MUPPIDATHI AMMAL—PLAINTIFF—
APPELLANT

versus

MUTHUSWAMI PILLAI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Construction of deeds—‘Santhathi’, whether includes adopted son.

The word ‘santhathi’ used generally includes an adopted son as well as a natural born son.

Balasubramania Pillai v. Pitcha Pillai (1), followed.

Per Curgenven, J.—In ordinary Hindu usage expressions signifying ‘offspring, progeny, issue’, though in English they are ordinarily restricted to natural children, include children by adoption.

Second appeal against the decree of the Court of the Additional Subordinate Judge, Tinnevely, in A. S. No. 4 of 1924, (A. S. No. 507 of 1923 on the file of the District Court, Tinnevely), preferred against that of the Court of the District Munsif, Tenkasi, in O. S. No. 557 of 1921.

Mr. S. Ramaswami Iyer, for the Appellant.

Messrs. P. N. Appuswami and P. S. Nagaswami, for the Respondents.

JUDGMENT.

Curgenven, J.—The first question in this second appeal is as to the meaning to be attached to the word ‘santhathi’ as used in the compromise Ex. D, whether it includes an adopted as well as a natural born son. There is perhaps a significant difference between the phrasing of Ex. C, embodying the provision made by Nainar Pillai in favour of his daughter Piramu Ammal born after the adoption of his son, and Ex. D, the compromise now in question, for, in the former, the words, used are ‘if issue (santhathi) are not born to (or forthcoming from) you,’ which seems clearly to exclude an adopted son, while in the latter the expression is ‘if the defendant had no issue (santhathi).’ This phrase appears to me to be fully compatible with the view that both a natural and an adopted son was contemplated, for there is no doubt that in ordinary Hindu usage expression signifying ‘offspring, progeny, issue’ though in English they are ordinarily restricted to natural children include children by adoption. One would, therefore, expect the word to have been accompanied

by some appropriate qualification had it been intended to exclude an adopted son. This was the meaning attached to the word in *Balasubramania Pillai v. Pitcha Pillai* (1) while in *Rajarajeswara Dorai v. Sundarapandiyaswami Thevar* (2) Seshagiri Ayyar, J., went so far as to hold that it included heirs other than lineal descendants. I do not think that any useful guidance is to be obtained from the consideration of a somewhat similar expression in *Shiyali Subraya Chetty v. Calve Subraya Chettiar* (3) because the context there led to a different conclusion. I see no reason to differ from the learned Subordinate Judge in the view he has taken, and since this finding is sufficient to dispose of the second appeal, it is dismissed with costs.

Ananthakrishna Ayyar, J.—I agree. The question that arises for decision in this case is about the proper interpretation to be placed on the expression used in Ex. D if the defendant Piramu Ammal left no ‘santhathi’ the properties should go to the plaintiff (Shanmuga Nainar Pillai). It is contended by the learned Vakil for the appellant that the word ‘santhathi’ should be confined to children born of Piramu Ammal, and that the existence of an adopted son of Piramu Ammal would not prevent the property going to the plaintiff. I am unable to accept that contention. The word ‘santhathi’ though a Sanskrit word is also in general use among people who use Tamil. This question whether the word ‘santhathi’ is wide enough to include adopted son, arose for decision in the case of *Balasubramania Pillai v. Pitcha Pillai* (1) and I agree with Sankaran Nair, J., that the word in general use is wide enough to include adopted son also. Justice Seshagiri Iyer would seem to go further and would seem to be of the opinion that the word means ‘the heir in general’ see *Rajarajeswara Dorai v. Sundarapandiyaswami Thevar* (2). If the context clearly shows that the word was not used in its ordinary sense, the question might be different. In the present case, I am not able to say that the context justifies us in placing a different construction. On the other hand, turning to Ex. C, under which Nainar Pillai settled the properties on his daughter Piramu Ammal, we

(1) 33 Ind. Cas. 552; (1916) 1 M. W. N. 306.

(2) 27 Ind. Cas. 283; 27 M. L. J. 694.

(3) 37 Ind. Cas. 404; 5 L. W. 740; 21 M. L. T. 315.

find the expression used is "if no 'santhathi' be born to you." After Nainar Pillai's death, there was litigation between his son Shanmuga Nainar Pillai (the husband of the present plaintiff) and Piramu Ammal. The suit was compromised, under Ex. D. Under Ex. D, Piramu Ammal gave some property to Shanmuga Nainar, and as regards the other properties received by Piramu Ammal under Ex. C, it was stipulated that she was to take the same and if she left no 'santhathi' then Shanmuga Nainar was to take possession of the same.

The difference in the expression used in Exs. C. and D would, if at all, only go against the contention urged by the appellant.

On the whole I am of opinion that the expression used in Ex. D includes a case of adopted son, and that the heirs of Shanmuga Nainar are not entitled to recover possession of the properties. The decree of the Subordinate Judge is correct and the second appeal is dismissed with costs.

V. N. V.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 410 OF 1926.

May 6, 1927.

Present:—Justice Sir William Watkins Phillips, Kt.

MURUGIAH PILLAI—PLAINTIFF

—PETITIONER

versus

PAKKIRIA PILLAI—DEFENDANT—

RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 57, 60—Loan or deposit—Question of fact—Presumption.

Where there is a doubt as to whether a transaction amounts to a loan or a deposit, there is no presumption that it is a deposit and not a loan. The question is one of fact in each case.

Narayan Chettyar v. Vellayappa Chettyar (1), commented upon.

Petition under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, Tiruvalur, in S. C. S. No. 641 of 1925,

Mr. N. S. Srinivasa Iyer, for the Petitioner.

Mr. K. Raghavachari, for the Respondent.

JUDGMENT.—The only question which arises in this case is whether the money sued for was a deposit with the defendant's father or whether it was a loan. The money was remitted to defendant's father by one Govinda Pillai in 1914 and this suit is brought in 1925 the plaintiff having taken an assignment of the debt from a lady who purchased it in Court sale. The Subordinate Judge has found that *prima facie* the suit is barred by limitation and, unless plaintiff can show that this remittance was in the nature of a deposit and that the suit had been brought within three years of demand having been made, the suit must fail. He has held on the evidence that plaintiff has failed to prove his case and dismissed the suit.

It is contended here that there is evidence sufficient to prove the case and reliance is placed on a remark in *Narayanan Chettyar v. Vellayappa Chettyar* (1). This refers to *Ramanathan Chetty v. Subramaniam Chetty* (2) a prior case, reported in 28 M. L. J. 372 and says as pointed out in that case, if there is any doubt as to whether a transaction amounts to a loan or a deposit the presumption is that it is a deposit and not a loan. The above presumption does not find a place in *Ramanathan Chetty v. Subramaniam Chetty* (2) and I think we must read that remark as relating solely to the circumstances of that case, for I can find no authority for the presumption as a general presumption of law. If there is no such general presumption I think the Subordinate Judge was justified in holding that there was not sufficient evidence to prove the case.

The revision petition is dismissed with costs.

V. N. V.

Petition dismissed.

(1) 34 Ind. Cas. 347; (1916) 1 M. W. N. 206; 19 M. L. J. 237.

(2) 28 Ind. Cas. 688; 28 M. L. J. 372; 17 M. L. T. 266.

**MADRAS HIGH COURT.
FULL BENCH.**

REFERRED CASE No. 12 OF 1926.

May 5, 1927.

Present:—Sir Victor Murray Coutts-Trotter,
Kt., Chief Justice, Mr. Justice Wallace
and Mr. Justice Beasley.

THE COMMISSIONER OF INCOME TAX,
MADRAS—REFERRING OFFICER

versus

TRICHINOPOLY TENNORE HINDU
PERMANENT FUND, LTD.—RESPONDENT.

Income Tax Act (XI of 1922), s. 4—“Mutual Benefit Society,” what is—Object of fund not inconsistent with making profit—Fund, liability of, to be assessed to income-tax.

The question whether a Fund is a society constituted essentially for the mutual benefit of its members, the income of which is not liable to be assessed to income-tax, or whether it is an ordinary money-lending Bank engaging in money with a view to earning profit for distribution among its shareholders is one of fact to be decided on the circumstances of each case. [p. 291, col. 2.]

The object of the Trichinopoly Hindu Permanent Fund as set out in its Memorandum of Association was “to enable persons to save money” and “to secure loans at favourable rates of interest.” The capital, paid up or subscribed, was made up of shares limited in number and in value, and the shareholders and subscribers constituted the controlling authority while membership was restricted to such shareholders or subscribers. Outside these members was a class called monthly depositors who were by a bye-law practically on the same footing as subscribers but were not subject to the losses and liabilities of the Fund. Loans were granted to any one and were of two kinds, ‘term loans’ restricted to subscribers and monthly depositors and ‘temporary loans’ to any constituent. There was no special concession whatever which was confined to shareholders and subscribers. They were exactly on the same footing as outsiders, for example, monthly depositors. Profits were distributed in the way of dividends in the ordinary business fashion and were expressed to be “out of the net profit arising from the business of the Fund”:

Held, that the Fund was not one which did not aim at making profit by lending money on interest, that in the constitution and object there was no purpose of mutual benefit, and that the Fund was, therefore, liable to be assessed to income-tax as a Company. [p. 293, col. 1.]

Secretary, Board of Revenue, Income-Tax, Madras v. Mylapore Hindu Permanent Fund, Ltd. (1), *New York Life Insurance Co. v. Styles* (2), *Liverpool Corn Trade Association v. Monks* (3) and *Thomas v. Evans & Co.*, *Jones v. South West Lancashire Coal Owners' Association, Ltd.* (4), distinguished.

Case stated under s. 66 (2) of the Income Tax Act, XI of 1922, for the decision of the High Court on the following questions of law which have arisen in assessing the Trichinopoly Tennore Hindu Permanent Fund, *viz.*,

(1) Should this Fund be assessed as a Mutual Benefit Society or as a Company,

(*i. e.*) should the assessment be made only on the income earned from non-members or on the total income?

(2) If the Fund should be assessed as a Mutual Benefit Society (*i. e.*) only on its income from non-members, are the depositors members of the Fund?

(3) Should the sums paid to the term shareholders and depositors in respect of subscriptions and deposits be deducted as expenditure incurred solely for the purpose of earning the profits or gains of the Fund?

Mr. M. Patanjali Sastri, for the Referring Officer.

Mr. M. Subbaraya Iyer, for the Respondent.

JUDGMENT.—In this Reference three questions have been referred to this Court by the Commissioner of Income-tax. Of these, questions Nos. 2 and 3 have not been pressed. Then question No. 1 remains, that is: “Should this Fund be assessed as a Mutual Benefit Society or as a Company?” The Commissioner of Income-tax has decided that the Fund is not a Mutual Benefit Society and is, therefore, not entitled to the benefit of the ruling of this Court reported as *Secretary, Board of Revenue, Income-Tax, Madras v. Mylapore Hindu Permanent Fund Ltd.* (1).

In the main this question is a question of fact and this Court will not differ from the finding unless that finding is vitiated by some error of law. The chief contention of the learned Vakil who appears for the Fund is that the Commissioner has radically misunderstood the constitution of the Fund as set out in its Memorandum of Association and its Articles.

The point at issue is whether the Fund is a society constituted essentially for the mutual benefit of its members or whether it is an ordinary money-lending Bank engaging in money-lending with a view to earning profit for distribution among its shareholders. A legal definition of a Mutual Benefit Society has not been set out in any Statute and we do not attempt such definition here as it is not necessary. The claim put forward here on behalf of the Fund is that it is of the same nature and constituted on the same footing as the *New York Life Insurance Co. v. Styles* (2) and as the *Secretary, Board of Revenue, Income-Tax, Madras v. Mylapore Hindu Permanent Fund* (1)

(1) 76 Ind. Cas. 833; 47 M. 1; (1923) M. W. N. 409; A. I. R. 1923 Mad. 684; 20 L. W. 27.

(2) (1889) 14 A. C. 381; 59 L. J. Q. B. 291; 61 L. T. 201.

If that claim is substantiated, then by force of these rulings the present Fund will be a Mutual Benefit Society. We shall, therefore, examine that claim.

The New York Life Insurance Company was founded on principles of Mutual Life Insurance. Two sorts of policies were issued, participating policies and non-participating. There were no shares, but the holder of every participating policy became *ipso facto* a partner while the holder of a non-participating policy was a mere creditor, without any interest in the assets or liabilities of the Company. The rate of premium for participating policy-holders was calculated from time to time at a figure sufficient to cover the probable disbursements. Then an account was taken of the transactions of the Company, and the excess, if any, of premiums received over expenditure was returned or re-paid to the members. The essential condition in the constitution of this Company was that the contributions of the members so far as they were not required for the common purpose of the Company should be re-paid to them; that is, the aim of the Company was not to make a profit for distribution to members but to make no profit; any realisation of profit meant that the purpose of the Company had so far been imperfectly fulfilled because too large a contribution had been levied. The return of such profit, if it could be called profit, to the members was merely a return to them of the excess of contribution which had been levied from them, and any dividend, if it can be called a dividend, was paid to them not as share-holders but as policy-holders. In the report of that case at page 411* Lord Macnaghten says: "What is to become of the surplus if everything goes right? The practice is to take an account every year of assets and liabilities, and to give the insured the benefit of the surplus, either by way of reduction of premium or by way of addition to the sum insured. It can make no difference in principle whether the surplus is so applied, or paid back in hard cash. In either case it is nothing but the return of so much of the amount contributed as may be in excess of the amount really required. I do not understand how this excess can be regarded from any point of view or for any purpose as gain or profit earned by the contributors." That this was the principle underlying this decision is also the view adopted by Rowlatt, J., in

*Page of (1869) 14 A. C.—[Ed.]

Liverpool Corn Trade Association v. Monks (3) and it has been applied to a similar case *Thomas v. Evans & Co., Jones v. South West Lancashire Coal Owners' Association, Ltd.* (4) where the Company was an association founded solely for affording indemnity to its members against compensation in respect of fatal accidents to workmen. In the case of *Secretary, Board of Revenue, Income-Tax, Madras v. Mylapore Hindu Permanent Fund, Ltd.* (1) learned Judges held that it was on all fours with the *New York Life Insurance Company* (2), since the income did not come from outside, but from inside, and was, therefore, not taxable. There the capital was made up solely of investments by members, and the income was derived from interest earned on loans to members. The essence of the society was mutuality and the members and constituents were one and the same.

Now we have to see whether the constitution of the present Company is at all on those lines of mutuality. Its object as set out in the Memorandum of Association is "to enable persons to save money" and "to secure loans at favourable rates of interest." This is a perfectly general object and there is no hint that those who are to be enabled to save money or to secure loans are confined to the members of the Company, or that the essence of the object is the low rate of interest; so that, for example, the purpose aimed at is not profits but a lowering of the rate of interest as far as possible. The stated object of this Fund is not incompatible with a purely business effort to make as much profit as possible out of lending money on favourable rates of interest. The capital paid up or subscribed is made up of shares limited in number and in value, and the share holders and subscribers constitute the controlling authority while membership is restricted to such share-holders or subscribers. Outside these members is a class called monthly depositors who are, by a bye-law under Art. 34, practically on the same footing as subscribers but are not subject to the losses and liabilities of the Fund. Here the principle of mutuality, if it existed before at all, is entirely abandoned. Loans are granted to any one and are of two kinds, 'term loans' restricted to subscribers and monthly depositors and 'temporary loans' to any constituent. There is

(3) (1926) 2 K. B. 110; 95 L. J. K. B. 519; 131 L. T. 756; 10 Tax. Cas. 442; 42 T. L. R. 393.
(4) (1927) 1 K. B. 33.

no special concession whatever which is confined to shareholders and subscribers. They are exactly on the same footing as outsiders, for example, monthly depositors. Profits are distributed in the way of dividends in the ordinary business fashion and are expressed to be "out of the net profit arising from the business of the Fund." See Art. 55 (1-a). There is no suggestion that the dividends paid to the shareholders and subscribers are merely by way of return of their original capital subscribed, and, as we have noticed, there is no hint that the aim of the Company is not to make a profit by lending money on interest. We find, therefore, in the constitution and objects of this Fund no purpose of mutual benefit, no society of persons banded together to lend money to each other, no benefit to be obtained by, or derived from, membership alone. The constitution of this Fund, therefore, differs fundamentally from that of the *New York Life Insurance Company* (2) or the *Mylapore Hindu Permanent Fund* (1) and the claim of the Fund that they are entitled by virtue of the rulings in those cases to be exempt from taxation in regard to any of their profits cannot be sustained. The Commissioner has made no mistake in holding that there is here no mutual benefit society and that the net profits of the Fund are taxable in full.

We must, therefore, answer this Reference that this Fund should be assessed as a Company. The Fund will pay the costs of this Reference which we fix at Rs. 250.

V. N. V.

Reference answered.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 566 OF 1924.

May 5, 1927.

Present.—Mr. Justice Jackson.

KARUPANNA KONAR AND OTHERS—

DEFENDANTS—APPELLANTS

versus

RANGASWAMI KONAR AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 32 (3) (7), 13, cl. (a) —'Statement against proprietary interest'—Statement of boundaries, admissibility of—'Assertion of title'—Mere statement or mention, whether amounts to assertion.

Under s. 32 (3) of the Evidence Act it is the statement, not the document containing the statement, which must be against the proprietary interest of the person making it. [p. 294, col. 1.]

A mere "mention" of a right not amounting to an "assertion" of it is not admissible in evidence under cl. (7), s. 32. [*ibid.*]

Where the question in issue was whether certain property was the joint property of the plaintiffs and the defendants and certain old documents executed by the defendants' ancestors which contained a recital in a statement of boundaries that the said property was common property were sought to be adduced in evidence:

Held, that the documents could not be admitted in evidence either under s. 32, cl. (3) or s. 32, cl. (7) of the Evidence Act. [p. 294, cols. 1 & 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, in A. S. No. 22 of 1923 (A. S. No. 85 of 1922 on the file of the District Court, Trichinopoly) preferred against that of the Court of the District Munsif, Trichinopoly, in O. S. No. 561 of 1918.

Mr. T. M. Krishnaswami Iyer, for the Appellants.

Mr. K. Narasimha Iyer, for the Respondents.

JUDGMENT.—Plaintiffs sued for a declaration that a room belonged to the family of defendants and themselves in common. The lower Appellate Court decreed the suit and defendants appeal.

In the trial Court the District Munsif thought the oral evidence adduced by plaintiffs to be worthless. Witnesses said that they worshipped in the room with no clear idea how or what they worshipped. The lower Appellate Court does not traverse the reasoning of the District Munsif but merely holds that the plaintiffs' evidence is better than that of defendants' which may not necessarily mean that plaintiffs have made out their case. Evidently what chiefly impressed the learned Subordinate Judge was the entry in certain old documents that a boundary was the "God's house enjoyed in common." Exhibit E, a partition deed of 1874, Ex. H, a mortgage of 1874, and Exs. A and B, sale deeds of 1881 all contain this recital. Their admissibility as evidence was challenged in the lower Appellate Court and the Subordinate Judge ruled: "The documents are old and their executants are not alive. Statements made by persons deceased about the ownership of the adjacent property in describing boundaries, are, I think, relevant evidence." This is a most perfunctory pronouncement on a point of law. The Subordinate Judge was presumably applying s. 32 of the Evidence Act, and he should have stated with precision and reasons the sub-clause under which in his

opinion the documents came. The District Munsif's treatment of the matter was even worse. He thought the documents inadmissible, but proceeded on the assumption that they were admissible. It is now argued that the documents come under sub-cl. (3); statements made against the proprietary interest of those making them; or sub-cl. (7); statements contained in a deed which relates to a transaction such as is mentioned in s. 13, cl. (a).

It cannot be said that a statement of boundaries is against the proprietary interest of the person making it except on the assumption that every person must be presumed to own the universe until he makes a statement circumscribing his title. On the contrary a person may be presumed to own nothing until he brings into existence an effective deed evidencing his title to property and such a deed with the boundaries stated therein, is a document not against but in his proprietary interest. In *Rajah Leelanund Singh v. Lakhputtee Takoorain* (1) it was held that a mortgage-deed is a statement against the proprietary interest of the person making it, and, therefore, a statement in a mortgage-deed that so much rent was payable on the property, was also a statement admissible in evidence because the whole document was admissible in evidence. It is difficult to see how this argument could be founded on s. 32 of the Evidence Act of 1872 and possibly the learned Judges considered themselves governed by Act II of 1855 [see *Ningava v. Bharmappa* (2)]. Under s. 32 (3) it is the statement not the document containing the statement which must be against the proprietary interest of the person making it. But *Ningava v. Bharmappa* (2) follows *Rajah Leelanund Singh v. Lakhputtee Takoorain* (1) and holds that a mortgage is against the proprietary interest of the executant, and, therefore, a statement of boundary in the mortgage is admissible. This view has been dissented from in this Court in *In re Dadapaneni Narayanappa* (3) and *Saripalli Venkatarajagopala Raju v. Fota Narasayya* (4) and I defer to that authority. Lastly it is argued that sub-cl. (7) is applicable because in the partition deed Ex. E, the

parties assert the family's common right to the holy room. The exact phrase in Ex. E is "east of the Swami house which is common to the said *dayadis* and ourselves, north of the thatched house, etc." It is obviously a mere statement of boundary and as such cannot be classed with any of the verbs in s. 13, created, claimed, modified, recognized, asserted or denied; "mentioned" would be the appropriate verb, which means considerably less than "asserted." Therefore, it must be held that Exs. E, H, A and B are not admissible in evidence.

The learned Subordinate Judge has no doubt been influenced by the idea that these ancient documents are obviously not intentionally false and are, therefore, presumably true. But he has overlooked that parties making statements which are not material to their interests have no occasion to be accurate. Suppose that the holy room was never common in any legal sense, yet was thought to be common because sometimes the whole family met there in worship. The parties who drew up these documents might easily have called it the common room, as a sufficient description, without troubling to see if that appellation was strictly accurate. It is exactly in view of such contingencies that the provisions of the Evidence Act are framed.

I find that the Subordinate Judge was materially influenced in his finding on issue No. 2 by inadmissible evidence and remand the suit to the lower Appellate Court for a fresh finding upon that issue on the evidence on record excluding Exs. E, H, A and B. Time for submitting finding will be six weeks. Time for filing objections to the finding will be six days.

[In the light of the finding submitted his Lordship pronounced judgment for the appellants with costs throughout.]

V. N. V.

A. N. A.

Appeal allowed.

(1) 22 W. R. 231.

(2) 23 B. 63; 12 Ind. Dec. (N. S.) 42.

(3) 8 Ind. Cas. 268; (1910) M. W. N. 668; 9 M. L. T. 91.

(4) 26 Ind. Cas. 747; (1914) M. W. N. 779.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 82 OF 1925.

August 15, 1927.

Present :—Mr. Justice Ramesam and
Mr. Justice Cornish.T. S. RAMASWAMI AYYANGAR,
OFFICIAL RECEIVER OF RAMNAD AND
ANOTHER—DEFENDANTS No. 8 AND PETITIONER
—APPELLANTS

versus

M. L. M. RAMA NATHAN CHETTIAR

—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 90
—Court sale—Property consisting of numerous plots in
various villages—Sale in one lot, whether proper—
Gross inadequacy of price, meaning of—Sale subject
to prior mortgage—Order fixing upset price for decree-
holder in reference to value of both mortgages, effect
of—Sale, whether void.The fact that property consisting of various parcels
of land situated in several villages was sold in one
lot does not by itself constitute a gross irregularity
in conducting the sale. [p. 296, col. 1.]A Court sale cannot be set aside under O. XXI,
r. 90, Civil Procedure Code, where it is not possible
to infer that the price which was realised by the sale
was substantially less than the real market value or
that such inadequacy of price, if any, was the result
of an irregularity. [p. 297, col. 1.]In execution of a decree on a puisne mortgage, the
mortgaged properties were proclaimed for sale sub-
ject to the first mortgage. The Court subsequently
gave permission to the decree-holder "to bid for
Rs. 3,20,000 which will be the upset price so far as
he is concerned." At the sale the only bid by an
outsider was for a sum which if added to the amount
of the first mortgage was less than the decree-holder's
bid of Rs. 3,20,500. The sale was concluded in favour
of the decree-holder. On an application being made
to set aside the sale:*Held*, that the order giving permission to bid did not
amount to an order to sell free of the encumbrance in
variation of the sale proclamation but only directed
that the decree-holder could bid only for such a sum
which if added to the first mortgage amount would
come up to Rs. 3,20,000 and that what was sold was
not, therefore, different from what was advertised
for sale, so as to make the sale a nullity. [*ibid.*]*Raja Thakur Barmha v. Jiban Ram Marwari* (2)
and *Mahomad Kala Mea v. Harperink* (3), distinguish-
ished.Appeal against an order of the Court of
the Subordinate Judge, Dindigul, dated
the 29th of September, 1924, and passed
in E. A. No. 33 of 1920, in E. P. No. 40
of 1919, in O. S. No. 11 of 1917.Mr. A. Krishnaswami Iyer, for the Appel-
lants.

Mr. S. Varadachari, for the Respondent.

JUDGMENT.Ramesam, J.—This is an appeal
arising out of an application to set aside
a sale in execution of the mortgage decree
in O. S. No. 11 of 1917, under O. XXI, r.
90, Civil Procedure Code. The mortgageitself being subsequent to a prior mort-
gage, the decree directed the sale subject
to the prior mortgage. The Subordinate
Judge dismissed the petition without en-
quiring into the petitioner's allegations.
There was an appeal to the High Court
and the case was sent back for further
enquiry by Spencer and Venkatasubba Rao,
JJ. The matter has been fully enquired
into by the present Subordinate Judge of
Dindigul and the petition has been again
dismissed. The petitioner appeals.The sale is sought to be set aside on
account of the following material irregu-
larities in making the proclamation and
effecting the sale:—1. the property consists of various
parcels of land situated in six villages and
it was directed to be sold in one lot in-
stead of being sold separately thus reduc-
ing the number of possible bidders, and
as the whole property is certainly worth
about three lakhs a number of purchasers
were deterred from joining in the sale and
bidding;2. the proclamation was not properly
published in all the six villages; and3. the market value fixed in the pro-
clamation was too low.It is said that these irregularities have
led to substantial injury to the petitioner
as the properties were sold for a gross
undervalue. The appellants have also
taken another question which, it is alleged,
is a question of jurisdiction and makes the
sale null and void. It is said that the
property that was advertised for sale was
only the equity of redemption of the first
mortgage, where as what was sold was
the whole property free of all encum-
brances and it is contended that this ir-
regularity is so gross as to make the sale a
nullity.On the first point it is now contended
that the properties ought to have been
sold in separate parcels. The execution
petition was filed in April, 1919. On 29th
April, the 1st defendant was declared in-
solvent and the properties were vested in
the Official Receiver. In August, the Offi-
cial Receiver applied for the adjournment
for four months on the ground that a
private sale at the spot would be more
advantageous than the Court sale. Though
the petition was not granted, practically
the petitioner had the four months' time
he sought, for the sale ultimately took
place only in January, 1920. Anyhow,

in this petition no request was made to sell the property by separate parcels. Notice was ordered, but none of the judgment-debtors appeared, nor did the Official Receiver appear. On 3rd December, 1919, it was ordered that all the properties should be sold in one lot subject to the first encumbrance the principal of which was Rs. 1,10,000 and the market value of the equity of redemption was estimated to be Rs. 40,000. The reason for directing the sale of all properties together is that they were all subject to one prior mortgage and if parcels were sold separately and purchased by different purchasers there will be numberless suits, for contribution among the purchasers if the amount of the prior mortgage is recovered from some of them only, a course open to the prior mortgagee. These considerations might deter purchasers and; therefore, all were directed to be sold together. On the other hand, it is now urged that there is a way of selling separately without the inconvenience of giving rise to numerous suits for contribution. It is suggested that all the parcels should be sold free of encumbrances and that a reservation should be made in the proclamation that the bids will be accepted only if the total price realised on all the parcels exceeded the amount due on the first mortgage. In this way the inconvenience resulting from the sale of several parcels subject to one common mortgage is avoided and the payment of the first mortgage is ensured while the purchasers secure an unencumbered title. The suggestion is, no doubt, good and in this particular case would have probably worked out well, but this suggestion requires the consent of the first mortgagee. He might have given the consent or not. The suggestion has been made for the first time only before us now and it cannot be said that the course followed by the Subordinate Judge constituted a gross irregularity merely because there is a better way of carrying out the sale. This first objection, therefore, fails.

The second objection is that the proclamation was not properly published in various villages. There were six villages, three of them lying in one group and the other three lying in a different region.

[His Lordship referred to the evidence and proceeded:—]

From the above documents and oral evidence it is not only likely that the

proclamation was properly made and, at any rate, was known to many likely purchasers, but no complaint was made about it at any time.

It is next suggested by the petitioner that the lands were sold for an under-value, and this is the result of non-proclamation and also of the low market value mentioned in it. A large amount of evidence was referred to to show the value of the lands. Two kinds of evidence were brought to our notice: (1) the sale-deeds of adjacent lands, and (2) the income of the lands. Here again it is unnecessary to refer to the evidence in great detail because the petitioner has not produced his best evidence. The 1st defendant is P. W. No. 46. He says in his evidence, "He (the Official Receiver) took possession of the villages. I was in possession till *Fasli* 1327. My elder brother Adaikappa Chettiar has got the accounts of these lands for *Fasli* 1326. He would help me in the conduct of this case in appeal. I have not filed those accounts now." If the income of the lands is to be relied upon for estimating the market value, the accounts which the 1st defendant and his brother have must be produced. It is futile to rely upon oral evidence. It is easy to work out arithmetically that the lands are worth 4 or 5 lakhs. A small variation in the method pursued will produce a large amount of difference. For instance, Mr. Sastri was always trying to capitalise the value of land at 25 times the annual income. It is not very clear that it ought to be 25 times and not 20 times. Making allowance for the revenue of the land and capitalising the value at 20 times the annual income, it seems to me that the lands cannot be worth more than Rs. 3,60,000 and it cannot be said that the market value mentioned in the proclamation is such a gross under-estimate as to vitiate the sale. [See *Saadatmant Khan v. Phul Kuar* (1) where the estimate given in the proclamation was 1/10th of the real value]. In the present case it must be remembered that, though the principal of the first mortgage was Rs. 1,10,000 its actual amount at the time of the sale was Rs. 1,93,000 so that the market value as given in the proclamation works out at the figure Rs. 2,35,000 for the value of the land free of any encumbrance. Thus, whatever the

(1) 20 A. 412; 2 C. W. N. 550; 25 I. A. 146; 7 Sar. P. C. J. 380; 9 Ind. Dec. (N. s.) 624 (P. O.).

truth about the proclamation may be, it is not possible to infer that what was realised is substantially less than the real market value and such inadequacy of price, if any, was the result of irregularity, if any.

It is next suggested that the sale itself was void for want of jurisdiction. This portion of the case was argued by Mr. Krishnaswami Iyer and he relied on *Raja Thakur Barmha v. Jiban Ram Marwari* (2) and *Mahomad Kala Mea v. Harperink* (3). The facts necessary for this portion of the case are these. The Subordinate Judge gave the decree-holder permission to bid on 10th January. In his order he refers to the fact that, in a prior execution at the instance of a money decree-holder against the same properties subject to both the mortgages the bid went up only to Rs. 10,000 and the two mortgages then amounted to Rs. 3,10,000. He then said, "Having regard to the bid in the previous sale I think it safe to give permission to the decree-holder to bid over Rs. 3,20,000 which will be the upset price so far as he is concerned." This order does not say that the property should be sold free of encumbrance in variation of the proclamation. It merely says, that the total price which the decree-holder should pay for the lands should not be less than Rs. 3,20,000. This was for the protection of the judgment-debtor. Though other bidders may bid for any sum, however low they like, the decree-holder cannot do so. He can only bid for such a sum which if added to the first mortgage amount will come up to Rs. 3,20,000. This is the clear meaning of the order of the 10th January. What happened on the actual date of sale was this. On 19th January the only bid outstanding was that of P. S. P. L. Palaniappa Chettiar for Rs. 45,000. It is said for the petitioner that this Palaniappa Chettiar was merely a creature of the decree-holder; but whatever it may be, there was no other bid. Then the figure for the decree-holder was Rs. 3,20,500, free of all encumbrances. Then there is a note to this effect: "The other bidder T.S.P.L.P.

Palaniappa Chettiar is not prepared to bid for over this amount. This sale will, therefore, be concluded in favour of the decree-holder for Rs. 3,20,500...free of the first encumbrance which is in pursuance of the effect of my order on 10th January 1920." It seems to me that what the Subordinate Judge meant in his order is that Palaniappa Chettiar is not prepared to bid for the equity of redemption by offering an amount larger than Rs. 45,000 and also larger than what the decree-holder's bid comes to for the equity of redemption. No complaint seems to have been made by Palaniappa Chettiar that the property was being sold free of encumbrances and, if so, he finds it difficult to bid though he might be able to bid for a higher amount if only the equity of redemption is to be put up for sale. In these circumstances it is not clear that the decision in *Thakur Barmha v. Jiban Ram Marwari* (2) has any application to this case. In that case the facts are that the judgment-debtor's property consisted of two parts a 10-annas share subject to encumbrance and a 6-annas share not so subject. The decree-holder's petition attached the 6-annas share subject to encumbrances and a 6-annas share not so subject. The decree-holder's petition attached the 6-annas share subject to encumbrances. It was afterwards suggested that there was a slip in the petition and that what was meant to be attached was the 6-annas share not subject to encumbrances. This suggestion was accepted by the High Court, but the Privy Council held that, whatever might have been meant, the attachment made was only of 6-annas share subject to encumbrances and as this is less than 10-annas share which was subject to encumbrances, the petition on its face, referred only to a 6-annas share subject to encumbrances and it must be taken that what was sold was only a 6-annas share subject to encumbrances and if it is attempted at a later stage to change this into a 6-annas share not subject to encumbrances, it will amount to a case of changing the identity of the property sold and not a case of mere slip in description. In the present case, there is nothing to show that anybody understood that what was finally knocked off was property which was only the equity of redemption. On the other hand, no such objection was

(2) 21 Ind. Cas. 936; 41 C. 590; 18 C. W. N. 313; 15 M. L. T. 137; 12 A. L. J. 156; 19 C. L. J. 161; 28 M. L. J. 89; 16 Bom. L. R. 156; (1914) M. W. N. 118; 41 I. A. 38 (P. C.).

(3) 1 Ind. Cas. 122; 36 C. 323; 13 C. W. N. 249; 6 A. L. J. 34; 5 M. L. T. 126; 9 C. L. J. 165; 11 Bom. L. R. 227; 19 M. L. J. 115; 36 I. A. 32 (P. C.).

taken in the present petition, nor was it taken in the grounds of appeal to the High Court on the former occasion. Mr. Krishnaswami Iyer informs us that he mentioned it at the time of argument and also when the judgment was delivered by our brothers Spencer and Venkatasubba Rao, JJ., but they made no reference to this point. Their order merely says that the case should go back and the Subordinate Judge should take further evidence on all the objections raised by petitioner in his petition and affidavit. Nor is the objection taken in the present grounds of appeal. For these reasons we do not think that there is any substance in the objection that the sale was a nullity. This argument is merely to take advantage of the looseness of the language employed by the decree holder's Vakil and by the Subordinate Judge in the final order accepting the bids. It is not suggested that the prior mortgagee ever consented to sell free of encumbrances and it seems that nobody could have contemplated such a sale.

The appeal fails and is, therefore, dismissed with costs. Pleader's fee Rs. 500.

Cornish, J.—I agree.

V. N. V.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1328 OF 1924.

April 26, 1927.

Present:—Mr. Justice Devadoss and
Mr. Justice Jackson.

K. ABDUL SALAM SAHEB TRADING
UNDER THE NAME AND STYLE OF K. SHEIK
MEERA SAHIB & Co. OF MADRAS
—PLAINTIFF—APPELLANT

versus

BATOHU VEERABHADRA RAJU

—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, r. 11—Rateable distribution—'Application for execution', requisites of—Application for attachment of fund in Court to credit of judgment-debtor, whether one in execution or merely interlocutory—Informal applications, effect of.

All that s. 73 requires in order to enable a person to get rateable distribution is that he should make an application for the execution of the decree before the receipt of the assets by the Court. [p. 299, col. 2.]

An application purporting to be under O. XXI, r. 11, Civil Procedure Code, contained the names of

parties and prayed that the amount belonging to the defendant and in deposit in the Court in another suit may be attached immediately on condition of producing the copy of the decree, later on. But the petition contained neither verification, the date of the decree, nor the particulars required by the subcls. (d), (e), (f), (g) and (h) of the Rule. The Court, however, acted upon the petition and ordered an attachment of the fund:

Held, Per Jackson, (Devadoss, J., dissenting), that the application was merely an interlocutory one and not an application for execution within the meaning of s. 73, Civil Procedure Code. [p. 301, col. 1.]

Per Devadoss, J.—Where a Court overlooks certain small informalities and grants the relief asked for, it is not open to the party against whom the relief is granted to question the correctness or the legality of the Court's order on the ground that the application on which the relief is granted is not in the proper form. [p. 299, col. 2.]

Per Jackson, J.—A Court cannot take up a mere application for rateable distribution and fill in the particulars necessary in order to make it a regular application for execution. Nor can it do so with a mere application for attachment. [p. 301, col. 1.]

Arunachellum Chettiar v. Haji Sheik Meera Rowther (1) and *Vishnu Dhonev Palkar v. Rampratap Daulatram Marwadi* (3), relied on.

Second appeal against the decree of the Court of the Subordinate Judge, Cooanada, in A. S. No. 50 of 1924, preferred against that of the Court of the District Munsif, Cooanada, in O. S. No. 204 of 1923.

Mr. T. Krishnaswami Iyengar, for the Appellant.

Mr. P. Somasundaram, for the Respondent.

JUDGMENT.

Devadoss, J.—The plaintiff's suit is for the recovery of a sum of money said to have been paid by the District Munsif's Court to the defendant who was not entitled, to receive the same. The defendant got a decree in O. S. No. 99 of 1922 against certain persons in July or August, 1922. Before decree, he had attached certain moveables belonging to the defendants and the proceeds of their sale were paid into Court. He applied for a cheque for the amount due to him on 11th September, 1922. The plaintiff who had filed O. S. No. 103 of 1922 against the same defendants obtained a decree on 29th June, 1922, and applied for attachment of the amount in Court on 30th June, 1922, and the attachment was effected on 11th August, 1922. Both the lower Courts have held that the plaintiff failed to file a proper execution application before 11th September, 1922, and, therefore, he did not come within the provisions of s. 73, Civil Procedure Code, so as to be entitled to rateable distribution of the assets in Court.

The plaintiff has preferred this second appeal.

The only point for consideration is whether Ex. C is an execution application within the meaning of s. 73, Civil Procedure Code. Exhibit C is headed "Petition filed by the plaintiff under O. XXI, r. 11 Civil Procedure Code," and the prayer is "that the amount belonging to the defendants and now in deposit in this Court in O. S. No. 99 of 1922 may be attached immediately on condition of producing the decree copy later on". The Subordinate Judge who is inclined to hold that this is an execution application is of opinion that he should have filed another application for a transfer of the money standing to the credit of Suit No. 99 of 1922 to the credit of his own Suit No. 103 of 1922. If Ex. C is an execution application, no second application would be necessary in order to enable the plaintiff to get the benefit of s. 73. The contention for the respondent is that this is only an interlocutory application and, therefore, it cannot be treated as an execution application. If considering whether the application is an execution application or not we have to look at the substance and not the form of the application. No doubt Ex. C is not in the form prescribed by the Civil Rules of Practice but it is filed under O. XXI, r. 11 which lays down what particulars should an execution application contain. Exhibit C complies with the main particulars required by r. 11, the names of the parties, the order under which it is filed and the relief claimed. The condition mentioned in Ex. C of producing the copy of the decree shows that it was in pursuance of the decree that the relief mentioned in it was claimed. The Court acted upon it and ordered an attachment of the fund in Court and the attachment was made on 11th May, 1922. In these circumstances can it be said that Ex. C is not an execution application? It was the duty of the Court to have returned the application when it was not in proper form but when the Court overlooked the want of form or the absence of certain particulars required under the rules and passed an order granting the relief prayed for it would be pedantry to say that the petition on which the relief claimed was granted was not a proper petition. Forms and rules are prescribed for the guidance of the Courts and the litigants. Where a Court

overlooks certain small informalities and grants the relief asked for, it is not open to the party against whom the relief is granted to question the correctness or the legality of the Court's order on the ground that the application on which the relief is granted is not in the proper form. Where one relief is claimed and another is granted the Court may be said to act illegally or with material irregularity but where a certain prayer is specifically made under a rule which permits the making of that prayer and when the Court grants the prayer overlooking the informality, if any, the order of the Court is legal. I, therefore, hold that Ex. C is an execution application.

If Ex. C is an execution application, it is unnecessary that there should be a further application in order to enable the plaintiff to come within s. 73. All that s. 73 requires in order to enable a person to get rateable distribution is that he should make an application for the execution of the decree before the receipt of the assets by the Court. In this case it is admitted that the assets were not received before 11th September, 1922, and the application made on 20th June, 1922, was, therefore, made before the assets were received. A number of cases are relied upon by the respondent for the position that Ex. C is not an execution application but none of the cases touch the point at issue. In *Arunachellum Chettiar v. Haji Sheik Meera Rowther* (1) it was held that an attachment before judgment was in no sense an application for execution. In *Nachiappa Chettiar v. Subbier* (2) it was held that the amount deposited in Court became "assets held in Court" within the terms of s. 73, Civil Procedure Code, only when the Court passed an order on an application for payment in execution of the decree.

In *Vishnu Dhondav Palkar v. Rampratap Daulatram Marwadi* (3), the petitioner applied for attachment before judgment. The property attached was sold and the sale proceeds were paid into Court to the credit of the suit. Another person who had previously got a decree against the same defendant applied for execution

(1) 7 Ind. Cas. 856; 34 M. 25; 8 M. L. T. 226; (1910) M. W. N. 6.

(2) 72 Ind. Cas. 820; 46 M. 506; 44 M. L. J. 413; 17 L. W. 390; 32 M. L. T. 198; A. I. R. 1923 Mad. 505.

(3) 59 Ind. Cas. 713; 45 B. 360; 22 Bom. L. R. 1407.

and asked that the proceeds which were lying in Court to the credit of the petitioner's suit must be attached. His application was heard and the money in Court was paid to him without any notice to the petitioner. The petitioner could not then apply for execution as he had not obtained a copy of the decree in his suit. He brought a suit against the person who got the sale-proceeds from Court and it was dismissed by the lower Courts. He made an application to the High Court under s. 115 and the High Court held that there was no material irregularity in not giving the petitioner notice of the application of his opponent before paying the proceeds out of Court. This decision is in conformity with *Arunachellum Chettiar v. Haji Sheikh Meera Rowher* (1). If the plaintiff relied upon only on his application for attachment before judgment as entitling him to rateable distribution under s. 73 he would no doubt be out of Court but here he made an application for execution by way of attachment after he obtained a decree in his favour.

The decision in *Visvanadhan Chetti v. Arunachalam Chetti* (4) has no application to the present case. If the plaintiff had applied for the transfer of the assets standing to the credit of O. S. No. 99 of 1922 to the credit of his own suit he would be entitled to the whole of the amount for, the defendant did not obtain a decree till August, 1922. Now he claims only rateable distribution under s. 73 and, therefore, his not applying to have the amount standing to the credit of O. S. No. 99 of 1922 transferred to the credit of his own suit does not stand in the way of his obtaining relief under s. 73. The decision in *Kasiwar De v. Aswini Kumar Pal* (5) is strongly relied upon in support of the position that another application was necessary in order to enable the plaintiff to come within s. 73. In that case an application was made for the issue of a precept to another Court for attachment of certain property. No further application was made for execution. A Bench of the Calcutta High Court held that a mere application for the issue of a precept to another Court was not an execution application so as to entitle the applicant to the benefit of

s. 73. Section 46, Civil Procedure Code, requires that an application should be made to the Court to which the precept is issued for the sale of the property attached. If this application is not made within two months or within such period as is extended by the order of the Court which passed the decree the attachment by the Court to which the precept is issued will cease to continue. That decision has no application to the present case, for, here the custody Court was the Executing Court and the attachment was made by the Court which passed the decree.

Though the plaintiff claims in the suit the whole of the amount which was paid to the defendant he is only entitled under s. 73, Civil Procedure Code, to a rateable distribution. The appeal is allowed. The decrees of the lower Courts are set aside and the District Munsif will pass a decree in conformity with the provisions of s. 73. Both the parties will pay and receive proportionate costs throughout.

Jackson, J.—The point for determination is whether the plaintiff can be said to have made application to the Court for the execution of his decree by filing the petition Ex. C. This document runs "Petition filed by the plaintiff under O. XXI, r. 11 of the Civil Procedure Code. For reasons stated in the affidavit herein, it is prayed that the amount belonging to the defendant and now in deposit in this Court in O. S. No. 29 of 1922 may be attached immediately on condition of producing the decree copy later on... Signed.....Pleader."

Although O. XXI, r. 11 is cited at the head, few of the requirements of that rule are fulfilled. The petition contains neither verification, the date of the decree, nor the particulars required by the sub-clauses (d), (e), (f), (g) and (h) of the rule. I cannot regard these defects as immaterial. It is not as though the party had made some accidental omission which is now sought to be turned to account as invalidating the application. From the outset, it must have been clear to the party and Court alike that in form and substance this was not an application under O. XXI, r. 11 and, as a matter of fact, the Court treated it as an interlocutory application and not as an execution petition, if it treated it as the latter, the Court under r. 17 had the alternative of rejecting the application or returning it for amendment. It could not adopt a third course and order attachment as if it was seized of a proper

(4) 60 Ind. Cas. 302; 39 M. L. J. 608; 12 L. W. 744; 28 M. L. T. 412; (1921) M. W. N. 14; 44 M. 100 (F. B.).

(5) 90 Ind. Cas. 527; A. I. R. 1926 Cal. 249.

application or though not so seized, by its inherent power.

There can be no question of inherent or of dispensing power in this matter. Execution is an invasion of private right and can only be done under and in compliance with the Code. "Section 235 (O. XXI, r. 11) specifies the form and contents of the application. The mere application for rateable distribution, therefore, which does not comply with the requirements of the section in form or substance cannot be treated as the sort of application for execution falling within the scope of s. 295 (s. 73)." *Arunachellum Chettiar v. Haji Sheik Meera Rowther* (1). In other words, the Court having regard to the known circumstances of the case cannot take up a mere application for rateable distribution and fill in the particulars necessary in order to make it a regular application for execution. Nor can it do so with a mere application for attachment.

In *Vishun Dhondav Palkar v. Rampratap Daulatram Marwadi* (3) the Court was confessedly confronted with a very hard case, but there was no question of straining the Code on behalf of the party who had failed to comply with its provisions. "He did not apply for the execution of the decree so as to make his position secure."

The general equity in these cases appears to follow the common maxim, first come first served. The person who is sufficiently alive to his interests to attach the property of his debtor is left undisturbed, and others who are behind him in the chase can only claim rateable distribution if they create such circumstances under s. 73 as entitle their claim to be regarded as simultaneous. In the absence of those circumstances, they have no right and the Court has no concern to deprive the other creditor of his legitimate gains.

Therefore, I see no reason to differ from the Courts below and should dismiss the appeal with costs.

By the Court.—As there is a difference of opinion, the appeal will stand dismissed with costs.

V. N. V.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 910 OF 1925.

March 23, 1927.

Present:—Mr. Justice Jackson.

MEENAKSHI AMMAL—PETITIONER

versus.

ISWARAM IYER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Order allowing claim petition—Failure to determine question of possession—Revision—Interference.

Where the lower Court whose order is impugned has entirely misconceived the question before it or committed an obvious irregularity, there is no reason why the High Court should not interfere in revision under s. 115 of the Civil Procedure Code.

Petition under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Ambasamudram, dated the 19th, March, 1925, in C. M. P. No. 253 of 1925, in S. C. S. No. 505 of 1919, on the file of the Court of the Subordinate Judge, Tinnevely.

Mr. E. Krishna Ayyar, for the Petitioner.

Mr. K. S. Ramabhadra Ayyar, for the Respondent.

JUDGMENT.—The petitioner seeks to set aside the order of the District Munsif of Ambasamudram in C. M. P. No. 253 of 1925 allowing a claim in S. C. S. No. 505 of 1919 on the file of the Tinnevely Sub-Court. A preliminary point has been taken that this Court cannot interfere by way of revision. I have already discussed the authorities on this question in *Veeraswami Mudali v. Venkatachala Mudali* (1). I think the rule is that this Court will not do anything like going into the merits when an appeal is available to the party, but if the lower Court whose order is impugned has entirely misconceived the question before it or committed such obvious irregularity, there is no reason why this Court should not interfere. In the very short order written by the learned District Munsif in this case he finds that the claimant's *prima facie* title is proved, and evidently he has not addressed his mind at all to the question of possession which is the question to be decided in this connection. In these circumstances the order is set aside and the petition referred to the District Munsif for disposal according to law.

Costs of this petition will be costs in the proceedings.

V. N. V.

A. N. A.

Order set aside.

(1) 92 Ind. Cas. 20; 50 M. L. J. 102; 22 L. W. 44 (1925) M. W. N. 763; A. I. R. 1926 Mad. 18.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 64 of 1926.

July 29, 1927.

Present:—Justice Sir William Watkins
Phillips, Kt., Offg. Chief Justice,
and Mr. Justice Ananthakrishna Iyer.

Rai Bahadur BANSILAL

ABBEROHAND—PLAINTIFF—APPELLANT
versus

V. SRIRANGANACHARAMMAL

AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (1)—Vendor's lien for unpaid purchase-money, whether lost by execution of pro-note by vendee for sale—consideration—Recital in sale-deed that properties were not to be sold till pro-note was discharged, effect of.

The vendor's lien for unpaid purchase-money is given by Statute and continues until there is a contract between the parties that it shall cease.

Swaminatha Odayar v. Subramania Iyer (1), referred to.

A purchaser of immoveable property executed a pro-note for the amount of the consideration for the sale but the sale-deed contained a distinct recital that the vendee was not to alienate the property until the pro-note had been discharged. The promissory note was subsequently renewed in the name of the vendor and his wife for either or survivor. In a suit after the death of the vendor by the wife to enforce vendor's lien:

Held, that the vendor's lien could not, under the circumstances, be held to have been abandoned.

Appeal from the judgment and decree of Mr. Justice Kumarswami Sastri, dated the 22nd April, 1926, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in C. S. No. 381 of 1926.

Mr. V. C. Gopalratnam, for the Appellant.

Mr. Surayanarayana, for the Respondents.

JUDGMENT.—In this appeal the first question that arises and one which formed the leading part of the argument in appeal was that the vendor's lien in this case had been given up by a contract to the contrary. The plaintiff's husband sold a certain property to the 1st defendant and a sum of Rs. 10,000 was not paid in cash but a promissory note was executed for the amount. It is of course possible that the parties might have intended that this promissory note by itself would form part of the consideration and that they would not treat the Rs. 10,000 as unpaid purchase-money. The only question is whether in the present instance that was the intention

of the parties. It is clear that this intention is negatived by the recital in the sale-deed by which the vendee was not to alienate the property until the promissory note had been discharged. If the lien was abandoned, this provision is perfectly useless for it can only be of use in order to enforce such a lien. That lien is given by Statute and continues until there is a contract between the parties that it shall cease. Even the fact that the renewal of the first promissory note is taken in the name of the vendor and his wife for either or survivor does not remove this lien in view of the recital in the document. We agree with the learned Judge that this lien was not given up by the vendor.

A further point has been taken in appeal, namely, that the very fact of getting the pro-note renewed in the vendor's name and also his wife's name is proof of the abandonment of the lien, and reference has been made to a case recently decided in this Court *Swaminatha Odayar v. Subramania Iyer* (1). After referring to that case and as a development of the argument it was contended that the plaintiff who is only the wife of the vendor and; therefore, a third party to the original contract, could have no vendor's lien. This assumes that the plaintiff is not also the legal representative of the vendor. The point was not taken in the written statement, nor is it even taken in the grounds of appeal to this Court, but it is sought to be put forward now as a pure question of law and, therefore, one which should be allowed to be taken for the first time in arguing the appeal. Apart from the facts that the other side had no notice whatever of this contention, there are various other reasons against the advisability of allowing this course to be taken. If this case had been taken in the pleadings it would have been open to the plaintiff to amend her plaint or possibly withdraw the suit with leave to bring another suit, or it might be within her power to prove that she is the legal representative. She is now deprived of these opportunities, but it is suggested that the remedies which would have been open to her before the trial began are still open to her. That may be so, but she would still be seriously prejudiced by having been

(1) 100 Ind. Cas. 10; 51 M. L. J. 856; A. I. R. 1927 Mad. 219; 25 L. W. 411; 50 M. 518.

allowed to proceed through two Courts without any objection being taken. In these circumstances we must decline to discuss this ground of appeal which is put forward for the first time in the course of the argument, and which depends upon a fact of which no evidence has been adduced.

The appeal is accordingly dismissed with costs.

V. N. V.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 161
OF 1925.

May 3, 1927.

Present:—Mr. Justice Waller and
Mr. Justice Madhavan Nair.

EDAVALATH POTAYUR MANAKKAL
MAHESWARAN NAMBU DRIPAD
KARNAVAN AND MANAGER OF THE
ILLOM.—APPELLANT

versus

THIRUVAZHIYOT VALAPPA MENON—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 11, 17 (1) and (2)—Application for execution—Deceased judgment-debtor's name entered as legal representative—Defect not noticed by Court—Subsequent amendment after period of limitation—Application, whether in accordance with law.

Parties should not be made to suffer by reason of the failure of the Court to check the correctness of the entries in their execution petition. [p. 304, col. 1.]

An application for execution was presented against the legal representative of a deceased judgment-debtor. A subsequent application was presented against the deceased judgment-debtor by oversight. The Court failed to detect the mistake and notice was issued in the name of the dead man. The attention of the Court was drawn to the defect later on by an application for amendment which was, however, granted after the expiry of the period of limitation:

Held, that the amendment fell within the scope of O. XXI, r. 17, sub-r. (1) of the Civil Procedure Code and that, therefore, by virtue of sub-r. (2) the application as amended must be deemed to have been one in accordance with law presented on the date when it was first presented. [p. 304, col. 1.]

Appeal against the order of the Subordinate Judge, South Malabar at Calicut, dated the 27th July, 1925, in Appeal No. 22 of 1925, (A. S. No. 335 of 1924, on the file of the District Court, South Malabar) preferred against that of the Court of the District Munsif, Parappanangadi, in E. P. No. 591 of 1923, in O. S. No. 521 of 1907, (A. S. No. 634 of 1909, S. A. No. 85 of 1909—C. M. P. No. 663 of 1914—A. S. No. 783 of 1914, and A. S. No. 70 of 1915.)

Mr. K. Kuttikrishna Menon, for the Appellant.

Mr. P. S. Narayanaswami Aiyar, for the Respondent.

JUDGMENT.—The legal representative of the judgment-debtor is the appellant. The question for decision is whether the execution application presented by the respondent on 4th April, 1923, is barred by limitation.

The facts are these: the original judgment-debtor one Narayanan Nambudripad died. On his death, execution was taken in 1917, against his legal representative Vasudevan Nambudripad. He also died. In 1920, as per Ex. B execution was then taken against his legal representative Maheswaran Nambudripad. This execution petition was dismissed for non-payment of *patta* for notice. The petition out of which this civil miscellaneous second appeal arises was presented on 4th April, 1923, within three years from the last application and on the last day of the 12th year from the date of the second appeal decree. In this application the respondent showed the deceased Vasudevan as the counter-petitioner and not Maheswaran as he should have done. The notice was returned with the endorsement that the counter-petitioner was dead. Then the petitioner applies for amendment of the execution application by substituting the name of Maheswaran for that of the deceased Vasudevan. The amendment was allowed on 6th July, 1923, when it was more than 12 years after the decree in the second appeal.

The last execution application presented on 4th April, 1923, was admittedly infructuous as nothing could be done in pursuance of it, as it was presented against a dead man and not against the proper living legal representative. If the substitution of the present appellant's name is valid under the provisions of sub-r. (1) of r. 17 of O. XXI, of the Code of Civil Procedure then by virtue of sub-r. (2) the application as amended must be deemed to have been an application in accordance with law, and presented on the date when it was first presented and, therefore, not barred by limitation. If the amendment does not, however, satisfy the requirements of the said rule, then the appellant's name having been substituted only on 6th July, 1923, the execution petition under appeal can be deemed to have been presented against him only on 6th July, 1923, when 12 years had elapsed after the passing of the decree and is, therefore, clearly barred by limitation. That it is so barred is the argument urged on behalf of the appellant.

Under O. XXI, r. 11, sub-r. 2, cl. (1) every application for execution shall contain among other particulars the names of the persons against whom execution of the decree is sought. Under O. XXI, r. 17, cl. (1), Civil Procedure Code the Court shall ascertain whether the requirements laid down in r. 11 have been complied with, if not complied with, it is open to the Court, to reject the application or to allow the defect to be rectified.

In the present case the name of the legal representative was not correctly entered in the application for execution. On this ground the Court could have either rejected it at once or allowed the defect to be remedied; but the Court did not detect the defect on account of the destruction of the previous records due to the Moplah rebellion. If the records had been available there can be no doubt that the Court would have adopted either of the courses mentioned above. The attention of the Court, however, was drawn to the defect later by the application for amendment already referred to and the amendment asked for was allowed by the Court. Parties should not be made to suffer by reason of the failure of the Court to check the correctness of the entries in their execution petition [See the principle of the decision in *Vemuri Pitchayya v. Ankineedu*

Bahadur Zemindar Garu (1). The dictum of Jackson, J., in *Sankaran Nair v. Urappoyil Ambu* (2) relied on by the appellant, no doubt, supports him to a certain extent but that is in conflict with the decision of the Bench in *Vemuri Pitchayya v. Ankineedu Bahadur Zemindar Garu* (1). Further we may point out that the failure to furnish a list of immoveable and moveable properties by the decree-holder stands altogether on a different footing.

It is true that the lower Court is wrong in ascribing decree-holder's mistake to the destruction of his Vakil's records during the rebellion. The evidence shows that the prior application was in the office of his Vakil and that by the exercise of some care and diligence the mistake could well have been avoided. It is, however, not shown that the mistake was otherwise than *bona fide*. Evidently the error must have crept in on account of an oversight.

In these circumstances we think the amendment fell within the scope of O. XXI, r. 17, cl. (1) of the Code of Civil Procedure and, therefore, by virtue of sub-r. (2) the application as amended must be deemed to have been one in accordance with law presented on the date when it was first presented.

In this view, we agree with the learned Subordinate Judge and hold that the present application is not barred by limitation. The appeal against the appellate order is dismissed with costs.

V. N. V.

A. N. A.

Appeal dismissed.

(1) 76 Ind. Cas. 750; 45 M. L. J. 651; 18 L. W. 739; 33 M. L. T. 125; A. I. R. 1924 Mad. 367.

(2) 92 Ind. Cas. 109; 49 M. L. J. 699; (1925) M. W. N. 917; A. I. R. 1926 Mad. 260.

PATNA HIGH COURT.

CRIMINAL APPEALS NOS. 35 AND 39 OF 1927.

April 26, 1927.

Present:—Justice Sir B. K. Mullick, Kt.,
and Mr. Justice Wort.

GHANSHYAM SINGH AND OTHERS—

ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal trial—Duty of prosecution and defence respectively—Defence merely relying on defects in prosecution evidence, propriety of—Penal Code (Act XLV of 1860), s. 107—Abetment, what constitutes.

Although the prosecution must prove their case in the first instance before the accused can be called upon to make their defence, yet when evidence has once been given on oath by witnesses who profess to have seen the occurrence and who directly implicate the accused and ascribe particular acts to them, it will not avail the accused merely to rely upon discrepancies here and there or upon the absence of adequate motive or on indications that there may be exaggerations in the prosecution story. [p. 306, col. 2.]

A, B and C had an altercation with D. B was armed with a *lathi* and C with a spear and A gave a general order to beat D. C thereupon inflicted a mortal blow on D with his spear:

Held, that A must be deemed to have intended all the results that followed from his general order to beat, and was, therefore, guilty of the offence committed by C. [p. 309, col. 2.]

Criminal appeals from a decision of the Sessions Judge, Saran, dated the 19th February, 1927.

Sir Ali Imam and Messrs. Yunus, Jafar Imam and S. Ali Khan, for the Appellants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

Mullick, J.—This is an appeal against an order made by the Sessions Judge of Chapra sentencing the appellant Ramkhushi to rigorous imprisonment for ten years for an offence under s. 304 of the Indian Penal Code. The appellant, Ghanshyam, has been sentenced to rigorous imprisonment for three years and a fine of Rs. 300 for an offence under s. 304 read with s. 109 of the Indian Penal Code. The appellant Ramautar has been sentenced to rigorous imprisonment for one year for an offence under s. 323 of the Indian Penal Code.

The case of the prosecution is that Ghanshyam, who was the President of the *Panchayat* of *Mauza Sabalpur*, set out about 1-30 on Saturday, the 27th November last, for the house of a *Kayasth* named Ramlagan who resided in another part of the same village. Ghanshyam was accompanied by his relatives, Ramautar and Ramkhushi, who resided in the same house with him,

Ramkhushi was armed with a spear and Ramautar and Ghanshyam were both armed with *lathis*. It is said that owing to the conduct of Ramlagan, which will be presently explained, Ghanshyam was annoyed and intended to punish Ramlagan that day. The evidence as regards the previous acts of Ramlagan is this: Ramlagan has a nephew called Ramchandra, a boy of 9 or 10 years of age. Ramlagan alleges that this boy has come under the influence of Audh Behari Singh, the son of Sheodhar, and of Baliram, the younger brother of Ghanshyam. Ramlagan did not approve of Ramchandra's association with these two youngmen and had been objecting for some time. Shortly before the 25th November Ramchandra disappeared from home. On the 25th November Ramlagan went to the fair at Sonepur which is close to Ghanshyam's house. There he found Ramchandra in the company of Baliram and Audh Bihari. An altercation took place between him and these two youngmen and he alleges that he gave them a beating.

It is suggested that Ghanshyam was annoyed at Ramlagan's impertinence and that he intended on the 27th November to take revenge upon him.

There are four eye witnesses in this case, Deoki Singh, Sukhan Singh, Rambaran Singh and Rambadan Singh, and they all depose to seeing Ghanshyam and his two companions coming from the direction of Ghanshyam's house and meeting the deceased Pardip, also a Babhan of the same village but apparently belonging to a separate faction.

It is alleged by these men that Pardip made some slighting remark about Ghanshyam and twitted him about his abusing his authority as the President of the local *Panchayat*. Pardip next abused Ghanshyam in foul language who thereupon ordered his companions to beat Pardip. Ramautar then struck Pardip with his *lathi* and Ramkhushi delivered a mortal blow with his spear. It appears that owing to some peculiarity of conformation the deceased Pardip had his liver on the left side instead of the right and Ramkishun's blow penetrated his liver and intestines and caused almost instant death.

The evidence further is that the village *chaukidar* Bhajan arrived on the scene almost immediately afterwards but was unable to obtain from Pardip any account

of who had caused his injuries. It is said that Pardip was alive but speechless. A stretcher was brought and, according to some witnesses, Pardip died before being placed upon the stretcher, and, according to others, he died on the way to the Police Station. Under the orders of Bhajan, Roshan Dusadh another *chaṛukidar* of the village then started for the Police Station which is about three miles from Sabalpur. Roshan arrived at the Police Station about 2 o'clock and made a communication to the Sub-Inspector which was recorded as a first information, although whatever he knew about the occurrence was mere hearsay.

In the meantime, Deoki Singh and Sukhan Singh set out with the body of Pardip Singh for the *Thana* and arrived there some time about 4 o'clock.

The Sub-Inspector, after having recorded Roshan's information, set out on horseback for Sabalpur and arrived there about 3-30 p. m. He stayed there for about half an hour and then went back to the Police Station in order, as he says, to take the dying declaration of Pardip in case he should be alive. He arrived at the Police Station about 4 p. m. and found that Pardip was dead and that Deoki and Sukhan were there with the body. At 5 p. m. he took the statements of Deoki and Sukhan and then learnt for the first time that Ramkhushi had killed the deceased with a spear thrust under the orders of Ghanshyam and that Ramautar also had joined in the assault. The Sub-Inspector immediately hurried back to the village and proceeded to the house of Ghanshyam. He did not find any marks of violence in the house; but on the way to that house he noticed at the house of Sheodhar Singh, the *gomashta* of the village, traces of an attack of some kind. He then went to the house of a *chaṛukidar* named Raja Singh and there took down the statement of Ramautar who had several injuries upon his person. In consequence of what Ramautar said, he next sent for Sheodhar and took down a statement from Sheodhar containing a more or less detailed account of an attack upon his house by a large number of villagers. At 7 or 7-30 p. m. he took down the statements of Rambaran and Rambadan. The investigation was continued for many days after that and the result was that the Police rejected the account given by Sheodhar and accepted the account given by Deoki,

Sukhan, Rambaran and Rambadan and sent up the present appellants for trial.

The four assessors distrusted the prosecution evidence and found all the accused not guilty.

The learned Sessions Judge in a careful and elaborate judgment has come to a different conclusion and has sentenced the accused as stated above.

Now before us the evidence of the four material witnesses has been examined very carefully and subjected to very destructive criticism by the learned Counsel for the appellants.

But after having considered all the matters brought into prominence in the course of the cross-examination of the prosecution witnesses in the lower Court and in the address of the learned Counsel before us, I think on the whole that the learned Sessions Judge has taken a right view of the evidence. The fact is that in this case the accused have too unwisely relied upon the abstract doctrine of the burden of proof. They had a definite counter-case which they put forward before the Police on the very evening of the day of the occurrence. It was a clear-cut case capable of precise proof. Ghanshyam was a well-to-do man and was the head of the village. Sheodhar, the man who was attacked, was the *gomashta* of the landlord. The village consists of a thousand houses and Ramlagan, the leader of the *Kayasths*, represents a very small minority. It was the easiest thing in the world for Ghanshyam to produce conclusive evidence before the trial Court of the attack upon Sheodhar's house and of the manner in which Pardip came by his death. Instead of that the appellants have relied upon suggestions, indications and improbabilities for the purpose of discrediting the sworn testimony of the eye-witnesses. It is true that the prosecution must prove their case in the first instance before the accused can be called upon to make their defence; but when evidence has once been given on oath by witnesses who profess to have seen the occurrence and who directly implicate the accused and ascribe particular acts to them, I do not think it will avail the accused merely to rely upon a discrepancy here and a discrepancy there or upon the absence of adequate motive or on indications that there may be exaggerations in the prosecution story. I think in this case something more was expected of the accused

and they should have called witnesses to prove on oath that Pardip was attacked not on a path near the houses of the witnesses Rambadan and Rambaran but in the house or outside the house of the *gomashtha*, Sheodhar. The fact is that there is only one version before us of which there is any legal evidence, and cross-examination has not materially shaken it.

As to what Sheodhar's account was, we have no idea whatever. It is said that the first information was allowed to be read out at the trial, but we have no knowledge of the contents of that information. I thought perhaps that we should be able to gather from the statements of the accused what their precise case was; but I find that in his examination in the Sessions Court on the 12th February Ramkhusi was asked why he had been implicated by the witnesses who had deposed against him. His answer was: "They have falsely implicated me out of malice. I shall make further statement in writing." He also stated that he was not in the village at all on the day of occurrence; but no evidence has been given to prove *alibi*.

Ramautar also was asked the following question: "Would you at all like to say if Pardip was struck with a *bhala* to your knowledge?"

Answer—"No, Sir."

Then he was asked: "Did you appear as a witness for Sheodhari Prasad before the *daroga* and supported Sheodhar's story by saying that you had witnessed Pardip being struck with a *bhala*?"

Answer—"I will not say anything further orally. Whatever I have to say I will submit in writing."

Ghanshyam was asked: "Is it a fact that you admitted your presence at the occurrence and supported the case of Sheodhar made to the *daroga* as his witness who had seen such an occurrence?"

Answer—"No, Sir, I shall file a written statement."

The written statements filed do not give any details. They merely state that the accused have been falsely implicated owing to enmity and that the real truth as to the cause of Pardip's death and the place of the occurrence has been suppressed.

In this unsatisfactory state of affairs I think that unless it can be shown beyond all doubt that the witnesses for the prosecution have broken down, their testimony is

entitled to be accepted as a substantially true account of the occurrence.

Now the first of these witnesses is Deoki Singh. This man says he was going to the house of Bhajan *chaukidar* to borrow a *tarwa*, which is a small basket attached to a plough for the purpose of distributing grain along the furrows made by the plough. His cross-examination shows that he has been previously convicted and that he has been a party in many civil and criminal cases; but there is nothing in the cross-examination which established beyond all doubt that this man could not have been at the place at the time of the occurrence. As a matter of fact he appeared before the Sub-Inspector at the earliest possible time and as Pardip had no wife or child, there was nothing unusual in his accompanying Sukhan who was a relation of Pardip's to the *Thana* with the body. The witness has admitted in his cross-examination that at the time that he went to Bhajan's house for the *tarwa*, Bhajan's son was in the house and it is contended that this cannot be possibly true and that, therefore, his whole story must be false. Now, the day was a Saturday and Deoki says that the school closed early on that day. At one place he does say that the school closed at 4 p. m., but he qualifies this by saying that the school sometimes closed earlier. And it is a question whether the boy could have been at home at the time of the attack on Pardip. I cannot say that it is established beyond all doubt that the boy could not have left school earlier on that day than usual and been in his own house at the time that Deoki came to see his father.

Then as regards Deoki's statement to the Sub-Inspector, it is clear from it that Deoki knew about the dispute that had been going on between Ramlagan on the one hand and Ghanshyam's brother Baliram and Sheodhar's son Audh Behari on the other. The Sub-Inspector was cross-examined on the point and he said that he does not think that Deoki told him about the presence of Baliram at Sonapur on the 25th November; but Deoki asserts that he did tell the Sub-Inspector this and he is corroborated by the statement which he made to the Sub-Inspector at 5 p. m. Further he states that he heard Ghanshyam coming along with the two other appellants shouting that he would teach Ramlagan a lesson for having assaulted Baliram and Audh Behari.

The next witness is Sukhan Singh. This man was related to Pardip and he was going to his *zemindar* to get a settlement of some land and he deposes that Pardip abused Ghanshyam and that he was then assaulted. I have no doubt that the witness was present at the assault upon Pardip and it is to be noticed that he has the courage to admit that he chased Ramautar for some distance and struck him several blows with his stick.

It is contended on behalf of the appellants that Sukhan would never have dared to attack Ramautar in this manner; but Sukhan is a Babhan just as much as Ramautar is and although Ramautar was armed with a *lathi* and Sukhan only with a stick, I do not think Sukhan's statement must necessarily be rejected.

But the main objection advanced against the story of both Deoki and Sukhan is that they have introduced into their depositions details of the abuse that was uttered by Pardip against Ghanshyam. It is said that in their statement to the Police there was no mention of any abusive or filthy language. The Sub-Inspector, however, states that he did not consider it necessary to put down the actual words used and that he contented himself merely by making a memorandum to the effect that "hard words" were used by Pardip to Ghanshyam.

Sukhan was also subjected to a very rigorous cross-examination to show that he could not have passed along the path where Pardip was attacked in order to go to the *zemindar's* house; but I am not satisfied that the cross-examination had been driven home sufficiently. As far as I can see, it has not been shown that Sukhan should not have come by that path at the time alleged.

There are, however, two other witnesses who seem to me to stand on a much higher footing than Deoki and Sukhan and these are the two cousins Rambaran and Rambadan who occupied a house close to the tree near which the occurrence took place. These witnesses state that they had come home and were watering their cattle when the altercation between Ghanshyam on the one side and Pardip on the other began. No reason has been shown why they should have perjured themselves in this case. They are Babhans and it has not been shown that they have any special enmity against the accused. It is pointed out that if they had seen the occurrence

chaukidar Bhajan would certainly have seen them there as soon as he arrived; but Bhajan states in his deposition that he saw 30 or 35 men and does not mention the names of Rambaran and Rambadan. The argument is inconclusive because Bhajan was not asked definitely whether these two men were present or not.

It is also argued that if these witnesses had been eye-witnesses they would certainly have appeared before the Sub-Inspector either when he first arrived or during his second visit at about 5 or 5-30. This assumes that in this country witnesses will come forward to give evidence gratuitously out of a sense of public duty; but experience shows that here a person who has seen an occurrence will often leave the place as quickly as possible and that his first thought will generally be to say that he does not know anything about the case. As a matter of fact, Rambaran and Rambadan did appear before the Police at 7-30 p. m., and it has been suggested by the learned Counsel for the appellants that the reason for this was that they knew that Sheodhar had been examined and had implicated them and it was, therefore, necessary for them to give a counter-version for the purpose of meeting Sheodhar's case. In my opinion Rambaran and Rambadan were not concerned to account for Pardip's death, nor was there time to manufacture a false case. It is far more likely that if they had taken part in an attack on Sheodhar they would have denied all connection with Pardip. I do not think that sufficient reason has been shown for disregarding their sworn testimony in Court.

With regard to the witness Bhajan, it is to be noticed that he says in his examination-in-chief that he told Roshan *chaukidar* to go to the *Thana* and to tell the Sub-Inspector that a collision had taken place between the President's party and Sheodhar's party. That is nobody's case and is obviously false. On the contrary, what Roshan did say was that a collision had taken place between the villagers on the one hand and the President and Sheodhar on the other. Bhajan does not explain now where he got his information. It is suggested by the learned Counsel on behalf of the Crown that Bhajan's evidence must be looked at with some suspicion as he was serving under Ghanshyam. I agree with this view and I do not think that his evidence can be accepted as satisfactory. The fact that he

did not tell Roshan who had killed Pardip or that Rambadan and Rambaran and Deoki and Sukhan had seen the occurrence does not, in my opinion, detract from the general value of the evidence of these four eye-witnesses. Deoki says that he told Bhajan that Ramkhusi was the man. Bhajan denies this. As Deoki was ready with this charge against Ramkhusi at the Police Station within three hours and as it does not appear that there was any time for his taking advice for the purpose of concocting a false story, I prefer to believe him rather than Bhajan. I also find that Roshan was present when Deoki and Sukhan made their statements to the Sub-Inspector and that Roshan made no attempt to set them right and to tell the Police that Pardip had been killed in an attack on Sheodhar's house.

The result, therefore, is that I agree with the learned Sessions Judge in believing that the four eye-witnesses are substantially speaking the truth in the Court.

It may be that the motive alleged was not adequate for so severe an injury, but it is impossible to speculate as to the sufficiency or insufficiency of motive for a criminal act. There may have been other matters of enmity between Ghanshyam on the one hand and Pardip on the other, or it may be that Ramkhusi acted under the excitement of the moment and delivered the fatal blow without thinking what he was doing. In this connection it has to be mentioned that Pardip was wearing wooden sandals. It is suggested that this part of the story is a fabrication; but we have the evidence of the Sub-Inspector that as soon as he came to the place he found the wooden sandals on the road and that they were besmeared with blood. The fact that Pardip was wearing these sandals to some extent supports the case that he was not a member of a mob making a determined attack upon the house of Sheodhar.

As regards the damage to the house, the evidence is that the Sub-Inspector found that some tiles were dislodged from the roof and one of the pillars of the verandah was cut with a sharp cutting instrument and a picture in the verandah had fallen or been pulled down and the glass of the frame was smashed. He also found some blood marks upon the top of the plinth of the verandah about three feet from the ground. He suspected that in the yard in the front of the house there were blood marks also; but the Chemical Examiner

reports that no blood was found in the earth scraped from these places. But the bricks removed from the plinth showed that the smears thereon were human blood. The learned Sessions Judge thinks it possible that after Pardip received his injuries on the road a large number of villagers attacked Sheodhar's house and did the damage found by the Sub-Inspector. With regard to the blood, he thinks that it might have come from Ramautar's injuries. He also observes that between Sheodhar's house and the spot marked B upon the Police map there are no traces of any blood at all on the ground but that from B to G a distance of about 128 feet there were several patches, and that the theory that Pardip could not have been injured in Sheodhar's house gains some support from the fact that there are no blood marks between Sheodhar's house and the spot B. In my opinion the evidence in the case is consistent with the theory and on the whole we must hold the learned Sessions Judge's view of the guilt of the accused to be correct.

A point has been made with regard to the conviction of Ghanshyam. It is said that as he gave only the order to beat he cannot be held liable for the results of the act of Ramkhusi and that at most he can be convicted only of the offence of abetting Ramautar in voluntarily causing hurt; but having regard to the fact that Ramkhusi was armed with a spear and Ramautar was armed with a *lathi* and that Ghanshyam gave the general order to beat, I think it is a reasonable inference that he intended all the results that followed. Ramkhusi would not have attacked Pardip if it has not been for that order and this is the learned Sessions Judge's view and, in my opinion, it is correct.

The result, therefore, is that the convictions and sentences are affirmed and the appeals are dismissed.

Wort, J.—I agree.

A. N. A.

Appeals dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 142 OF 1925.

November 14, 1927.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Adami.

BADLU PATHAK AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

SIBRAM SINGH AND OTHERS—DEFENDANTS
—RESPONDENTS.*Bengal Tenancy Act (VIII of 1885), ss. 158, 167—Rent-decree—Sale—Failure to serve notice on co-sharer landlord, effect of—Landlord purchasing himself at rent sale—Mortgagee of occupancy holding, rights of, against landlord—Failure to annul mortgage, effect of.*

The failure to serve notice under s. 158 of the Bengal Tenancy Act does not necessarily relegate the purchaser at a sale held in execution of a rent-decree to the position of an ordinary purchaser under a money-decree. The obligation to serve notice upon the co-sharer landlord is enacted to protect his interest and it is open to him at his option, to waive the necessity for such notice. [p. 312, col. 2.]

Rajani Kanta Ghose v. Rahaman Gazi (1), followed.

A mortgagee of an occupancy holding though he has obtained a decree on his mortgage and purchased the property in execution has no right to hold the land as a *raiyat* against the will of the landlord, who has purchased the holding in execution of a rent-decree, and his incumbrance, although never formally annulled under s. 167 of the Act and although still subsisting for what it is worth, is a barren right against the landlord when he seeks to enforce it by taking possession of the property. [p. 313, col. 1.]

Surat Lal Chowdhery v. Murlidhar (2), followed.

Appeal from a decision of the District Judge, Bhagalpur, dated the 15th November, 1924, reversing that of the Subordinate Judge, Bhagalpur, dated the 22nd December, 1923.

Messrs. *Hasan Imam* and *L. K. Jha*, for the Appellants.

Messrs. *L. P. Pugh*, *N. C. Sinha*, *N. C. Ghosh* and *N. C. Roy*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of the plaintiffs from a decision of the District Judge of Bhagalpur reversing the decree of the Subordinate Judge and dismissing the plaintiffs' suit.

The suit was instituted on the 28th March, 1923, claiming a declaration of their title to and delivery of possession of a holding in *Mauza Bosbhati*. It appears that in the year 1899 *Musharu Gope* and *Roudi Gope* executed a mortgage of their *kaimi jote* lands in *Mauza Bosbhati* in favour of *Tofa Lal Pathak* whose interest since his death has devolved on the plaintiffs. In March, 1912, *Tofa Lal Pathak*

brought a suit against the *Gopes* to enforce the mortgage and on the 9th October in the same year obtained a decree which was made absolute on the 3rd June, 1913. On the 27th October, 1924, the holding was sold in execution of the mortgage-decree and purchased by the mortgagee. On the 3rd August, 1915, the sale was set aside in proceedings under O. XXI, r. 90 of the Code of Civil Procedure at the instance of the mortgagors. A fresh application for execution was filed and on the 19th July, 1919, the holding was again sold in execution of the mortgage-decree and it was again purchased by the plaintiffs, the representatives-in-interest of *Tofa Lal*. On the 26th February, 1920, the plaintiffs obtained delivery of possession from the Court. At that time *Shibram Singh* and others, the defendants first party, were in possession of the holding having been inducted on the land as tenants by the proprietors in circumstances hereinafter mentioned. These defendants who may be referred to as the *Singh* defendants were, however, ousted by the plaintiffs in pursuance of the delivery of possession awarded them by the Court as purchasers in the execution proceedings in their mortgage suit. The *Singh* defendants then instituted proceedings under O. XXI, r. 100 of the Code of Civil Procedure against the plaintiffs, in which they were successful, and on the 16th May, 1921, the plaintiffs were dispossessed. The plaintiffs have accordingly brought the present suit to recover possession of the holding impleading, in addition to the *Singh* defendants, the proprietors of the village as second party defendants, *Gonar Gope* and another, the representatives of the original mortgagors, as third party defendants and *Chatku Pathak* and others, members of the plaintiffs' family who have separated from them after partition, as fourth party defendants.

In order to understand the situation which now arises it is necessary to go back to the year 1911 and trace the history of the litigation which took place in respect to this holding. It appears that *Kumar Rajendra Narain Singh* and *Babu Tejendra Narain Singh*, who are now represented by the second party defendants, were the *maliks* of the village in which the holding is situated, the former having a 9-annas share and the

latter a 7-annas share in the proprietary interest, and it seems that they made separate collections of rent from the tenants. In September 1911, and on the same day, each of the proprietors brought a separate suit for his proportion of the rent against the Gopes who were then in occupation of the holding as tenants. These suits were framed under s. 148-A of the Bengal Tenancy Act and each of the landlords obtained a decree for rent against the tenants, the 9-annas landlord on the 4th December, 1911, and the 7-annas landlord on the 27th January, 1912. The 7 annas landlord in execution of his decree put up the holding for sale and himself purchased it on the 5th April, 1914. A similar sale took place in execution of the decree obtained by the 9-annas landlord who also purchased the property on the 6th May, 1915, but with this transaction we are not now concerned. Neither of the landlords obtained immediate possession but on the 15th February, 1917, possession was delivered to the 7 annas proprietor who then held the land as a joint proprietor under the provisions of s. 22, sub-s. (2) of the Bengal Tenancy Act paying rent to his co-proprietor the 9-annas shareholder. On the 5th February, 1919, the 7-annas proprietor settled the holding with the Singh defendants who entered into possession as *raiyats* under s. 22 of the Bengal Tenancy Act. Subsequently, in February, 1920, as already stated, the Singhs were dispossessed by the plaintiffs but again recovered possession in the proceedings under O. XXI, r. 100 above referred to. It may here be stated that it has been found as a fact that the holding in question is a non-transferable occupancy holding, and the main question for determination in this appeal is whether the mortgagees of the original occupancy tenants can recover possession of the holding against those holding under the landlords and without the consent of the latter.

Various issues were raised at the trial with three of which only are we concerned in this appeal:—

(1) Whether, as the District Judge on appeal held, the suit is barred by s. 11 of the Code of Civil Procedure on the ground that the lands now claimed were found in the previous proceedings under O. XXI, r. 90, to which I have referred, not to be identical with the mortgage

property and that this decision operates as *res judicata* and bars the plaintiffs' claim.

(2) Whether the decree in the rent suit obtained by the 7-annas proprietor was a rent decree under s. 148 A of the Bengal Tenancy Act, or merely a money-decree, and, if a rent decree, whether the sale in pursuance thereof passed more than the right, title and interest of the judgment-debtors by reason of the fact that notice of the sale was not served upon the co-sharer proprietor as provided in s. 158 B of the Bengal Tenancy Act, and

(3) Whether having regard to the fact that the landlord purchaser did not take steps under s. 167 of the Bengal Tenancy Act to annul incumbrances, the mortgage charge upon the property must be regarded as still subsisting and conferring on the plaintiffs a right of possession.

In approaching the consideration of these questions and considering how far they affect the rights of the parties in this suit certain proved or admitted facts must be borne in mind. First, the holding in question is a non-transferable holding and the original occupancy holders, the Gopes, could confer no title upon the plaintiffs as *raiyats* without the consent of the landlord. Secondly, the landlords have never consented to accept the plaintiffs as tenants of the holding and, thirdly, the plaintiffs are now claiming possession as *raiyats*.

Both the Courts below found that the lands in suit were identical with the lands mortgaged to the plaintiffs, but whereas the trial Court considered that the proceedings between the plaintiffs and the Gopes under O. XXI, r. 90 in which it was found otherwise, did not act as *res judicata* against the plaintiffs in the present suit, the District Judge on appeal took a different view. The trial Court appears to have been of opinion that the decree obtained in the rent suit by the 7-annas proprietor was not properly framed under s. 148-A of the Bengal Tenancy Act and, further, held that as no proceedings had been taken under s. 167 of that Act, to annul the incumbrance the plaintiffs' lien remained and took priority over the rights of the landlord. The District Judge on appeal referred to the plaintiff in the rent suit and found that it complied with the requirements of s.

148-A and that the decree obtained in that suit was a rent-decree. He further found that, although no notice was served under s. 158-B on the co-sharer landlord, the latter had acquiesced in the sale and must be taken to have waived his right to such notice. In support of this proposition he relied on the case of *Rajani Kanta Ghose v. Rahaman Gazi* (1). He further held that although no proceedings had been taken under s. 167 of the Bengal Tenancy Act to annul the plaintiffs' incumbrance no annulment was necessary in the case of non-transferable occupancy holding. For this proposition he relied upon *Surat Lal Chowdhery v. Murlidhar* (2).

In argument before us it was no longer denied on behalf of the appellants that the decree obtained by the 7-annas proprietor was a rent decree. In fact the form of the plaint in that suit makes it quite clear that it complied with the provisions of the Statute. But it was contended that the sale in execution thereof conferred upon the landlord purchaser no more than the right, title and interest of the judgment-debtor because no notice was served upon the co-sharer landlord as required by s. 158-B, sub-s. (2) of the Act. It was also contended on behalf of the appellants that the failure to take proper proceedings to annul the incumbrance gave priority to that incumbrance over the rights of the landlord even assuming that he purchased under a rent-decree. On the question of *res judicata* it was contended that the point was not substantially in issue in the previous proceedings in 1915, that these proceedings were not between the same parties or their representatives and that as no objection was taken at the sale to the plaintiffs in 1917 objection could not be taken now on the principle laid down in the case of *Mungul Pershad Dichit v. Grija Kant Lahiri* (3) and that until the sale was set aside it could not be questioned.

It is unnecessary, in my opinion, to determine the question of *res judicata* as, even if we should decide this in favour of the appellants, we think they must fail upon other points in the case. Nor indeed could we finally determine this question without having before us more detailed information

as to the proceedings under O. XXI, r. 90 than we have at present.

With regard to the second point I have already stated that it is conceded that the decree was a rent-decree. Nor do I consider that in the circumstances the failure to serve notice under s. 158-B involved the consequence that the purchaser at such a sale was in the position of an ordinary purchaser under a money-decree. The obligation to serve notice upon the co-sharer landlord is enacted to protect his interest. In such a case the person upon whom it is required to serve notice may, at his option, waive the necessity for such notice. It is found by the District Judge in this case that he did waive the right to such notice and recognised the purchase of the 7-annas landlord, accepting from him his share of the rent. The question was considered in the case of *Rajanji Kanta Ghose v. Rahaman Gazi* (1) where it was held that a co-sharer landlord might waive his right to notice under the section in question notwithstanding the decision of the Judicial Committee in *Raghunath Das v. Sunder Das Khetri* (4). In my opinion the case of *Rajani Kanta Ghose v. Rahman Gazi* (1) was rightly decided.

It remains to consider the third point, namely, the effect of the failure to annul the mortgage incumbrance under the provisions of s. 167 of the Bengal Tenancy Act. Admittedly the provisions of that section were not complied with, but, although the notice required under the section is framed in language which applies generally to purchasers at sales in execution of rent-decrees, and incumbrances can only be annulled in the manner prescribed in the section, different considerations arise in a case like the present where the landlord is himself the purchaser and the incumbrancer is the mortgagee of a non-transferable occupancy holding. The section must be given effect to in the light of the other sections and of the right of the landlord to refuse to recognise a tenant not of his own choosing. Regarded merely as a purchaser he would be barred by the existing incumbrances unless they were annulled. But regarded as a landlord he has the right to refuse to recognise a transferee of the original occupier as his tenant. The

(1) 82 Ind. Cas. 507; 27 C. W. N. 765; 37 C. L. J. 447; A. I. R. 1924 Cal. 408.

(2) 46 Ind. Cas. 921; 4 P. L. J. 362.

(3) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).

(4) 24 Ind. Cas. 304; 42 C. 72; 41 I. A. 251; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 747; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154 (P. C.).

plaintiffs are none-the-less transferees though they acquired under a mortgage lien granted by the original tenants. By s. 65 the rent forms a first charge on the holding and takes priority over the mortgage lien. A landlord holding a decree for rent can sell the property and purchase it himself. If he is a co-sharer proprietor, as in this case, he acquires the peculiar interest conferred by sub-s. (2) of s. 22 and may hold the land on paying to his co-proprietors their share of rent, and may transfer his rights so acquired to a third person who thereupon becomes a *raiyat*. What then is to happen if the holding is subject to a mortgage granted by the defaulting tenant? Can the mortgagee who has obtained a decree on his mortgage and purchased the property in execution claim possession from the landlord or the *raiyat* settled on the land by the landlord? Clearly not, without the landlord's consent. He has no right to hold the land as a *raiyat* against the will of the landlord and his incumbrance, although never formally annulled and although still subsisting for what it is worth, is a barren right against the landlord when he seeks to enforce it by taking possession of the property. It is, therefore, of no consequence that the landlord did not seek to annul the mortgage, for the mortgagee could not step into the shoes of the original tenants and acquire a *raiyati* interest against the landlord's will. To hold otherwise would be, in effect, to allow the tenant of a non-transferable holding to transfer in a round about way to a stranger, without the landlord's consent, by executing a mortgage in favour of the stranger and allowing the holding to be sold in execution of a mortgage-decree. Such a sale can give him no right against the landlord without the latter's consent or entitle him to oust the landlord or the tenant claiming under him. It must be remembered that the plaintiffs in this case are claiming actual possession as purchasers of the holding. They are not seeking to redeem the land by payment of the rent charge under s. 73 of the Transfer of Property Act or to share in the surplus proceeds of the rent sale as second mortgagees. Such remedies may have been open to them in proceedings properly framed for that purpose. But the present suit is not one of such a nature. Even had proceedings been taken under s. 73, I apprehend that when the plaintiffs came to take possession they would

still have been in a difficulty unless the landlord consented to accept them as tenants. The view just expressed is in accordance with the decision of this Court in *Surat Lal Chowdhery v. Murlidhar* (2). The truth would appear to be that the transferee of a non-transferable occupancy holding, whether he takes by *kobala* from the original tenant or whether he acquires the property by purchase under a mortgage-decree, has a very precarious right, for he cannot force himself upon the landlord as a tenant without the latter's consent.

For these reasons I think that this appeal must be dismissed with costs.

Adami, J.—I agree.

B. K. P.

Appeal dismissed.

A. N. A.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 28 OF 1926.

November 8, 1926.

Present :—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Foster.

F. A. SAVI—DEFENDANT—APPELLANT

versus

Srimati SABITRI THAKURAIN—

PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 109 (a), (c)—Appeal to Privy Council—Order setting aside decree based on alleged compromise, whether 'final order'—Tests of finality of orders—Powers under cl. (c) to be sparingly used.

An order setting aside a decree passed in terms of a compromise alleged to have been made between the parties to the suit and directing the suit to be restored to the file and continued from the stage at which the compromise was filed, is not a final order within the meaning of s. 109 (a) of the Code of Civil Procedure. [p. 318, col. 1.]

Shankar Bharati v. Narasinha Bharati (8) and *Bhagwati Dayal v. Dhan Kunwar* (9), followed.

Lachmi Narain Marwari v. Bal Makund Marwari (10), distinguished.

Sabitri Thakurain v. Savi (1), *Shubrook v. Tufnell* (2), *Salaman v. Warner* (3), *Bozson v. Altrincham Urban District Council* (4), *In re Croasdel and Cammell, Laird & Co.* (5), *Sourendra Nath Mitter v. Tarubala Dassi* (6) and *Brito v. Brito* (7), referred to.

Per Dawson Miller, C. J.—The real test for determining whether an order is final or not is whether the order, as made, finally disposes of the rights of the parties. If it does it is a final order, but if it does not, then, it is an interlocutory order. [p. 317, col. 1.]

The powers granted under s. 109 (c) of the Code of Civil Procedure should be sparingly used. [p. 319, col. 1.]

Mr. P. C. Manuk (with him Mr. S. N. Palit), for the Appellant.

Mr. S. Sultan Ahmad (with him Messrs. L. K. Jha and H. K. Jha), for the Respondent.

JUDGMENT.

Miller, C. J.—This is an application by the first two defendants in the suit for leave to appeal to His Majesty in Council from an order of a Division Bench of this Court passed on the 8th June last setting aside (a) a decree passed on the 26th November, 1924, by the Subordinate Judge of Monghyr in terms of a compromise alleged to have been made between the parties in the suit, and, (b) an order of the Subordinate Judge dated the 6th July, 1925, rejecting an application under s. 151 of the Civil Procedure Code to set aside the said decree. The High Court further ordered that the case should be restored to the list to be taken up from the stage at which the compromise was filed.

The questions for determination are first, whether the order of the Division Bench is a final order within the meaning of s. 109 (a) of the Civil Procedure Code, and, secondly, if not, whether the case should be certified as a fit one for appeal to His Majesty in Council under s. 109 (c) of the Code.

The plaintiff is the widow of the late Babu Ugra Mohan Thakur, a rich *zamindar* of Bhagalpur, who died in 1914 leaving the great bulk of his estate to his nephew, the defendant No. 2 in the suit, and a small sum of Rs. 100 per month to his widow for her maintenance. His Will was duly proved and Probate was granted to his executor, the defendant No. 1, in spite of the strenuous opposition of the widow, the present plaintiff, who contested the case as far as the High Court and was finally refused special leave to appeal to His Majesty in Council. She also propounded an alleged Will of later date and sought for Letters of Administration but that suit was finally disposed of by the Privy Council in 1921 her claim being rejected. The present suit in which this application arises was instituted in 1920 by the plaintiff claiming to revoke the Probate on the ground that it was fraudulently obtained, and for other reasons and in the alternative she claims maintenance at a more liberal rate than that given by the Will. Apart from the executor and the residuary legatee, who are the first two defendants, the other defendants have some slight interest under the Will or by purchase from the executor.

In November, 1924, during the pendency of the suit negotiations with a view to compromise took place between the parties and on the 25th of that month the plaintiff and the first two defendants signed a petition of compromise which provided, *inter alia*, that the plaintiff should be paid out of the estate a sum of Rs. 1,000 per month, instead of Rs. 100 as provided in the Will, including arrears from the date of the testator's death in 1914, such arrears to be paid as to Rs. 17,000 in cash and the balance by instalments, and the suit was to be withdrawn. The plaintiff was in fact paid the Rs. 17,000 and a further sum of Rs. 3,000 as an advance towards her future maintenance. This transaction took place in the waiting room of the Railway Station at Monghyr, the plaintiff being about to proceed by train to Dharbhanga. It so happened that Mr. Chakravarti, the Subordinate Judge of Monghyr, before whom the suit was pending was also at the Railway Station upon business of his own and the parties with their Pleaders handed over the petition to him there and then. He appears to have caused it to be read over to the plaintiff and noted thereon the following words:—

"Filed before me at 5-12 p. m. and read over to the plaintiff who admitted the same."

The hearing of certain issues in the case had been fixed, by an earlier order, to take place on the 27th November. On the 26th the Pleaders of the parties appeared in Court and asked that the suit should be formally disposed of in the terms of the compromise. The Subordinate Judge then recorded the following order—

"Petition of compromise filed on 25th November, 1924, after Court hours put up to-day with the consent of the parties. Ordered.....suit be decreed in the terms of the compromise."

The rest of the order deals with certain costs. About a week later, on the 4th December, a decree embodying the terms of the compromise was prepared and signed and sealed by the Court. The order made on the 26th was presumably passed under O. XXIII, r. 3 of the Civil Procedure Code, which provides the procedure to be adopted when the Court is satisfied that a compromise has been entered into.

On the 7th April, 1925, the plaintiff filed

a petition in the Court of the Subordinate Judge seeking to have the compromise decree set aside on the ground that she had not consented to the terms thereof, and material terms had been omitted of which she was not aware when she signed the document; that her Pleader had no authority to file a compromise petition on her behalf and in her absence on the 26th November and that her signature had been obtained by fraud. The application was made under s. 151 of the Civil Procedure Code which reserves to the Court power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The application was transferred to the file of another Subordinate Judge, Mr. Choudhari, and determined by him on the 6th July, 1925. He dismissed the application, without going into the merits, holding that it was not maintainable under s. 151 and that the proper remedy was by suit to set aside the decree.

From this order of the Subordinate Judge refusing to set aside the decree the plaintiff applied in revision to the High Court asking that the Subordinate Judge, Mr. Choudhari, should be directed to exercise his jurisdiction under s. 151 of the Code, which he had failed to do. A further application in revision was at the same time presented to the High Court asking that the order of the Subordinate Judge Mr. Chakravarti, dated the 26th November, 1924, directing a decree to be drawn up in accordance with the terms of the compromise should be set aside on the ground that it was *ultra vires* and without jurisdiction inasmuch as it had not complied with the conditions prescribed by O. XXIII, r. 3, which, before a decree can be passed on compromise, requires that the compromise should be recorded, and this was not done. Had it been done an appeal would have lain from such an order but as no such order had been passed no appeal was possible. The plaintiff also complained that it did not appear from the order that the Court was satisfied that the suit had been adjusted by a lawful agreement or compromise within the terms of r. 3 of O. XXIII.

On the 8th June, 1926, these applications were heard together before Jwala Prasad and Bucknill, JJ., [*Sabitri Thakurain v.*

Savi (1)]. The Court held first that the Subordinate Judge had jurisdiction to hear the application under s. 151 and ought to have entertained it and not dismissed it without going into the merits; and, secondly, that the order of the 26th November, 1924, directing a decree to be drawn up in the terms of the compromise could not stand and that, consequently, the decree itself must also be set aside. The principal grounds upon which the Court arrived at this conclusion were (1) that the terms of O. XXIII, r. 3, were not complied with as no order had been passed that the compromise should be recorded, (2) that the Court had no jurisdiction to take up the case on the 26th November, 1924, as there was no formal consent of the parties to do so before the date fixed for hearing on the 27th, (3) that there was no consent of any duly constituted Pleader or agent to taking the case on the 26th November, because the *vakalatnama* of the plaintiff's Pleader gave him no authority to compromise or to file a petition of compromise, and (4) that the presentation of the petition of compromise by the plaintiff's Pleader in the absence of any authority so to act was a fraud upon the Court. The Court further directed the suit to be restored to the file of the Subordinate Judge of Monghyr to be continued from the stage at which the compromise was filed on the 26th November. The Court further directed that the case should be disposed of in accordance with law, by which I understand from the context the intention was that the Court should first be satisfied that a lawful compromise had, in fact, been entered into and, if it was satisfied, should order the compromise to be recorded before passing a decree in accordance therewith.

From this order the present application is made on behalf of the first two defendants for leave to appeal to His Majesty in Council. It is contended on behalf of the applicants that the order is final as it set aside a decree already passed in their favour. It is further pointed out that had the decision been the other way it would undoubtedly have been a final order determining the rights of the parties. In support of the argument reliance is placed upon certain of the earlier English decisions in which it has been laid down that an order made upon an application which, if

decided in one way, would determine the main dispute while, if decided the other way, would not, is a final order whichever way it is decided. The matter is one which has given rise to questions of nicety and considerable difficulty, and conflicting decisions are to be found in the cases upon the subject. It is not, in my opinion, necessary to refer to many of the English cases, which are numerous, on the point.

I propose, however, to refer to a few cases in their chronological order in which different tests for ascertaining the finality of a judgment or order have been laid down.

In *Shubrook v. Tufnell* (2) decided in 1882, an arbitrator under an order of reference stated a case for the opinion of the Court which provided that, if the opinion of the Court should be one way, the case was to be referred back to the arbitrator; if the other way, judgment was to be entered for the defendant with costs. The Court decided in favour of the plaintiffs and referred the case back to the arbitrator. The defendant appealed. It was objected that the case which had been treated as an appeal from an interlocutory order should have been entered as an appeal from a final order. The Court of Appeal consisting of Jessel, M. R., and Lindley, L. J., held that the order passed was a final order and that the appeal should take its place in the general list. The Court appears to have acted upon the view that where the decision of the Court on the point submitted to it could not in any event necessitate the entering of final judgment for either party the decision was interlocutory, but that if it could enter final judgment in the event of coming to a different decision then the order passed whichever way it went was final.

In the later case of *Salaman v. Warner* (3) a different view was taken by the same Court consisting of Lord Esher, M. R., and Fry and Lopes, L. JJ. In that case it was held that an order dismissing an action made upon the hearing of a point of law raised by the pleadings before the trial is not a final order within the meaning of O. LVIII, r. 3 of the Annual Practice. It was there laid down that a final order is one made on such an application or proceeding that for whichever side the decision is given, it will, if it stands, finally determine the matter in

litigation. The case had been set down for argument before the trial upon a point of law, that the statement of claim did not disclose any cause of action. A Divisional Court dismissed the action after argument upon this point. Had the decision been the other way the suit would have proceeded in the ordinary course upon the merits. The Court of Appeal held that the order appealed from was interlocutory and not final. "If their decision" said Lord Esher, M. R., "whichever way it is given, will if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory." Fry, L. J., who concurred stated the rule thus: "I think that the true definition is this, I conceive that an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined."

Each of these cases appears to have laid down a test based not upon a consideration of the actual decision appealed from but upon a consideration of the decision which might, in one event, have been given, and the tests formulated in the two cases are in direct conflict.

In the case of *Bozson v. Altrincham Urban District Council* (4) an order was made in an action brought to recover damages for breach of contract that the questions of liability and breach of contract only were to be tried, and that the rest of the case, if any, was to go to an Official Referee. At the trial the Judge held that there was no binding contract between the parties and made an order dismissing the action from which order the plaintiff appealed. The Court consisting of Lord Halsbury, L. C., Lord Alverstone, C. J., and Sir Francis Jeune, P., held that the appeal was from a final order. The Lord Chancellor refused to follow the decision in *Salaman v. Warner* (3) preferring to follow the earlier decision. Lord Alverstone, C. J., laid down what appears to me, with great respect, to be

(2) (1882) 9 Q. B. D. 621; 46 L. T. 749; 30 W. R. 740.

(3) (1891) 1 Q. B. D. 734; 60 L. J. Q. B. 624; 39 W. R. 547.

(4) (1903) 1 K. B. 547; 72 L. J. K. B. 271; 67 J. P. 397; 51 W. R. 337; 19 T. L. R. 266; 1 L. G. R. 639.

the real test in such cases. He says:—"It seems to me that the real test for determining this question ought to be this; Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order." Judged by that test the order dismissing the action was held to be a final order.

The only other English case which I think it necessary to refer to is *In re Croosdell and Cammell Laird & Co.* (5). In that case an arbitrator made his award in the form of a special case but a Divisional Court subsequently made an order setting aside the award on the ground of misconduct on the part of the arbitrator. On appeal to the Court of Appeal it was held by Collins, M. R., and five Lords Justices that the decision appealed from was an interlocutory order. The Court thought it unnecessary to enunciate any general rule on the question what orders are final and what interlocutory but arrived at their decision in the case before them on the ground that the order which did not determine any of the matters in dispute but left them where, they were, merely asserting an informality in the award which had been made, and setting it aside, was interlocutory. It will be observed that although the decision of the arbitrator was set aside the order was held to be interlocutory, as the effect of it was not to determine the rights of the parties at issue in the litigation but to leave matters where they were before the arbitration took place.

In the present case, if the test applied by Lord Alverstone, C. J., in the case cited above, is the proper test to apply, then it cannot be said that the order which the petitioners now seek to appeal from is a final order. The effect of the order is merely this, that owing to defects of procedure in the subordinate Court no proper decree has been passed and that the rights of the parties still have to be determined according to law. There is nothing in the order which, in my opinion, can even remotely be said to determine any of the rights in dispute between the parties and were it necessary to arrive at a conclusion in the light of the English cases only, I should hold that the order now sought to be appealed from is interlocutory and not final. It

seems to me that the real test must be based upon a consideration of the actual order made.

The Indian cases, however, in which there appears to be a singular unanimity on the particular point raised, also go to show that where a decree is set aside on the ground of irregularity or want of jurisdiction the order is not final but interlocutory. In Calcutta, Madras, Bombay and Allahabad the same view appears to have been taken, as a short reference to the cases recently decided in those Courts will show. In *Sourendra Nath Mitter v. Tarubala Dassi* (6) the trial Court had recorded a compromise and passed a preliminary decree in accordance therewith as in the present case. On appeal a Division Bench of the High Court held that the compromise had not been made out, set aside the order recording the compromise and the decree based thereon, and remanded the case to the lower Court for trial. Against this decision an application was made for leave to appeal to His Majesty in Council. The Court held that the order of the Division Bench remanding the case to the lower Court for trial must be regarded as an interlocutory order, and that it was not a decree or final order passed on appeal within s. 109 (a) of the Code. One distinction between that case and the present is that there the order and decree were set aside on appeal, whereas in the present case the decree was set aside under the Court's revisional jurisdiction. The distinction, if any, is in favour of the respondent for s. 109 (a) of the Civil Procedure Code speaks only of a decree or final order passed on appeal. I will assume, however, for the purposes of this case, without deciding the point, that no distinction is to be drawn between an order passed on appeal and one passed in revision. A further distinction lies in this, that in the order there sought to be appealed from it was in fact found that no compromise had been entered into, whereas in the present case it is still left for the trial Court to determine that question. Rankin, J., after pointing out in his judgment that an adjustment under O. XXIII, r. 3, was in some ways a very special matter whereby a party was allowed to stand upon and enforce an agreement which was not in existence at the date of the suit, and that it was a method whereby a party was allowed to enforce what is really a new cause of action in order

(5) (1906) 2 K. B. 569; 75 L. J. K. B. 769; 54 W. R. 620; 35 L. T. 441; 22 T. L. R. 759.

(6) 89 Ind. Cas. 94; 29 C. W. N. 832; A. I. R. 1925 Cal. 857.

to avoid abandoning one suit and starting another, says: "In my judgment, the mere dismissal of an application for recording an adjustment coupled with an order that it is, therefore, necessary for the case to be tried in the ordinary way does not stand in such a relation to the proceeding before the Court as to entitle it to be regarded as something which conclusively adjudicates upon the rights of the parties which were really the subject-matter of the litigation. It merely negatives one of the several ways in which it may be contended that the rights of the parties should be disposed of." Still less can it be said that there is any finality in an order which determines neither the rights of the parties in the suit nor the question whether a valid compromise has been come to but leaves all these questions to be determined hereafter.

In *Brito v. Brito* (7), a decision of the Madras High Court, it was held that an order passed in revision refusing to interfere with an order of the Subordinate Judge passed under s. 151 of the Code restoring to the file a suit which had been disposed of upon an alleged compromise between the parties was not a final order within the meaning of s. 109, and that leave could not, therefore, be granted to appeal to His Majesty in Council against such an order.

Again the Bombay High Court in *Shankar Bharati v. Narasinha Bharati* (8) decided that an order of the High Court setting aside a decree of the trial Court based upon an alleged compromise between the parties and directing the trial Court to proceed with the suit in the ordinary course was not a final order appealable under the Code to His Majesty in Council.

Lastly, it was decided by the Allahabad High Court in the case of *Bhagwati Dayal v. Dhan Kunwar* (9) that the words "final order" in s. 109 of the Code mean an order which puts an end to the litigation between the parties or, at all events, disposes so substantially of the matters in issue between them as to leave only subordinate or ancillary matters for decision, and that an order by which a Court set aside a compromise of a suit is an interlocutory order and not a final order.

(7) 78 Ind. Cas. 938; 46 M. L. J. 357; 19 L. W. 458; 34 M. L. T. 112; (1924) M. W. N. 330; A. I. R. 1924 Mad. 701.

(8) 69 Ind. Cas. 80; 47 B. 106; 24 Bom. L. R. 925; A. I. R. 1922 Bom. 383.

(9) 92 Ind. Cas. 1027; 24 A. L. J. 331; A. I. R. 1926 All. 311; 43 A. 329.

All these cases are of recent date having been decided between the years 1922 and the present year. No decision of any of the High Courts in India has been drawn to our attention in which an order such as that passed in the present case has been held to be a final order.

The case of *Lachmi Narain Marwari v. Bal Makund Marwari* (10) to which I was a party was referred to by the learned Counsel for the applicants in support of his argument. In that case a preliminary decree obtained in a partition suit had been set aside by the trial Court for want of prosecution in the subsequent proceedings. The preliminary decree had finally decided in favour of the plaintiff's right to partition. In carrying out the terms of the decree the plaintiff defaulted in appearance. The trial Court thereupon, exercising a jurisdiction which it did not possess, set aside the preliminary decree and dismissed the suit. The High Court decided that that order could not stand as the trial Court had no power to set aside the decree previously obtained merely on the ground of non-appearance in the subsequent proceedings. The decree was subsequently restored but no further question remained to be decided with regard to the plaintiff's right to that decree. It was there held that the order of the High Court was a final order and the case went on appeal to His Majesty in Council. The difference between that case and the present is this. The order in that case finally determined that the plaintiff was entitled to partition. The order in the present case decides nothing as to the rights of the parties in the suit and merely directs the Judge to re-hear the application for recording the compromise and to proceed thereafter according to law.

The case of *Baij Nath Goenka v. Rameshwar Singh* (11) was also referred to, but I can find nothing in the judgment in that case which conflicts with the view I have already expressed. In my opinion the order which it is sought to appeal from is not a final order.

It was further argued on behalf of the applicants that the order should in any event be certified as a fit one for appeal to His Majesty in Council under cl. (c) of s. 109. The argument under this head consists mainly in pointing out that the plaintiff

(10) 60 Ind. Cas. 479; 6 Pat. L. J. 116; 2 P. L. 155.

(11) 45 Ind. Cas. 192; 3 Pat. L. J. 339; (1918) Pat. 81; 5 P. L. W. 45.

iff, as appears from the various unsuccessful attempts she has made to contest the validity of her husband's will, is a lady of pronounced litigious tendencies, and that if this case were allowed to go before a higher tribunal that tribunal would have no difficulty in overruling the decision and putting an end once and for all to this unfortunate litigation. I am not prepared to enter into a discussion of the merits of the decision from which it is sought to appeal. It must be assumed that the decision is right until it is overruled or varied by a higher tribunal; nor am I satisfied that the course suggested would bring about a more speedy termination of the litigation than if the case proceeds as directed by the order. The powers granted under s. 109 (c) should, in my opinion, be sparingly used and although I do not consider it desirable to lay down the principles which should guide the Court in acting on it, I consider that the present case is not one in which the powers granted under cl. (c) of the section can properly be invoked. This application should, in my opinion, be dismissed with costs.

Ordinarily the hearing-fee would be assessed at five gold *mohurs* but on the 5th July last, before the vacation, an application was made asking, amongst other things, to expedite the hearing of the present application without serving some of the respondents in the suit. That application was refused but the costs were reserved to be taken into account when the application for leave to appeal should come before us.

Foster, J.—I agree.

A. N. A. *Application dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1341
OF 1924.

October 28, 1927.

Present:—Mr. Justice Das and Mr.
Justice Kulwant Sahay.

Musammat SOGIA AND OTHERS—
DEFENDANTS—APPELLANTS.

versus

Musammat KITABAN AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Dower—Interest of widow in possession in lieu of dower, whether transferable apart from dower-debt.

The interest of a Muhammadan widow in property of which she is in possession in lieu of dower can be validly transferred apart from the dower-debt itself. [p. 319, col. 2.]

Bibi Makbulunnissa v. Bibi Umatunnissa (1), *Nabijan v. Sahifan* (2) and *Abdulla v. Shams-ul-Haq* (3), followed.

Abdul Rahman v. Wali Mohammad (4), dissented from.

Appeal from a decision of the District Judge, Saran, dated the 19th June, 1924, affirming that of the Additional Munsif, Chapra, dated the 27th September, 1923.

Mr. *Saiyid Nurul Hassan*, for the Appellants.

Messrs. *Khurshed Husnain* and *Syed Izhar Husain*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the defendants. The principal question for decision is as to whether *Musammat Murti* had the right to transfer and whether *Eid Mohammad* obtained a valid title under the transfer of the property by *Musammat Murti* under a deed of gift. *Musammat Murti* was the widow of one *Basu*, and it has been found that she was in possession of the property in lieu of her dower debt. *Musammat Murti* executed a deed of gift in favour of *Eid Mohammad*, the husband of the plaintiff No. 1 and the father of the plaintiffs Nos. 2 and 3. The defendants claim to be some of the heirs entitled to the property by right of inheritance, and their case is that the transfer by means of the deed of gift by *Musammat Murti* did not pass any interest in the property to *Eid Mohammad* and that the defendants were entitled as the heirs-at-law to the property.

The Courts below have held that the transfer by *Musammat Murti* to *Eid Mohammad* was a valid transfer and the suit has been decreed in favour of the plaintiffs.

The question is as to whether *Musammat Murti* had the right to transfer the property under the gift to *Eid Mohammad*. The finding of the learned District Judge is that what was transferred under the deed of gift was the security and not the dower debt itself, and one of the questions raised is whether the security could be transferred apart from the dower debt. This question was considered by this Court in *Bibi Makbulunnissa v. Bibi Umatunnissa* (1) and it was held that such a transfer of the security is a valid transfer and is binding against the widow and persons claiming through the widow, as also against the heirs-at-law so long as there is a debt due

(1) 70 Ind. Cas. 312; 4 P. L. T. 272; (1922) Pat. 348; A. I. R. 1923 Pat. 33; 2 Pat. 84.

to the widow. The same view was taken in another case by a Division Bench of this Court in *Nabijan v. Sahifan* (2). This view is supported by a decision of the Allahabad High Court in *Abdulla v. Shamsul-Haq* (3). A different view was taken by another Division Bench of this Court in *Abdur Rahman v. Wali Mohammad* (4); but with very great respect to the learned Judges who decided that case, I am of opinion that the view taken in the other two cases is the correct view. There seems to be no reason in law or in equity why such a transfer should not be held to be a valid transfer. The widow is in possession of the property which is clearly transferable in law and the transferee of such a property from the widow would acquire a valid title so long as the debt is not satisfied. The interest which the widow had to remain in possession of the property would pass to the transferee, and there seems no reason why such a transfer should be held to be invalid apart from the debt itself. The view taken by the learned Judge on this point must, therefore, be accepted as correct.

Another point was taken by the learned Advocate for the appellants to the effect that the heirs of the widow and of her husband in the present case happen to be common and, therefore, the debt must be held to be extinguished and the heirs would be entitled to take the property according to their legal shares. This point, however, does not appear to have been taken in the Courts below and we are not in a position to say as to whether the heirs of the widow and of her husband are the same.

Lastly it is contended that there has been no finding in the judgment of the District Judge as to whether Eid Mohammad, the husband of the plaintiff No. 1, is really dead. The question, however, does not appear to have been raised either in the trial Court or in the Court of Appeal below.

The result is that this appeal is dismissed with costs.

Das, J.—I agree.

A. N. A.

Appeal dismissed.

(2) 67 Ind. Cas. 635; 4 P. L. T. 278; A. I. R. 1923 Pat. 153.

(3) 58 Ind. Cas. 833; 43 A. 127; 18 A. L. J. 969; 2 U. P. L. R. (A.) 329.

(4) 63 Ind. Cas. 601; 4 P. L. T. 267; (1922) Pat. 313; A. I. R. 1923 Pat. 72; 2 Pat. 75.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 150 OF 1927.

November 17, 1927.

Present.—Mr. Justice Kulwant Sahay and Mr. Justice Macpherson.

Mirza MUHAMMAD REZA

AND ANOTHER—APPELLANTS

versus

RAJBALLABHNATH SINGH

AND ANOTHER—RESPONDENTS.

Court-fee—Payment in excess under bona fide mistake—Power of Court to order refund.

Where an excess amount of Court-fee has been paid under a *bona fide* mistake the Court has power to issue a certificate to enable the party concerned to apply to the Revenue Authorities to obtain a refund of the excess amount.

Chaudra Hari Singh v. Tipan Prosad Singh (1), *Hari Har Guru v. Ananda Mahanty* (2) and *In re Grant* (3), followed.

Application for the refund of excess amount of Court-fee paid by the appellants on memo. of appeal.

Mr. *Kailashpati*, for the Appellants.

ORDER.—This is an application on behalf of the appellants for refund of the excess amount of the Court-fee paid by them on the memorandum of appeal. It is stated in the petition that the Court-fee paid by the respondents, who were the plaintiffs in the Court below, upon their plaint was Rs. 900 and the appellants were under the impression that that was the proper Court-fee to be paid on the memorandum of appeal and they purchased a Court-fee stamp at Gaya before they came to their Vakil at Patna for filing the present appeal. The Stamp Reporter has reported that the Court-fee paid is in excess of the amount required by Rs. 90.

The question as regards the power of the Court to make an order for refund of excess Court-fee was considered by a Division Bench of this Court in *Chaudra Hari Singh v. Tipan Prosad Singh* (1). Their Lordships relied upon *Hari Har Guru v. Ananda Mahanty* (2) which followed *In re Grant* (3). It appears from the petition that the excess Court-fee was paid under a *bona fide* mistake.

Let a certificate be issued to enable the appellants to apply to the Revenue Authorities to obtain a refund of the sum of Rs. 90, the amount of the excess Court-fee.

B. K. P.

Certificate issued.

(1) 46 Ind. Cas. 271; 3 P. L. J. 452; (1918) Pat. 273,

(2) 20 Ind. Cas. 498; 40 C. 365.

(3) 14 W. R. 47.

ODH CHIEF COURT.

FIRST CIVIL APPEAL No. 6 OF 1927.

September 14, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

RAJ BACHAN SINGH—DEFENDANT

— APPELLANT

versus

Shri Thakurjee Maharaj Thakur SOORAJ KUNWAR RAM—PLAINTIFF—RESPONDENT.

Hindu Law—Widow—Property acquired before marriage and after marriage—Power of disposition of such property—Possession of Hindu widow over property at time of her death—Presumption of absolute estate—Burden of proof—Finding of trial Court after close and intelligent attention—Duty of Appellate Court.

Property obtained by a Hindu female before marriage and property acquired by her subsequent to her marriage, in her own interest, either by purchase from the savings of her income or in other ways, is property which she is competent to dispose of in her lifetime. [p. 322, col. 2.]

There is no presumption of law that property which is in the possession of a Hindu widow and the acquisition of which is not explained, originally belonged to her husband, even though the husband died possessed of considerable property. On the other hand, the presumption under the general rule of law is that she is the owner thereof and has absolute power of disposal over it. [p. 323, col. 2.]

Diwan Ran Bijai Bahadur Singh v. Indarpal Singh (1), relied on.

Where the issue is one of fact and the only question is which set of witnesses is to be believed, the verdict of a Judge trying the case who has given a close and intelligent attention to the evidence and written a well-reasoned judgment should not be lightly disregarded in appeal. [p. 325, col. 2.]

Bombay Cotton Manufacturing Co., Ltd. v. Motilal Shiplal (2), relied on.

Appeal against a decree of the Subordinate Judge, Kheri, dated the 24th September, 1926.

Messrs. M. Wasim and Kashi Prasad, for the Appellant.

Messrs. P. L. Banerji, Radha Krishna, Harnam Sunder Lal and Sita Ram, for the Respondent.

JUDGMENT.—The circumstances in which this appeal has arisen are as follows. Gobardhan Singh was the *taluqdar* of Bijua in the Kheri District. He died in 1905. He had married five wives, three of whom survived him. He left no male issue. The name of the wife whom he first married was Suraj Kunwar known as the Bari Rani. The name of the wife whom he married after he had married Suraj Kunwar is not stated. She was known as the Manjhli Rani. The two wives whom he married next in succession had predeceased him. One of them had borne him a daughter, who married Maharaj Kunwar Sardar Singhji, the son of the Chief of Shabpura.

Their son is Raj Bhanwar Lalji Shatraonji Singh who was the second defendant in the suit. The wife whom he married last was Dambar Kunwar known as the Chhoti Rani. Raj Bachan Singh was the nearest collateral heir. Under the provisions of a Will he devised a life-estate in half of the *taluqdari* property, which he owned and possessed, to the Bari Rani and a life-estate in the remaining half to the Chhoti Rani subject to the payment of maintenance to the Manjhli Rani. Under the terms of this Will on the death of either the Bari Rani or the Chhoti Rani the survivor was to succeed to her life-estate and on the death of both of these ladies his daughter's son defendant No. 2 was to succeed to the whole of the *taluqa* subject to a life-estate in ten villages which was bequeathed to defendant No. 1. It is admitted that the Manjhli Rani died in 1915 and that the Chhoti Rani died in 1924. After the death of the Chhoti Rani the Bari Rani remained in possession of the whole of the *taluqa* until her death on the 15th May, 1925.

The Bari Rani was a lady who devoted a considerable portion of her life to religion and she devoted a considerable portion of her savings to religious purposes. It is agreed that she purchased out of the savings from her income the village of Dantara and Rajgarh and dedicated these villages in entirety to the deity as embodied in Sri Thakurji Maharaj Suraj Kunwar Ram who is the plaintiff in this suit. She built in addition temples for the worship of the same god and for the worship of the goddess Devie. She built a *thakurdwara* and installed the image of the god in the *thakurdawara* at Padarya Tala. She also endowed a religious fair. It is in evidence that the lady was absorbed in religious works of this nature. According to the evidence, when she was in her seventy-fifth or seventy-sixth year, she conceived the intention of dedicating the whole of her moveable property to the same deity, and on the 3rd May, 1925, she is alleged to have executed a deed of trust Ex. 1 by which she directed that she should remain in possession of this property during the rest of her life and that after her death it should be vested in a legal gentleman, B. Bankey Behari Lal, who practices in Lakhimpur, as trustee for the deity. The question as to whether she did or did not execute this deed is before us for decision. There can be no doubt as to the fact that the

deed was presented to the Sub-Registrar of Lakhimpur for registration on the 4th May, 1925, and that it was registered on the 5th May, 1925. The lady died on the 15th May, 1925. Before she executed this deed she had executed other deeds of trust. One of these deeds had been executed on the 24th May, 1924, by which she handed over certain property to the deity for religious purposes and appointed herself as manager during her lifetime appointing seven persons one of whom was B. Bankey Behari Lal to be members of a Committee of management after her death. This deed is Ex. 3. It is a registered deed and its validity is not questioned. Exhibit 1, if accepted, had the affect of vesting further property in the deity. It appointed, however, only one of the gentlemen who had been previously nominated as manager to manage the property so vested. But it clearly laid down that the control of the property should be subject to the conditions embodied in the deed Ex. 3.

After the death of Suraj Kunwar disputes arose as to succession. As there was an apprehension of forcible possession being taken over the moveable property in the possession of the lady at the time of her death the District Magistrate of the Kheri District took over charge of the property and kept it in his custody and refused to part with the possession to any person who could not show a title through the Civil Court. B. Bankey Behari Lal then filed a suit on the 1st of June, 1925, for a declaration that the moveable property left by the lady was dedicated to the deity under the terms of Ex. 1. He joined both the defendants. Both the defendants contested his claim. Each asserted that the deed Ex. 1 was not a valid disposition of the property. Defendant No. 1 took the position that on the 4th, May, 1925, Suraj Kunwar was incapable of understanding or transacting business and that she remained in a condition of mental coma until she died on the 15th May, 1925. He stated that the signatures upon the deed were forgeries. Both the defendants took the position that the property affected by Ex. 1 was property the disposition over which was not within the power of Suraj Kunwar. Each defendant claimed that property as against the other defendant. The learned trial Judge refused to decide which defendant would succeed to property which Suraj Kunwar was not competent to dispose of in her

lifetime. He found upon the facts that something less than two-thirds of the property which was in the possession of Suraj Kunwar was her self-acquired property which she could dispose of in her lifetime. He further found that the deed Ex. 1 was executed by Suraj Kunwar intelligently and with full knowledge of its contents and full intention to make the disposition which she made. He found that she was mentally capable at the time that she executed the deed. He decreed the suit accordingly. The defendant No. 1 has filed the present appeal asking that the suit should be dismissed in entirety and in the alternative that the relief should be reduced. Defendant No. 2 has not appealed. The plaintiff filed cross-objections but as he refused to pay the Court-fee chargeable upon them those cross-objections were dismissed by an order of a Bench dated 20th July, 1927. We now proceed with the determination of the appeal.

The first question which we propose to decide is as to the correctness of the decision of the learned trial Judge where he decides that the property of a value of Rs. 97,000-8-10 to which the decree relates was property which had either belonged originally to Suraj Kunwar or which had been acquired by her out of the savings from her income. We need not dwell upon the law on the subject as the law is exceedingly clear. The property which the lady had obtained before her marriage and property which she had acquired subsequent to her marriage in her own interest, either by purchase from the savings of her income or in other ways, is property which she was competent to dispose of in her lifetime. This view of the law is not questioned by the learned Counsel for the appellant. He attacks the finding on this ground only. His case is that it is established on the evidence that when Gobardhan Singh died a portion of his property passed into the possession of Suraj Kunwar, another portion passed into the possession of the Manjhli Rani and another portion passed into the possession of the Ohhoti Rani. His case is that under the law Suraj Kunwar had no right to dispose of such property. He further takes the position that all the property of the Manjhli Rani and the Ohhoti Rani eventually came into the possession of Suraj Kunwar. His case there is that, whether such property had originally come from

Gobardhan Singh or whether it had come from the Manjhli Rani or the Ohhoti Rani as the result of their self-acquisition, this property was not property which Suraj Kunwar was competent to dispose of. He accepted the position that property, which had been acquired by Suraj Kunwar in her personal right or purchased out of her savings, was property of which she could dispose, but he insisted that on the evidence it was clear that property had come to her from Gobardhan Singh, from the Manjhli Rani and from the Ohhoti Rani and that the plaintiff was only entitled to obtain the property which he was able to prove had been acquired by Suraj Kunwar herself. The learned trial Judge in dealing with this portion of the case took the following position.

He said at o. p. 43:—

"It was argued by the learned Counsel for the plaintiff that as the property entered in the list attached to the plaint was in the possession of Rani Suraj Kunwar, therefore, under s. 110 of the Indian Evidence Act she must be held to be its owner unless proved otherwise and as the defendants had failed to prove that any of the property belonged to Raj Gobardhan Singh or any of the co-widows Manjhli Rani or Ohhoti Rani it must be held that Bari Rani was its owner. That position was, however, abandoned when it was pointed out that it was in the evidence of the plaintiffs' witnesses also that the Bari Rani got the property of Manjhli Rani and Ohhoti Rani after their death and the plaintiff could not avail of the presumption under s. 110 of the Evidence Act and it was conceded that any property which the defendants' witnesses had deposed as belonging to Raj Gobardhan Singh or Manjhli Rani or Ohhoti Rani might be excluded and it was also conceded that if there be several properties in the lists attached to the plaint of the description of the properties given by defendant's witnesses as belonging to the two Ranies or Raj Gobardhan Singh then the property of the highest value might be excluded. It was contended by the learned Counsel for the defendant No. 1 that it was for the plaintiff to prove that each and every item of the property entered in the lists attached to the plaint was *stridhan* of Bari Rani or had been acquired by her and as the plaintiff had failed to establish it the suit should be dis-

missed. The property consists of small items and is entered in 53 pages. It would be practically impossible to prove when and for how much each item of property was acquired and it would be very hard and inequitable to dismiss the entire suit because the plaintiff has not been able to prove when and how each item of property was acquired."

The learned Judge then proceeded to decide that Suraj Kunwar was competent to dispose of all the property in her possession at the time of her death except the property which the defendants were able to prove had originally belonged to Raj Gobardhan Singh or the Manjhli Rani or the Ohhoti Rani. We consider that he arrived at a correct conclusion, but we do not think that he has given the correct reason to support it. In our opinion the provisions of s. 110 of Act I of 1872 undoubtedly were sufficient to establish the title of Suraj Kunwar to all the property in her possession at the time of her death and were sufficient to show that she had power to dispose of all such property unless and until it was established that she did not have that power. The section is as follows:

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

The lady at the time of her death was in possession of all the articles mentioned in the plaint. These articles have been placed under lock and key and are in the custody of the District Magistrate of Kheri. Under this section the presumption is that she was owner and had power to dispose of all those articles and until that presumption is rebutted by direct evidence which the Court accepts it remains. The presumption has been rebutted by direct evidence which the learned trial Judge has believed in reference to articles of a net value of Rs. 52,999-7-2 and the decree gives no relief in respect of those articles. There is authority in addition in support of this view. Their Lordships of the Judicial Committee in *Diwan Ran Bijai Bahadur Singh v. Indarpal Singh* (1) said at page 228:

"There is some conflict of evidence as to whether this property was originally

(1) 26 I. A. 226; 26 C. 871; 4 C. W. N. 1; 2 Bom. L. R. 1; 7 Sar. P. C. J. 578; 13 Ind. Dec. (N. S.) 1158 (P. C.).

acquired by Randhir Singh or his wife Ajit Kunwar, but Counsel for the appellant, admitting that both the Courts below were adverse to the plaintiff's contention on the evidence, elected to treat the case as if there were no evidence one way or the other, and to base their client's claim on the following proposition of law. They alleged that when a widow is found in possession of property of the acquisition of which no account is given, and it is shown that her husband died possessed of considerable property, then there is a presumption of law that the property found in the widow's possession was originally that of her husband. No authority was cited at the bar which supports this proposition, and their Lordships are not prepared to adopt it or to lay down anything inconsistent with the general rule that he who claims property through some other person must show the property to have been vested in that person."

We have, however, to observe that the learned trial Judge appears to have included in the property which he decreed one article which, according to the principles which he has adopted, should not have been included in the decree. That is an article known as *Harmina-kari* with eighteen *taviz* having one studded *chand* and five *lars* of pearls valued at Rs. 2,500. There is evidence, which he has accepted on other points, of defendant's witness Lachman Singh at o. p. 162 that the Chhoti Rani urged to wear a *Harmina-kari*. There is more than one of the ornaments of this description awarded and according to the rule laid down by the learned trial Judge the ornament of the highest value of this description should be excluded. We, therefore, propose to amend the decree by the exclusion of this article. It shall in any circumstances reduce the valuation to Rs. 94,500 8 10.

We have now to consider the final question as to whether Suraj Kunwar did actually execute the deed Ex. 1 and whether its execution was intelligent and effective. The evidence in favour of the execution of the deed is as follows. Maharaj Kumar Sardar Singhji, the son of the Chief of Shahpura who, as we have already stated, married Raj Gobardhan Singh's daughter, has deposed that he had in the month of April, 1925, come to reside close to Padarya, where Suraj Kunwar lived to be near her as her health was failing. He has

deposed that she told him that she wished to make a further disposition of her property for religious purposes and that she asked him at the end of April to send his motor car to Lakhimpur, which is some twenty-two miles distant from Padarya, to fetch B. Bankey Behari Lal who, as we have already stated, was one of the trustees under the deed Ex. 3. Maharaj Kumar Sahib sent his motor car accordingly and B. Bankey Behari Lal arrived. B. Bankey Behari Lal has deposed that the lady instructed him at the end of April 1925 to draw up a deed on the lines of Ex. 1 and that he prepared a draft accordingly which he brought to her on the 2nd May, 1925. In that draft he says that he had entered the names of Raj Bachan Singh and the Maharaj Kumar Sahib as trustees. He says that the lady told him to remove those names and insert his name as sole trustee, that she accepted the draft as correct and that she instructed him to instruct her *ziladar* Parbhu Dayal, to fair out the deed on a stamp paper which had been purchased for the purpose. He says that Parbhu Dayal faired out the deed accordingly and the Rani then signed it after it had again been read out to her. The evidence as to the execution is the evidence of B. Bankey Behari Lal, of Parbhu Dayal the scribe, and of two servants Ganesh Prasad otherwise known as Ganesh Rai and Hazari Lal who signed, as attesting witnesses to the lady's signature. The lady had given a power of attorney Ex. 21 to a certain Mohan Lal a resident in Lakhimpur. Under this power of attorney Mohan Lal had authority to register deeds on her behalf provided he could show a special written permission to have such deeds registered. Mohan Lal had been with Bankey Behari Lal while the deed was under preparation, and after the deed was executed the lady gave Mohan Lal a signed permission to get the deed registered, and he took it accordingly to Lakhimpur where it was admittedly presented for registration on the 4th May, 1925, and registered on the following day. The evidence as to registration is that of Mohan Lal. It is true that he has not produced the written authority given to him to present the deed for registration, but it is clear from Ex. 21 that the Sub-Registrar could not have accepted the power of attorney as sufficient authority.

to permit Mohan Lal to have the deed registered unless he had a separate permission in writing. This separate permission is said to have been lost and secondary evidence has accordingly been allowed in proof of its contents. We consider that the secondary evidence has been rightly admitted. The written authority appears to have been returned to Suraj Kunwar. When Mohan Lal was called on to produce it he said that he had given it to Suraj Kunwar. All those above witnesses have deposed not only to the execution of the deed Ex. I, they have also deposed to the effect that the lady was in full possession of her mental faculties and that the execution of the deed was the result of her independent wishes after consultation with B. Bankey Behari Lal, who was not only a gentleman who was carrying out her desires as a trustee, but was also her legal adviser. They deposed that although the lady was ill at the time her mental faculties were in no way affected. The evidence as to her mental condition is supported by the evidence of a medical practitioner by name Hansraj who has been for some thirteen years employed in the service of the District Boards. He acts as a confidential friend for the Rani of Katesar who was the elder sister of Suraj Kunwar. According to his evidence he went to Padarya on the 9th of May, 1925, to inquire whether Suraj Kunwar was fit to come and stay with her sister at Katesar. It appears that the Rani of Katesar had heard that Suraj Kunwar was not well. According to the evidence of Dr. Hansraj, Suraj Kunwar, when he saw her on the 9th May, 1925, was suffering from dropsy and was in no condition to travel. She was very ill. He, however, considered that she was in full possession of her mental faculties. Another witness upon this point was Janardan Prasad a Brahman teacher in the Sanskrit school at Padarya. He was appointed to that position by Suraj Kunwar and visited her frequently. Another witness was Ram Lal a servant of Suraj Kunwar. Both these witnesses have deposed that Suraj Kunwar was in full possession of her mental faculties at the time of the execution of the deed.

Against this is the evidence of a certain number of witnesses who have deposed that they saw the lady about that period and that she had completely lost all power of

movement and all knowledge of what she was doing. These witnesses are Krishna Bahadur Sah and Makrandhuj Sah distant connections of Raj Gobardhan Singh, Thakur Gobardhan Singh an employee of the estate, Bhagwan Din a Brahman cultivator of Deorya, Kanauji Lal a peon of the estate, Kuar Partab Singh a *guzaradar* of the estate, Raj Bachan Singh the defendant No. 1, Lachman Singh Thakur, a brother of the servant of defendant No. 1 Parsotam Deo a man who called himself an Indian Medical Practitioner who lives at Gola Gokaran Nath and a Brahman woman called Shebhu who lives close to Gola Gokaran Nath. Parsotam Deo stated that he was called in to attend Suraj Kunwar during her illness and that he found her in the last stages of dissolution and unable to understand anything. Shebhu says that she was an unpaid servant of the lady.

These witnesses have stated facts diametrically opposite to the facts stated by the plaintiff's witnesses. The position of a Court of Appeal, when it finds witnesses for the plaintiff deposing to facts absolutely contrary to the facts to which the witnesses for the defendant depose, when, as here, the witnesses on one side are *prima facie* as deserving of credit as the witnesses on the other side, when, as here, the witnesses on neither side have been shaken in cross-examination, is not as difficult as it would appear when, as here, we have the advantage of a well-reasoned and well-thought out judgment by a competent trial Judge who has given a close and intelligent attention to the evidence before him. The attitude to be taken in a case of this kind was indicated by their Lordships of the Judicial Committee in the *Bombay Cotton Manufacturing Co. Ltd. v. Motilal Shirlal* (2). They stated at page 113* :—

"It is doubtless true that on appeal the whole case, including the facts, are within the jurisdiction of the Appeal Court. But generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement

(2) 29 Ind. Cas. 229; 42 I. A. 110; 19 O. W. N. 617; 17 M. L. T. 403; 28 M. L. J. 593; 21 O. L. J. 528; 17 Bom. L. R. 455; 2 L. W. 521; 39 B. 386. (1915) M. W. N. 788 (P. C.).

with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. In making these observations their Lordships have no desire to restrict the discretion of the Appellate Courts in India in the consideration of evidence. They only wish to point out that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed the verdict of a Judge trying the case should not be lightly disregarded."

We have been impressed greatly by the care and intelligence with which the learned trial Judge has decided this case. We are satisfied that he has applied his mind intelligently as to the witnesses whom he should believe and the witnesses whom he should not believe. After hearing the criticisms of the learned Counsel for the appellant, who has criticised intelligently and with skill, we accept the finding of the learned trial Judge as to the credibility of the witnesses. He believed the witnesses for the plaintiff, and disbelieved the evidence for the defendants.

There is one piece of evidence, however, adduced on behalf of the defendant appellant to which we have not yet referred. That is the evidence of Charles Hardless who was called as an expert in handwriting. The learned Judge did not consider the evidence of this witness as of any value and did not accept his opinion. After having made an independent examination and a comparison of the handwriting involved we have arrived at the same conclusion. We have taken as the standard signatures of Suraj Kunwar the signatures in Ex. 3, a document which was admittedly executed by her. Exhibit 1 contains her signatures in two places. After a close examination of the signatures in Ex. 3 and Ex. 1 we have arrived at the conclusion that the signatures in Ex. 3 and the signatures in Ex. 1 are the signatures of the same person, and as the signatures in Ex. 3 are admittedly the signatures of Suraj Kunwar the signatures on Ex. 1, according to our findings, are also the signatures of Suraj Kunwar. The lady signed her name in Hindi in scrawling letters. She clearly was not skilled in handwriting. In every one of her signatures there is some slight difference in the formation of a particular letter. But there can, to our mind, be no doubt as to the fact that all these signatures were

made by one and the same person. The differences in the letters are just the differences which would be expected. The opinion of the Expert Hardless is an opinion which we cannot reconcile with our own observations. He has stated that in his opinion the two separate signatures on Ex. 1 are what he calls "traced forgeries." He would appear to assume that both the tracings were from the same signature. Not only do we not find from the appearance of the signatures any indication that they have been traced but we find that the two signatures on Ex. 1 differ between themselves in the shape of the letters. No two letters are exactly alike in both. So they clearly could not have been traced from the same signature. There is absolutely nothing to show that they are forgeries. Mr. Hardless has prepared a photograph which to us proves nothing at all. We consider that the learned trial Judge took the correct view in attaching no weight to the evidence of this witness.

As a result, therefore, we modify the decree of the lower Court by eliminating from it the *Har mina kari* with eighteen *taviz* which is entered as the first article in Box No. 22 in List A of the ornaments found in the Kuti Kothri. In the printed book this item will be found at page 107 of the list attached to the decree. This is the only alteration which we make. As the appeal was in respect of Rs. 7,000 8-10 and has succeeded to the extent of Rs. 2,500 we consider that on the question of costs it should be taken as having failed in entirety. We accordingly direct that the appellant Raj Bachan Singh pays his own costs and those of both the respondents in this appeal. No determination is made by this Court of the rights of the defendant No. 1 and defendant No. 2 *inter se*.

G. H.

Decree modified.

A. N. A.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 158 OF 1927.
November 11, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

SAHEB DIN AND ANOTHER—PLAINTIFFS—

APPELLANTS

versus

MAHABIR SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS

Jurisdiction—Suit between rival tenants for

declaration of title to occupancy lands—Cognisance by Civil Court.

A suit by a tenant of occupancy lands for declaration of his occupancy right against a rival tenant claiming such right in the lands is cognisable by the Civil Court. [p. 328, col. 2.]

Dilawar Khan v. Kulsum Bibi (1), distinguished.
Second appeal against a decree of the District Judge, Fyzabad, dated the 9th March, 1927, reversing that of the Munsif, Akbarpur, Fyzabad, dated the 16th December, 1926.

The case came on for hearing before Mr. Justice Hasan who made the following

ORDER OF REFERENCE.—This is the plaintiffs' appeal from the decree of the District Judge of Fyzabad, dated the 9th of March, 1927, reversing the decree of the Munsif of Akbarpur, dated the 16th of December, 1926.

The plaintiffs' suit, which was decreed by the Court of first instance, has been dismissed by the lower Appellate Court on the ground that its cognisance by the Civil Court is barred. The lower Appellate Court relies on a decision of a learned Judge of this Court in the case of *Dilawar Khan v. Kulsum Bibi* (1). On behalf of the plaintiff-appellants the soundness of that decision is challenged in appeal before me. I am of opinion that the appeal involves a very important question of law and should be decided by a Bench of two Judges. I accordingly make the Reference.

Messrs. Ali Zaheer and Staya Nand Roy, for the Appellant.

Messrs. Niamat Ullah and Naim Ullah, for the Respondent.

In pursuance of the Order of Reference the case was heard by Sir Louis Stuart, Kt., Chief Justice, and Mr. Justice Raza who delivered the following

JUDGMENT.—This is an appeal from a decree of the District Judge, Fyzabad, dated the 9th March 1927, setting aside a decree of the Munsif, Akbarpur, dated the 16th December, 1926.

The following facts are, no longer, in controversy.

One Harbadan Singh had four sons, namely, (1) Ram Saran Singh, (2) Sheo Pershad Singh (3), Debi Dat Singh and (4) Raghunath Singh. Harbadan Singh and Raghunath Singh died some time before the first settlement. The sons of Harbadan Singh were not living jointly as members of a joint Hindu family at the time of the first settlement. Ram

Saran Singh, Sheo Pershad Singh Debi Dat Singh and Ram Dat Singh, son of Raghunath Singh, brought separate suits against the *taluqdar* of Samanpur for their under-proprietary rights in village Diwai-pur, and ultimately decrees for occupancy rights (without right of transfer) were passed in their favour in 1869, as detailed below:—

	bighas	biswas
1. Ram Saran Singh ...	24	9
2. Sheo Pershad Singh ...	30	6
3. Debi Dat Singh ...	7	10
4. Ram Dat Singh ...	7	17

A few years after the decrees were passed by the Settlement Court, Sheo Pershad Singh, Debi Dat Singh and Ram Dat Singh fell into serious arrears and left the village to avoid payment. Ram Saran Singh paid off the arrears and got possession of their holdings also. He was recognised and treated by the *taluqdar*, as the occupancy tenant of the said holdings also and rent was realised from him as such. After a period of more than 12 years, Sheo Pershad Singh, Debi Dat Singh and Ram Dat Singh returned to the village and then Ram Saran Singh let certain lands to them. He let some 12 bighas land (including the land in suit) to Sheo Pershad Singh, at the annual rent of Rs. 26 odd. In 1887 Ram Dat Singh sued Ram Saran Singh for his share of the occupancy tenure, but his suit was dismissed by the Civil Court (Munsif of Akbarpur) on the 29th November 1888. Sheo Pershad Singh was examined by Ram Dat Singh as a witness in that suit. He admitted that he had absconded, as he had failed to pay the rent of his holding. He stated that he had returned to the village in or about 1877 and that Ram Saran Singh had taken possession of his holding in his absence, having colluded with the *taluqdar*. He stated further that he had got possession of 12½ bighas land only out of his holding which was held by tenants and that Ram Saran Singh was making collections. The *taluqdar* has all along realised the rent of all the holdings from Ram Saran Singh and his (Ram Saran Singh's) descendants.

Sheo Pershad Singh died many years ago. He had four sons. They are also dead. The plaintiffs, Sahib Din Singh and Gaya Din Singh, are the only surviving members of the family. They are the sons of Sheo Pershad Singh's son, Ram Bharos Singh.

(1) 93 Ind. Cas. 62; 3 O. W. N. 210; A. I. R. 1926 Oudh 205; L. R. 7 A. (O.) 79; 13 O. L. J. 496.

Amarjit Singh, Udraj Singh, Samarath Singh and six others (defendants Nos. 2 to 10 in the present suit) are the descendants of Ram Saran Singh deceased.

The dispute in this case relates to 3 *bighas* 13 *biswas* 5 *biswas* land specified at the foot of the plaint. Mahabir Singh (defendant No. 1 in the present suit) holds the land as a tenant.

Deoki Singh, uncle of the plaintiffs, issued a notice of ejectment against Mahabir Singh (defendant No. 1) in respect of the land in suit, in 1920. Mahabir Singh contested the notice of ejectment on the ground that he was not the tenant of Deoki Singh and that he was holding the land as the tenant of the defendants Nos. 2 to 10. His claim was decreed by the Revenue Court and the notice of ejectment was cancelled, on the 26th May, 1920. The plaintiffs then brought the present declaratory suit on the 19th April, 1926, on the allegation that the land in suit formed part of their 30 *bighas* 6 *biswas* land in respect of which their ancestor Sheo Pershad Singh had obtained a decree for occupancy rights on the 4th January, 1869, that they were entitled to claim occupancy rights in the land as against the defendants and that the defendants Nos. 2 to 10 had got no right whatever in the land in suit. They prayed for a declaration of their right, and in the alternative, for a decree for possession of the land.

The claim was resisted by the defendants on various grounds. They denied that the plaintiffs were entitled to claim occupancy rights in the land in suit and alleged that the defendants Nos. 2 to 10 were the rightful occupancy tenants of the land which was held by the defendant No. 1 as their tenant. They pleaded also limitation, *res judicata* and estoppel. It was also pleaded that the suit was not cognizable by the Civil Court.

The learned Munsif framed seven issues and found as follows:—

1. The plaintiffs are 'qabzadars' of the land in suit.

2. The plaintiffs have been in possession as 'qabzadars' within limitation.

3. The plots in suit were let to the defendant No. 1 by the plaintiffs' uncle Deoki Singh.

4. The plaintiffs' claim is not barred by s. 11, Civil Procedure Code, as against the defendant No. 1.

5. The plaintiffs are not estopped from alleging themselves to be the 'qabzadars' of the land in suit.

6. The suit is cognizable by the Civil Court.

The plaintiffs are entitled to the declaration that they are owners as 'qabzadars' of the land in suit, that the defendant No. 1 is only a tenant and that the defendants Nos. 2 to 10 have no title to the land in suit.

The learned Munsif decreed the plaintiffs' claim accordingly.

The defendants appealed and their appeal was allowed by the learned District Judge. He held that the present suit was not maintainable in the Civil Court. He, therefore, dismissed the suit and did not think it necessary to give his finding on any other point involved in the case. In determining the question of jurisdiction, the learned Judge has gone into questions of fact also, but he has given no definite finding on issues of fact.

The plaintiffs have now come to this Court in second appeal.

We are not prepared to agree with the finding of the learned District Judge on the question of jurisdiction. We think the present suit is cognizable by the Civil Court. The learned District Judge has referred to the case of *Dilawar Khan v. Kulsam Bibi* (1) decided by one of us on the 21st of January, 1926. That case may be easily distinguished from the present case. The present suit is not a suit between a tenant-in-chief and a sub-tenant. The facts and circumstances of that case are quite different from the facts and circumstances of the present case. The present suit is a suit between rival claimants of *qabzadari* lands. The tenant (defendant No. 1) has of course been impleaded in the present suit, but defendants Nos. 2 to 10 are the principal defendants against whom the plaintiffs want to establish their occupancy rights in the land in suit.

We do not think it necessary to remand the case to the lower Appellate Court for findings on other points as the evidence on record is sufficient to enable us to determine the issues of fact necessary for the disposal of the appeal on the merits. We have examined the record and heard the learned Counsel on both sides. In our opinion the plaintiffs' claim must be rejected on the merits.

The principal points for determination in this case are these :—

1. Are the plaintiffs entitled to claim occupancy right in the land in suit?
2. Does the defendant No. 1 hold the land in suit as the plaintiffs' tenant or as the tenant of defendants Nos. 2 to 10?

We find on the first point that the plaintiffs are not entitled to claim occupancy rights in the land in suit. The statement made by the plaintiffs' grand-father, Sheo Pershad Singh, on the 22nd June, 1883, (Ex. C. 13) shows clearly that he had absconded as he had failed to pay the rent due from him. He had left the village and abandoned the holding. He remained absent for a long time. In these circumstances the *taluqdar* was justified in assuming that Sheo Pershad Singh had abandoned the holding. He treated the holding as abandoned and settled the land with Ram Saran Singh, the ancestor of defendants Nos. 2 to 10. He was perfectly right in doing so under the circumstances of the case. Ram Saran Singh thus became the occupancy tenant of the holding in question and paid rent for the same as such. Sheo Pershad Singh remained absent for more than 12 years and then returned to the village. His brother, Ram Saran Singh, then let some 12 *bighas* land to him at the annual rent of Rs. 26 odd. If he and his sons thus held the land after they returned to the village, it was an act of grace from Ram Saran Singh and they did not hold the land in their own right. They had lost their rights and Ram Saran Singh did not and could not confer on them right of occupancy in the lands to which they were admitted. It is neither alleged nor shown that the *taluqdar* had conferred on them right of occupancy in the land in question. It is said that Sheo Pershad Singh had obtained a decree against Ram Saran Singh for possession of the land as *qabzadar* but no such decree has been produced in this case. It is true that there is a reference to a decree in a statement made by Ram Saran Singh on the 17th August, 1895 (Ex. 6), but there is nothing in that statement to show that Sheo Pershad Singh had obtained any decree against him as a *qabzadar* in respect of the land in question. Ram Saran Singh has stated clearly that he was the *qabzadar* of the entire occupancy tenure (72 *bighas*) in the village. Sheo Pershad Singh and, after his death,

his sons were, surely holding the land in question as the sub-tenants of Ram Saran Singh, the occupancy tenant. Ram Saran Singh had sued the plaintiffs' father, Ram Bharos Singh, for arrears of rent for the years 1291 and 1292 *Fasli* (1883 and 1884 A. D.). The suit was compromised and the claim of Ram Saran Singh was decreed by the Commissioner of Fyzabad on the 8th June, 1886. (See Exs. C. 3 and C. 9). Had Ram Bharos Singh been holding the land as an occupancy tenant from the *taluqdar*, under the decree of the Settlement Court mentioned above, Ram Saran Singh could not obtain the decree against him for arrears of rent. The very fact that Ram Saran's claim for arrears of rent was decreed against Ram Bharos Singh shows clearly that the latter was holding the land as the sub-tenant of the former. It may safely be inferred from the compromise (Ex. C-9) that Ram Bharos Singh admitted that he was holding the land as a tenant from Ram Saran Singh. It is true that the entries in the *Patwari's* papers support the plaintiffs' case, but the entries in question cannot help the plaintiffs when their ancestor Sheo Pershad Singh lost his rights under the circumstances stated above. It should be borne in mind that mutation of names, by itself, confers no title. It is amply proved that the plaintiffs' ancestors have all along paid the rent to Ram Saran Singh and have never paid it to the *taluqdar*. It is neither alleged nor shown that the plaintiffs or their ancestors were ever recognised by the *taluqdar* as occupancy tenants after Sheo Pershad Singh left the village and abandoned his holding. No suit was brought by Sheo Pershad Singh against the *taluqdar* after he returned to the village. The *taluqdar* is not a party to the present suit also. The land which was let to Sheo Pershad Singh on his return, was not wholly the land of his decree of 1869. There were some plots which were not included in the decree. Some plots out of the plots in suit are not included in the said decree. The plaintiffs' allegation that all the plots in suit are included in the decree is untrue. The learned Munsif thinks that there was some exchange of plots, but this view of the learned Munsif is hypothetical and speculative. It was never the plaintiffs' case that there was any exchange of plots at any time.

We hold, therefore, that the plaintiffs cannot claim occupancy right in the land which was let to their ancestors by Ram Saran Singh under the circumstances stated above.

We find on the second point that the defendant No. 1 holds the land in suit as the tenant of the defendants Nos. 2 to 10. The plaintiffs' witness, Sampat Lat, Patwari, states that the plaintiffs' uncle Deoki Singh had let the plots in suit to Mahabir Singh, defendant No. 1, more than 10 years ago. His evidence is quite vague and unreliable. We are not satisfied with his evidence. He says that a *patta* and a *kabuliyat* were executed in his presence, but no *patta* or *kabuliyat* has been produced in this case. The evidence given by Mahabir Singh and Amarjit Singh shows clearly that it was Ram Saran Singh who had let the land in suit to Mahabir Singh about 18 or 20 years ago. Ram Saran Singh took back the land from Ram Bharios Singh or Deoki Singh and let it to Mahabir Singh at the annual rent of Rs. 12. Mahabir Singh never paid rent to Deoki Singh or to the plaintiffs. He has all along paid the rent to Ram Saran Singh and his descendants. We are inclined to believe the evidence given by Mahabir Singh and Amarjit Singh on the point under consideration.

The result is that the plaintiffs' suit fails on our findings on the two points mentioned above. We do not think it necessary to decide any other point in disposing of this case—Hence we dismiss the appeal with costs. The defendants will get their costs from the plaintiffs in all the three Courts.

Appeal dismissed.

G. H.
A. N. A.

ODDH CHIEF COURT.

ORIGINAL SUIT No. 2 OF 1927.

November 25, 1927.

Present:—Mr. Justice Pullan.

Thakur RAJENDRA BAKHSH SINGH

—PLAINTIFF

versus

Musammat BAHU RANI AND ANOTHER—

DEFENDANTS.

Court Fees Act (VII of 1870), s. 7, cl. iv, sub-cl. (c) and (d)—Declaratory suit—Valuation—Gross over-valuation by plaintiff—Court's power to interfere under s. 151, Civil Procedure Code.

Where a plaintiff seeks to obtain a declaratory decree with consequential relief under s. 7 cl. iv, sub-cl. (c) or to obtain an injunction under sub-cl. (d) of the Court Fees Act, the suit must be valued according to the amount for which the relief sought is valued in the plaint, and there is no direct authority for the Court to interfere with the valuation set up by a plaintiff who seeks a relief under s. 7, cl. iv, sub-cl. (c) or (d) of the Court Fees Act, unless the Court can take advantage of s. 151 of the Civil Procedure Code. [p. 331, col. 2; p. 332, col. 1.]

Hari Sankar Dutt v. Kali Kumar Patra (1), *Sunderbat v. Collector of Belgaum* (2), *Raj Krishna Dey v. Bepin Behary Dey* (3), *Jageshtra v. Durga Prasad Singh* (4) and *Thakur Sheodat Singh v. Thakur Bishunath Singh* (5), referred to.

Obiter.—If a plaintiff makes an absurd and outrageous misrepresentation as to the value of his suit in order to have it tried by a higher Court, the Court can interfere with the valuation set up by a plaintiff by invoking its powers under s. 151, Civil Procedure Code. [p. 332, col. 1.]

Messrs. Niamat Ullah and Ghulam Hassan, for the Plaintiff.

Messrs. Ishwari Prasad, Kedar Nath Tandon, Thakur Prasad, Bisheshwar Nath Srivastava, Girja Shankar and Bhairon Nath, for the Defendants.

JUDGMENT.—For the second time this suit has come before this Court for determination of the question of valuation. The plaintiff when he filed his suit in the first instance valued it at over six lacs of rupees, but in so doing he omitted to notice the provisions of s. 254 of the Oudh Civil Digest, which limited the valuation of his suit to one thousand rupees on account of the first relief claimed and forty thousand rupees on account of the second relief. When this objection was made the plaintiff sought to amend his plaint, but my learned predecessor decided that the amendment could not be allowed at that stage, and that he should first of all determine the valuation of the suit as filed. He accordingly found that the valuation was forty-one thousand, and returned the plaint for presentation to the proper Court. The plaintiff amended his plaint in the manner which he had already proposed, and again presented the plaint in this Court on the ground that on the allegations now disclosed and the reliefs now sought, the suit was within the jurisdiction of this Court.

In the first instance the plaintiff had assailed a deed of gift executed by a certain lady partly because she denied that he was the validly adopted son of Thakur Mahabir Bakhsh Singh and partly because the document transferred certain property to which he was entitled as reversioner. In the plaint as amended he has also asked

that the whole deed of gift should be set aside and he has further sought an injunction against the defendants, that is to say, the donor and the donee, restraining them from dealing with the property in a manner inconsistent with the rights of defendant No. 1, as a Hindu widow, and prejudicial to the interests of the plaintiff, and there is still another relief which has been laid open to him by the action of the defendants, who, in their written statements, set up the case that this was a joint Hindu family, contrary to the allegations in the plaint. The plaintiff is now able to say that if the Court finds that this is a joint Hindu family he is entitled to possession of the whole property, except one village Sardaha, which has not been transferred by the deed of gift. I am asked by the defendants to find that these are not genuine additions to the plaint, but have been inserted merely as a device to bring the suit within the jurisdiction of the Court. No doubt this is the primary object of the plaintiff. He has always tried to have this suit tried in this Court and he has always valued the suit at upwards of six lacs. It is now admitted that the deed of gift was grossly under-valued and, even on the admission of the defendants, the property transferred by that deed of gift could not be worth less than 2½ lacs of rupees. Consequently, the reduction in the valuation of the plaintiff's suit, to meet the technical provision of the Oudh Civil Digest, was brought about primarily by the dishonesty of the defendants, who wished to execute a deed of gift on a stamp of less value than that prescribed by law. I am not prepared to find at this stage that the new reliefs claimed are without any meaning or that they can be rejected summarily without a hearing. This plaint has now been amended and I have got to consider it in its amended form, and as long as I find that the reliefs asked are reasonable and such as would have been considered by the Court without question had not the defendants been able to impute dishonest motives for their insertion, I consider that they may be taken into account in order to estimate the valuation of the suit for the purposes of jurisdiction.

Now there is no question that these reliefs are included in s. 7, cl. iv of the Court Fees Act, which must be read with s. 8 of the Suits Valuation Act (VII of 1887), that is to say, the valuation for the purposes of

jurisdiction must be the same as the valuation for the purpose of Court-fee. Where a plaintiff seeks to obtain a declaratory decree with consequential relief (s. 7, cl. iv, sub-cl. (c), or to obtain an injunction (sub-cl. (d), the suit must be valued according to the amount for which the relief sought is valued in the plaint. I have been referred to several rulings commencing with *Hari Sankar Dutt v. Kali Kumar Patra* (1), which pointed out that in such a suit the Court must accept the value of the relief stated in the plaint and this view was accepted by their Lordships of the Privy Council in the case of *Sunderbai v. Collector of Belgaum* (2), where they quoted with approval a decision of the High Court of Bombay which laid down this principle. At the same time I must point out that in every case that has been shown to me the Courts have been regarding the matter from an opposite standpoint to that which I must adopt in the present case. They have always considered cases in which the plaintiff has sought to pay a lower Court-fee by an under-valuation of some part of his claim, and no case has been brought to my notice where a plaintiff has sought to bring his suit in a Court of higher jurisdiction by falsely overestimating the value of his claim, and paying a higher Court-fee than that which the law demanded. In the present case no question of Court-fee arises, as the plaintiff has paid the maximum. In several cases I have been shown remarks directed against arbitrary valuation on the part of the plaintiff, but it has always been an arbitrary undervaluation and never an arbitrary overvaluation. Such was the case of *Raj Krishna Dey v. Bipin Behari Dey* (3) and *Jageshra v. Durga Prashad Singh* (4). All that the rulings show me in favour of the defendants in the present case is that Courts have not uniformly accepted the plaintiff's valuation of his suit for the purposes of Court-fee when they have held that the valuation for the purpose of jurisdiction was higher. No doubt, the observations of Mr. Chamier in *Thakur Sheodat Singh v. Thakur Bishunath Singh* (5), where he says that the Courts have

(1) 32 C. 734; 9 C. W. N. 690.

(2) 52 Ind. Cas. 897; 43 B. 376; (1919) M. W. N. 254; 23 C. W. N. 753; 21 Bom. L. R. 1148; 46 I. A. 15 (P. O.).

(3) 17 Ind. Cas. 162; 40 C. 245; 16 C. L. J. 194; 17 C. W. N. 591.

(4) 24 Ind. Cas. 679; 36 A. 500; 12 A. L. J. 844.

(5) 6 O. C. 255.

always accepted the plaintiff's valuation as determining the forum, except in cases where it has been proved that the plaintiff has misrepresented the true value with the intention of getting a trial in a different Court from that intended by the Legislature or has acted recklessly in valuing his suit, or has adopted a wrong method of valuation, may be considered, if taken apart from their context, to assist the defendants' plea. But this again is a case in which the plaintiff sought to under-estimate and not to over-estimate the valuation, and, moreover, it was a suit for pre-emption which stands on a somewhat different footing from other suits. In my opinion, therefore, there is no direct authority for the Court to interfere with the valuation set up by a plaintiff who seeks a relief under s. 7, cl. iv sub-cl. (c) or (d) of the Court Fees Act, unless the Court can take advantage of s. 151 of the Civil Procedure Code. There can be no doubt that that section may be brought into use if a plaintiff makes an absurd and outrageous misrepresentation as to the value of his suit in order to have it tried by some particular Court. If a person attempted to sue in a Munsif's Court for property worth a lac of rupees by declaring it to be worth one hundred, the Court would refuse to entertain his plaint and similarly this Court would refuse to entertain a plaint if the valuation was demonstrably far below the minimum of five lacs, which is prescribed for the original jurisdiction of this Court.

I have, therefore, considered carefully what the real valuation of this property is for the whole property as stated in the plaint may be taken into account for the purpose of valuation if reliefs (c) and (d) are read together. There is no contest as to the recorded profits of the villages in suit. The average for the last six years has been shown to be Rs. 11,615, but the plaintiff has been able to show that in two villages at least defendant No. 1 has given leases to her servants on very low terms. A *Patwari* Samsan Ali, who has been called as a witness, (P. W. No. 7) shows that one village has been let out to a certain Taluqdar Singh, defendant's *mukhtar*, at a rent of Rs. 90 a year, and that he has sub let considerably less than half of the whole for Rs. 114. Similarly in another village 452 *bighas* have been let out to one Jagdish Bakhsh Singh at a rental of Rs. 286 9, whereas the true rental of this holding could not be less

than Rs. 700. The plaintiff, therefore, has made out a good case for showing that the profits are more than Rs. 11,615 which is the amount stated by the defendants.

The plaintiff has given two other methods of calculating the value. First of all he has argued that in this part of the Province sales are frequently calculated on the value of the land *per bigha*. He has taken the cultivated land and shown that at a rate of Rs. 35 *per katcha bigha* the value of these villages is upwards of four and a half lacs of rupees. He has produced exemplars in the form of sale-deeds of other land in neighbouring villages where it appears that a very high price has been fetched, sometimes over Rs. 60 *per katcha bigha*. No doubt, some of these sale-deeds were executed in exceptional circumstances and the sale consideration was not in cash but went to pay off debts. Still they are valuable as showing that this principle of valuation is from time to time adopted in the neighbourhood.

The other basis of calculation is taken from the fact that defendant No. 2 by the terms of the deed of gift agrees to pay the donor a sum of Rs. 12,000 a year. Now it is argued that a man who receives a gift of property does not pay the donor an annual sum in excess of the profits, and the plaintiff, therefore, argues that at least I should accept this sum of Rs. 12,000 as representing the annual value of the seven villages which are contained in the sale deed. It is not, however, necessary to set the price of the villages so high because, in my opinion, village land is generally sold at a rate representing something like 30 years' purchase. The defendants themselves examined a witness, who stated that a certain property had been sold for Rs. 14,000 of which the *nikasi* was Rs. 500 and from that *nikasi* the land revenue had to be deducted. It is, therefore, not likely that this land was sold at less than 30 years' purchase; and indeed this contention is in accordance with common experience. If the profits of the land are to be taken as Rs. 11,615 a year, I cannot estimate its value as less than 30 times that figure, namely Rs. 3,48,450. But this is not the whole of the plaintiff's claim. He states that there is in the possession of the defendants a quantity of valuable moveable property of which he has filed a list, and the value of which he states to be Rs. 1,30,000. The defendants do not admit the existence of this property and conse-

quently they give no other valuation. Clearly the whole valuation given by the plaintiff must be accepted for purposes of jurisdiction and Court-fee because no other value can be given, and there is still a comparatively small sum of Rs. 25,000 which the plaintiff claims as a share of a pension granted by Government to this family, and which may be properly included in this suit. The total, therefore, comes to more than five lacs of rupees and I, therefore, find that this suit is within the jurisdiction of this Court and I decide this preliminary issue in favour of the plaintiff. The plaintiff will receive his costs from the defendants.

The 8th of December is fixed for issues, and the 17th for filing of documents which must be admitted or denied on or before the 23rd December before the Registrar.

G. H.

A. N. A.

Order accordingly.

ODDH CHIEF COURT.

CRIMINAL REFERENCE No. 44 OF 1927.

December 1, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge.

DEBI DAYAL—APPLICANT

versus

MANAO alias JIT BAHADUR AND

ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 133, 139-A (2)—Public nuisance—Denial of public right—Duty of Magistrate to stay proceedings—Dismissal of application, legality of.

The proper procedure to be adopted by a Magistrate where he finds in proceedings under s. 133 of the Criminal Procedure Code that there is reliable evidence to show that the place from which the alleged unlawful obstruction or nuisance is sought to be removed is not a public place, is not to dismiss the application and refer the parties to the Civil Court but to stay the proceedings before him under s. 139-A (2) of the Code until the matter of the existence of the alleged public right is decided by a competent Civil Court.

Case reported by the Second Additional Judge, Lucknow at Unao.

ORDER OF REFERENCE.—This is an application to revise the order of Chaudhri Mohammad Mah Sahib, Special Magistrate, First Class, Unao, dated the 23rd May, 1927, dismissing the applicant's application under s. 133 of the Criminal Procedure Code.

The learned Magistrate has found that there was reliable evidence in support of the defendant's denial that the place from which the alleged unlawful obstruction, or nuisance was sought by the applicant to be

removed was a public place. But he has dismissed the application, which order is sought to be revised.

The applicant seeks that the order dismissing the application under s. 133 be set aside because it would stand under s. 133, cl. (2) in his way of seeking his remedy in the Civil Court. The learned Vakil for the defendant refers me to the sentence in the learned Magistrate's judgment towards the end and before the order that the parties should go to the Civil Court to have their rights adjudicated. I think the Civil Court would neither be entitled to, nor would go behind the operative portion of the order, that the application be dismissed.

I, therefore, send up this case to the Hon'ble the Chief Court with the recommendation that the order of the learned Magistrate dismissing the application under s. 133 be set aside and he be directed under s. 139-A (2) to retain the proceedings on his file and stay until the matter of the existence of the alleged public right has been decided by a competent Civil Court. The papers will be submitted to the Hon'ble Court on receipt of any explanation which the learned Magistrate might submit.

Mr. Moti Lal Saksena, for the Applicant.

Mr. Bal Krishna, for the Opposite Party.

JUDGMENT.—I understand the learned Magistrate to agree that the wording of his order is open to objection and that the best method of putting the matter right is to set aside his order and to direct that under the provisions of s. 139-A (2) the proceedings be stayed until the matter of the existence of the alleged public right has been decided by a competent Civil Court. I accordingly direct under the provisions of s. 139-A (2) that the proceedings be stayed until the matter of existence of the right has been decided by a competent Civil Court.

A. N. A.

Proceedings stayed.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 198 OF 1927.

November 30, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Pullan.

RAM SIDH SINGH AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

Mahanth BAKOODAS AND ANOTHER—

DEFENDANTS—RESPONDENTS.

U P. Land Revenue Act (III of 1901), s. 111

Partition proceeding—Jurisdiction of Civil Court—Objection that land is jagir and not sir—No question of proprietary title—Refusal of Revenue Court to decide objection—Civil suit, maintainability of.

Under the U. P. Land Revenue Act, 1901, the jurisdiction of Civil Courts in matters relating to partition is expressly ousted, except in so far as is provided by the provisions of s. 111 of the Act and the conditions and qualifications annexed to the grant of jurisdiction must be strictly complied with. [p. 334, col. 2; p. 335, col. 1.]

Mukhtar Ahmad v. Barati Lal (1), referred to:

An objection to partition which merely states that the land in question is not *sir* but *jagir* does not raise any question of proprietary or under-proprietary title and the Civil Court has consequently no jurisdiction to determine the matter even though the Revenue Court has erroneously left the question undetermined and referred the parties to the Civil Court. [p. 335, col. 1.]

Second appeal against the decree of the Additional Subordinate Judge, Sultanpur, dated the 21st March, 1927, reversing that of the Munsif, Musafir Khana, dated the 30th June, 1926.

Messrs. Haider Husain and Ali Zaheer, for the Appellants.

Mr. Niamat Ullah, for the Respondents.

JUDGMENT.—In order to understand the questions for decision in this second appeal it is necessary to state the previous history of the case at some length. There is in the Sultanpur District a certain village called Fatehpur which is held by certain persons as under-proprietors. The *taluqdar* of Maniarpur is the superior proprietor of the village. In this village there is an area of some 24 *bighas* of land. In partition proceedings of the Revenue Courts prior to 1916 this area has been treated in a particular manner. We have it that in the year 1916 Mahant Nanku Das applied under the provisions of Chap. VII of Local Act III of 1901 for partition of his own under-proprietary rights in that village. The proclamation under s. 110 of that Act fixed as a date for the filing of objections by other co-sharers the 26th of June, 1922. Up till that date no objections were filed. At a considerable later date afterwards the appellants filed an application to the effect that this particular area, was their *jagir* held by them for a period of over fifty years and that it should be excluded from partition and retained by them as their *jagir*. The Deputy Collector conducting the partition appears to have considered this as an objection to the partition made under s. 110 and as time-barred. In due course of time the partition proceeding was com-

pleted and submitted to the Collector under the provisions of s. 114 for confirmation. At the time of considering the confirmation the Deputy Commissioner considered an appeal made by the appellants against the dismissal of their objection. The Deputy Commissioner passed upon this appeal an order dated the 16th February, 1925. Apparently he considered the application made by the applicant as an objection made by a recorded co-sharer involving a question of proprietary title which had not been already determined by a Court of competent jurisdiction and he apparently intended to direct the appellants to institute within three months a suit in the Civil Court for the determination of the question. We say that he apparently intended to do this for the words are by no means clear. The words used are these:—

“The applicant-appellant will have his rights adjudicated before a proper forum and the result of the decision will be given effect to in the partition proceedings to whatever stage they might have reached, but in order to avoid delay I would recommend that the necessary steps should be taken by the applicant-appellant to have his rights adjudicated within the next three months. The lower Court will proceed with the partition.”

The appellants understood this to be an order under s. 111, cl. (b) and instituted a suit accordingly for a declaration that the land in question was their *jagir* and should be excluded from the partition. The learned Munsif, who tried the suit, awarded them the declaration which they desired. The lower Appellate Court, however, found that a Civil Court had no jurisdiction to grant the relief and dismissed their suit. They appeal here.

We support the conclusion that the suit must fail. Our reasons, however, are completely different from the reasons of the lower Appellate Court. The reason why we find that the suit must fail is this. As was pointed out by a Bench of the Judicial Commissioner's Court in *Mukhtar Ahmad v. Barati Lal* (1) the jurisdiction of the Civil Courts in matters relating to partition is expressly ousted, except in so far as is provided by the provisions of s. 111, and the conditions and qualifications annexed to the grant of jurisdiction must

(1) 25 Ind. Cas. 316; 17 O. C. 224 at p. 229; 1 O. L. J. 335.

be strictly complied with. The Civil Court has jurisdiction to determine a question of proprietary title, which has not been already determined by a Court of competent jurisdiction arising in a partition proceeding, if the partition officer refuses to inquire into the merits of the objection himself. Here undoubtedly the Deputy Commissioner refused to inquire into the merits of the objections but the question was not a question of proprietary title. We have examined the objection of the appellants. This objection is very clear. It merely states that the land in question is not their *sir* and that it is their *jagir*; but they claimed neither proprietary nor under-proprietary title in it. Their statement is exactly the same in their plaint. The learned Deputy Commissioner had no jurisdiction of any kind to pass the order which he did. He should have decided the matter himself. He has asked the Civil Courts to do something which they have no jurisdiction to do. We notice as a somewhat peculiar incident that while directing the Civil Courts to determine the matter he proceeded to conclude the partition without waiting for the decision. It is not for us to say what remedy the appellants will have in this matter. But the case clearly stands that in the partition proceeding they came forward with a very reasonable request that the land which was recorded in the *wajib-ul arzas* as their *jagir*, which had been decided in previous partition proceedings to be their *jagir* and as such to be excluded from partition, should be excluded from the present partition. They set up no claim of any kind to proprietary title. The Deputy Commissioner proceeded under a misapprehension to refer them to the Civil Courts, in order that they might decide the question which they had no jurisdiction to decide, but before the Civil Courts had arrived at a conclusion one way or another proceeded to make a partition in which he decided the point against the appellants. What the appellants' remedy may be it is not for us to say. It would seem hard if they have no remedy. This much we can say that the Civil Courts can give them no remedy. The Civil Courts had no jurisdiction. For these reasons and for these reasons alone we dismiss the appeal, but in the circumstances of the case direct that the parties bear their own costs in both the Courts.

A. N. A.

Appeal dismissed.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 217 OF 1927.

November 11, 1927.

Present:—Mr. Justice Hasan.

Hafiz GHANI AHAMAD KHAN AND
ANOTHER—DEFENDANTS NOS. 1 AND 3—

APPELLANTS

versus

Musammât MEHDI BEGAM—PLAINTIFF
AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammādan Law—Dower—Sharai dower—Transfer of property to wife after marriage towards dower, validity of—Transfer of Property Act (IV of 1882), s. 53—Preference of creditors, effect of.

Where no dower is fixed at marriage it may be fixed at a later period and *sharai* dower has to be fixed only where no dower is fixed either at the time of marriage or subsequently. [p. 336, col. 2.]

A Muhammadan husband, some time after his marriage, transferred immoveable properties worth Rs. 2,000 to his wife under a deed which recited that the transfer was for a consideration of Rs. 2,000 due to his wife towards her claim of dower of Rs. 25,000. It was found that the alleged claim of dower of Rs. 25,000 was fictitious and it was contended on the basis of this finding that the transfer was for an inadequate consideration as the wife would only be entitled to *sharai* dower.

Held, (1) that the husband must, under the circumstances, be held to have undertaken to pay Rs. 2,000 at least in discharge of his obligation for the dower-debt, that, there was, therefore, no case for fixing a *sharai* dower, and that the transfer could not consequently be said to have been made for an inadequate consideration; [*ibid.*]

(2) that the transfer could not be held to be invalid merely because the other creditors of the transferor were defeated thereby. [p. 336, col. 1.]

In a case in which no consideration of the law of bankruptcy or insolvency applies, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for payment of the rest of his debts. [p. 336, col. 2.]

Second appeal from the decree of the Sub-Judge, Lucknow, dated the 6th February, 1927, confirming that of the Munsif, Lucknow District, dated the 11th August, 1926.

Messrs. Zahur Ahmad and Mohammad Hafiz, for the Appellants.

Mr. Ganga Dayal Khare, for the Respondents.

JUDGMENT.—This is the appeal by the defendants Nos. 1 and 3 from the decree of the Subordinate Judge of Lucknow, dated the 8th of February, 1927, affirming the decree of the Munsif of the same place dated the 11th of August, 1926.

The respondent, Musammât Mehdi Begam, is the plaintiff in the suit out of which this appeal arises. The facts as agreed upon at the hearing of this appeal are as follows:—

One Nawazish Ali Khan obtained a decree for possession of certain immoveable pro-

party against Ahmad Ali Khan, the husband of the plaintiff, *Musammāt Mehdi Begam*, from the Court of the Subordinate Judge of Lucknow on the 31st of August, 1921. Under this decree Nawazish Ali Khan was entitled to recover also costs to the extent of Rs. 400 odd. There was a first appeal and a second appeal but the decree of the Court of first instance was all along affirmed. On the 24th of September, 1923, Nawazish Ali Khan applied for execution of his decree for costs by attachment of certain property belonging to Ahmad Ali Khan. The execution proceedings, however, proved infructuous and nothing further was done in that direction. On the 25th of October, 1923, Ahmad Ali Khan made a gift of his half share in a grove, in a house and in certain lands which he held in an under-proprietary tenure in favour of his wife, *Musammāt Mehdi Begam*, the plaintiff. On the 11th of September, 1924, Nawazish Ali Khan sold his decree for costs to the defendant-appellant, Hafiz Ghani Ahmad Khan. On the 12th of February, 1925, Hafiz Ghani Ahmad Khan took out execution of his decree by attaching the share of the grove which was the subject-matter of the gift of the 25th of October, 1923. The plaintiff intervened during the execution proceedings claiming title to the property attached on the basis of the gift just now mentioned. She was, however, unsuccessful and the result was the suit, out of which this appeal has arisen. Meanwhile, the grove was sold and purchased by Nabi Ahmad Khan, the third defendant in the suit, the second defendant being Ahmad Ali Khan, the husband of the plaintiff.

The deed of gift purports to be a transfer for consideration and the consideration stated therein is the sum of Rs. 2,000 as due to *Musammāt Mehdi Begam* for her claim of dower of Rs. 25,000. *Prima facie*, therefore, the transfer is a good transfer and should be given effect to unless the defendants succeed in avoiding it. The ground of avoidance is that the gift in question was executed by Ahmad Ali Khan with intent to defeat and delay his creditors and was for inadequate consideration within the meaning of s. 53 of the Transfer of Property Act, 1882. This plea in defence as against the gift has been negatived by both the Courts below.

The main argument in second appeal is that the lower Appellate Court having found in agreement with the trial Court

that the total amount of the dower, that is Rs. 25,000, mentioned in the deed of gift, was fictitious, the only dower that could legally be held to be due from the husband to the wife was *sharai* dower and no more. The amount of *sharai* dower comes to Rs. 110. If these premises are correct it is further argued that the property in suit being at least worth Rs. 2,000, the consideration for the transfer in question must be held to be grossly inadequate.

The precise proposition of law to which appeal seems to be made in the arguments addressed on behalf of the appellants is that where no dower is fixed either at the time of marriage or subsequently, the wife is entitled only to *sharai* dower. If no dower is fixed at marriage it may be fixed at a later period. In support of this reference may be made to *Jaddo Begam v. Sharf Jehan Begam* (1) and to *Bashir Ahmad v. Zobaida Khatun* (2). In the present instance it was no body's case that no dower was fixed at the marriage nor can I read the finding of the lower Appellate Court in that sense. On the construction of the deed of gift and consistently with the finding that the amount of dower fixed at the marriage was not Rs. 25,000, it appears to me that the husband undertook to pay at least Rs. 2,000 in discharge of his obligation for the dower debt. This being so there is no case for fixing the *sharai* dower.

The rest of the arguments advanced in support of the appeal is covered by the observations of their Lordships of the Judicial Committee in the case of *Musahar Sahu v. Hakim Lal* (3):—

"As a matter of law, their Lordships take it to be clear, that in a case in which no consideration of the law of bankruptcy or insolvency applies, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for payment of the rest of debts."

The appeal fails and is dismissed with costs.

A. N. A. Appeal dismissed.

(1) 102 Ind. Cas. 838; 4 O. W. N. 450; A. I. R. 1927 Oudh 194.

(2) 92 Ind. Cas. 265; 1 Luck. 83; 3 O. W. N. 105; A. I. R. 1926 Oudh 186; 29 O. C. 108.

(3) 32 Ind. Cas. 343; 43 I. A. 104; 3 M. L. J. 116; 3 L. W. 207; 20 O. W. N. 393; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406; 18 Bom. L. R. 378; 43 O. 521 (P. O.).

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

December 12, 1927.

Present :—Lord Buckmaster, Lord Carson,
Lord Darling, Lord Warrington of Clyffe,
and Sir Lancelot Sanderson.

JEWAN LAL DAGA AND

ANOTHER—PLAINTIFFS—APPELLANTS

versus

NILMANI CHAUDHURI—DEFENDANT

—RESPONDENT.

Evidence Act (I of 1872), s. 159—Document not produced within proper time, whether available for refreshing memory of witness—Agreement for mortgage—Suit for specific performance—Equitable relief—High rate of interest—Interference by Court—Compound interest, whether allowable in the absence of express agreement.

For purposes of s. 159, Evidence Act, 1872, it is not requisite that the writing used to refresh the memory of a witness should have been admitted in evidence. Accordingly, a document not produced in Court within the proper time and, in consequence, rejected as evidence under the provisions of O. XIII, r. 2, Civil Procedure Code, 1908, may nevertheless be referred to by the party producing it or his witness to refresh his memory if the document is otherwise within the purview of s. 159 of the Evidence Act. "The weight of the evidence, the objection to the document upon the ground that its not having been produced at the proper time renders its authenticity the subject of suspicion, and all other grounds upon which a document can be successfully impeached still remain open, but refusal to permit a man to refresh his memory by proper relevant contemporaneous documents might lead to a grave injustice." [p. 342, col. 2.]

Where, by an agreement for a mortgage, the defendant agreed to grant a mortgage of his immoveable property for the true amount of his indebtedness to the plaintiff, the Privy Council held that the property being identified and the terms of the loan being fixed, the document constituted an agreement which equity would enforce, unless there were circumstances which the Court would consider sufficient to justify the unqualified refusal on the defendant's part to carry out its terms. The plaintiff having brought a suit to obtain this equitable relief, their Lordships held that there was a valid agreement charging the property with whatever sum was actually due to the plaintiff, together with interest at the rate provided for in the agreement, and that a proper mortgage ought to be executed to carry out these terms. [p. 343, col. 1.]

Although the agreed rate of interest be high, it will not be disallowed by the Court unless there is evidence to show that in the circumstances the agreement as to interest is so unconscionable that effect ought not to be given to it. [*ibid.*]

"Rate of interest must vary with the risk run", and in considering the question of risk the Court should take into account, *inter alia*, the financial condition of the debtor and the rate of interest he has hitherto been paying:

Held, under the circumstances, that interest at 21 per cent. per annum on a mortgage security was not excessive. [*ibid.*]

Compound interest, unless agreed to, cannot be allowed. [p. 343, cols. 1 & 2.]

Appeal from a judgment of the

Patna High Court, (Dass and Adami, JJ.), dated the 22nd May, 1925, reversing a decree of the Subordinate Judge, Dhanbad, dated the 22nd December, 1922.

The defendant, being heavily involved in debts, entered into an agreement with one Kedarnath Daga (who was the plaintiff in the action, and being since dead, was represented by the appellants) on the 21st of September, 1920, at Calcutta, agreeing to sell to him one-half share in certain collieries belonging to the defendant for Rs. 7,25,000. At the time of the said agreement the collieries were subject to various incumbrances amounting to Rs. 8,00,000. The agreement, therefore, provided that, simultaneously with the execution of the conveyance, the defendant should execute an indemnity bond covenanting to pay to the plaintiff with interest all sums which the plaintiff might have to pay to discharge the incumbrances, and also that a deed of partnership should be executed providing for the working of the said collieries.

On the date of the agreement the plaintiff paid to the defendant Rs. 3,50,000 earnest money. Pending the investigation of title and completion of conveyance, the parties, in accordance with the agreement, commenced working the collieries, and the plaintiff from time to time advanced Rs. 33,128-8-3 for the working-expenses of the collieries, and at the defendant's request also advanced to him further sums amounting to Rs. 2,00,000.

On the investigation as to title, the same at first seemed defective. The plaintiff was anxious to get security for his advances amounting to about Rs. 5,50,000, and the defendant expressed his willingness to execute a mortgage to secure these advances. A draft of a mortgage bond was prepared.

Subsequent investigation proved that the defendant had a good title in the collieries, and the plaintiff wanted the sale-deed executed in accordance with the agreement of the 21st September, 1920. Differences arose between the parties as to whether the plaintiff had agreed to take a mortgage in substitution of his claim under the agreement of the 21st September, 1920.

Eventually the plaintiff agreed to give up his claim under the agreement if the defendant executed the mortgage within a reasonable time. Accordingly, a memo-

randum of agreement was drawn up and signed by the parties on the 5th of February, 1921. As the construction of this document was one of the main points for determination, before the Privy Council, it is set out below in full :—

- "1. Interest at 21 per cent. per annum.
2. Principal amount Rs. 5,50,000.
3. Any money over Rs. 5,50,000 and all interest to be paid on the day of the execution of the mortgage.
4. Costs of mortgage and in connection with the purchase due to B. N. Basu & Co., and Morgan & Co., to be paid by Mr. Chowdhury.
5. *Hundis* to be drawn for Rs. 5,50,000 by Mr. Chowdhury and to be renewed from time to time to the extent of the principal for the time being outstanding, the stamps on all *hundis* being paid by Kedar Nath Daga.
6. Mr. Chowdhury to pay Mr. Daga the sum of Rs. 800 on account of costs of establishment incurred by Mr. Daga.
7. The instalments of principal to be paid for April, May and June, 1921, to be Rs. 10,000 each instead of Rs. 20,000 each as mentioned in the mortgage.
8. Interest to be paid at 18 per cent. up to the approval of the draft mortgage and thereafter at 21 percent. per annum."

Thereafter the draft of a mortgage deed was duly prepared and approved of by the Solicitors of both parties; the plaintiff had the document engrossed, which was also approved of by the defendant's Solicitors. At the request of the plaintiff's Solicitor the defendant's Solicitor sent the defendant's cheque for Rs. 2,750 for the stamp duty for the mortgage deed and the engrossed document was duly stamped. Notwithstanding repeated demands on behalf of the plaintiff, the defendant did not execute the mortgage deed. Therefore, the plaintiff filed on the 12th of May, 1921, in the Court of the Subordinate Judge of Dhanbad the present suit.

The plaint stated that according to the accounts therein set out the defendant owed the plaintiff on that date Rs. 6,05,642-11, and that the defendant had failed to execute the mortgage and to pay the instalments of Rs. 10,000 each for April and May, due as set out in the memorandum of agreement, dated the 5th of February, and in the unexecuted stamped engrossed

document. The main prayers in the plaint were:—

(a) For a declaration that a moiety share of the properties mentioned in schedule A is charged for the sum of Rs. 5,50,000 with the interest, at the agreed rates which the plaintiff had advanced on account of purchase-money.

(b) For a declaration that under the terms of the agreed mortgage, the whole of the properties mentioned in schedules A and B are charged and mortgaged for the sum of Rs. 6,05,642-11-0 as per account given in schedule C.

(c) For an order that the defendant do specifically perform either the agreement dated the 21st September, 1920, and execute the conveyance in plaintiff's favour of his moiety share in the aforesaid collieries mentioned in schedule A, and also execute the indemnity bond and the deed of partnership, or that the defendant do specifically perform the agreement dated the 5th February, 1921, and do execute the said engrossed deed of mortgage as the Court may be pleased to hold the one or the other or both specifically performable.

(d) For an order that the defendant do register and otherwise complete the said documents, that the Court will order execution, and, on defendant's failure to execute, register and complete the same, the Court may be pleased to execute and register the documents on defendant's behalf.

(e) That a decree may be given declaring the defendant's indebtedness to the plaintiff to the sum of Rs. 6,05,642-11-0 out of which a decree may be given to the plaintiff as against the defendant for immediate payment for that amount as the plaintiff may be found entitled to get from the defendant.

(f) That a declaration may be given and a decree may be passed for such interest as the plaintiff may be found entitled to get from the defendant.

(g) That such declarations and decrees may be passed for specific performance, and otherwise as the plaintiff may be found entitled to get under the circumstances of the case.

(h) That on the default of the defendant to pay three instalments a decree may be given awarding possession to the plaintiff of the properties mentioned in schedule A.

(i) That such other or further relief may

be granted as the plaintiff may be found entitled to.

The claim for specific performance of the contract of sale, dated the 21st September, 1920, did not arise in the appeal before the Privy Council.

The Subordinate Judge framed the following, among other issues:—

(5) Is the agreement of the 5th February, 1921, specifically enforceable?

(6) Has the defendant failed to perform his part of the agreement? Has there been any undue delay or laches on his part? Is the plaintiff debarred by his conduct from claiming specific performance of all or any of the agreements referred to in the plaint?

(7) For what sum, if any, is the defendant indebted to the plaintiff? Is the plaintiff entitled to claim interest, therefore, and if so, at what rate?

(8) Are the properties described in schedules A and B of the plaint or any of them charged or mortgaged for the claims of the plaintiff or for any portion thereof?

(9) To what relief, if any, is the plaintiff entitled?

The Subordinate Judge's finding was that the defendant deliberately broke the contract and that he had absolutely no reason for refusing to perform it. On the question as to what relief the plaintiff ought to obtain, the Judge was of opinion that specific performance of the agreement of mortgage in the terms as set out in the agreement had been rendered impossible because the monthly instalments therein set out had never been paid. The engrossed deed, however, provided that if the defendant failed to pay any of the said monthly instalments of principal or interest, then, "notwithstanding anything hereinbefore contained," the mortgagee should at his option be at liberty to call in the moneys therein secured and should be entitled to take possession of the coal, lands, and collieries. In the opinion of the Subordinate Judge the plaintiff was entitled in the circumstances to "substantial relief and not merely to a money decree." On the analogy of the decision in the case of *Yashwantrao Holkar v. Dadabhai Cursetji* (1) the Court thought that in justice and equity the plaintiff should be given the relief claimed in terms of the approved engrossed deed, for otherwise fraud and falsehood would be encouraged.

The trial Court decreed on the 22nd

(1) 14 B. 353; 7 Ind. Dec. (N. S.) 695.

December, 1922, the suit with costs as follows, namely, it declared that the plaintiff was entitled to the sum of Rs. 5,50,000 with interest at 21 per cent. from the 1st of April, 1921, up to the date of full satisfaction. It also ordered that the plaintiff should get forthwith possession of the properties as described in the schedule to the engrossed deed and retain possession of the same and work the collieries and pay the superior landlord's dues for rent and appropriate the balance towards the satisfaction of the dues until they were fully satisfied.

The defendant appealed against the decree of the Subordinate Judge to the High Court of Judicature at Patna. The learned Judges (Dass and Adami, JJ.) allowed the defendant's appeal and dismissed the suit. Dass, J., said in his judgment that "the terms of the mortgage bond are as hard and unconscionable as any that can be imagined, and undoubtedly shock the conscience of the Court," and that the defendant resisted the suit mainly on two grounds: (i) on the ground that his liability could not be ascertained except on an adjustment of accounts between the parties, and (ii) on the ground that he in fact owed the plaintiff Rs. 4,41,650 and not Rs. 5,50,000. The learned Judge (Mr. Justice Dass) also thought that the Subordinate Judge should not have allowed the plaintiff's witness Bishun Das to refresh his memory by referring to entries in the account books as these account books had not been accepted in evidence on the ground that they had been produced too late. Holding that Bishun Das should not have been allowed to refresh his memory by referring to the entries in the books of account, Dass, J., held that his evidence was *valueless*.

As the Privy Council approve of the procedure adopted by the trial Court in allowing the plaintiff's witness Bishun Das to refresh his memory from the account books which were kept by him and which were under his supervision, the order of the learned Subordinate Judge, dated the 6th November, 1922, is set out below *in extenso*.

"Certain account books as they were private documents of the plaintiff were not received by the Court when produced yesterday as they were not filed at the first hearing and as no good cause, in my opinion, was shown why they were not reproduced. The plaintiff's prayer for reconsideration of that order of the Court is rejected, the plaintiff's other prayer was that the witness

No. 3 (Bishun Das) in whose presence the entries in the *kacha rokords* were written and who saw the payments, may be allowed to refresh his memory by looking into such books and then to depose to the fact of certain advances of money to the defendant; the law on the point is that contained in s. 159 of the Evidence Act and also in r. 18 sub-r. (2), O. VII, Civil Procedure Code. Rule 18, sub-r. (2), O. VII, provides that a document which ought to be produced in Court by the plaintiff when the plaint is presented; etc., etc., and which is not produced, etc., etc., shall not without the leave of the Court be received in evidence on his behalf at the hearing of the suit. The sub-r. (2) of that r. 18 does, however, provide that nothing in this rule...applies to documents produced in cross-examination of the defendant's witnesses or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory. Section 159, para. 2, Evidence Act, provides that "the witness may also refer to any such writing made by any other person and read by the witness within the time aforesaid (para. 1 of that section) if when he read it he knew it to be correct." It appears to me that the spirit of the law is that documents even though not received in evidence or inadmissible in evidence may be looked into by a witness who wrote such documents or in whose presence such documents were written and who read them, to refresh his memory. The learned Counsel, Mr. P. K. Sen, for the defendant has urged that to allow the witness to look into the rejected books to enable him to refresh his memory and to depose about the entries, amounts to permit the plaintiff to adduce secondary evidence of the contents. In my opinion that contention though plausible is not correct according to the law. No authority is cited in support of that contention. The witness is under examination, he says advances of different sums of money were made to the defendant in his presence and he saw entries of such sums made in the *kacha rokord* books, he does not, however, remember which specific sums were advanced on which particular dates. In such circumstances, although the plaintiff has not been allowed to put in the books as independent evidence, I think the law does permit the witness to refresh his memory by looking into the entries. I do, therefore, allow the witness to refresh his memory by looking into the *kacha rokords* books."

Commenting on the procedure adopted by the learned Subordinate Judge, Dass, J., observed as follows:—

"There remains the important question as to the alleged advance of Rs. 1,20,000 between 12th October, and the 2nd November, 1920. Now the plaintiff did not produce his books of account at the first hearing of the suit or indeed at any time until Bishun Das came to the witness-box. Bishun Das was examined on behalf of the plaintiff on the 5th November, 1922. On that date, as the order-sheet of the learned Subordinate Judge shows, 'plaintiff filed some *rokors* and *khata*s as per list with a petition stating cause for filing at this late stage.' The learned Vakil for the plaintiff tendered these documents in evidence; but the learned Subordinate Judge very properly rejected them. The grounds for rejecting the documents are stated by the learned Subordinate Judge in these words: 'Here, the learned Vakil for the plaintiff wants to produce some account books, on which the plaintiff relies and which he produces only to-day and as, in my opinion, no good cause has been shown for their production at this late stage, I refuse to accept the documents. The learned Counsel for the defendant most strongly objected to the documents being taken in at this stage. These are private documents and I do not think it will be legal and just to admit such documents now.' The rules as to the production of documents are stated in O. XIII of the Civil Procedure Code. Rule 1 compels the parties to produce, at the first hearing of the suit, 'all the documentary evidence of every description in their possession or power, on which they intend to rely. Now it is obvious that the first hearing of the suit does not mean the day on which the case is opened on behalf of the plaintiff and witnesses examined. It means the first day when the parties appear in Court after the written statement is filed. Now it is obvious that the rule has been enacted to prevent fraud by the late production of suspicious documents; and where the documents are private documents of the parties there is no reason why the rule should be relaxed unless, as r. 2 provides, 'good cause is shown to the satisfaction of the Court for the non-production thereof.' In my opinion the Legislature has expressed so strongly against documents being received at a late stage that, although it has given a

discretion to the Court to receive such documents if filed at a late stage, it has limited the discretion of the Court by providing that the document should not be received unless good cause is shown to the satisfaction of the Court for the non-production thereof; and it compels the Court receiving any such evidence to record the reasons for so doing. In other words, the Legislature has expressed a strong view that there is suspicion inherent in the late production of documents.

"The learned Subordinate Judge considered the matter whether there was any ground to receive the account books tendered on behalf of the plaintiff; and, in my opinion, he exercised a wise discretion in rejecting these documents.

"But having rejected those documents, the learned Subordinate Judge allowed Bishun Das to refresh his memory by referring to the entries in the account books, and to give his evidence as to the advances made by referring to those entries. In my opinion the course adopted by the learned Subordinate Judge cannot be justified. The question involved in the decision of the learned Subordinate Judge to allow Babu Bishun Das to refresh his memory by referring to the entries in the account books is one of prudence and not one of law; and, in my opinion, it is wrong exercise of discretion to allow a witness to give his evidence by reference to a document when there are any circumstances casting suspicion upon the document. Now as I have shown, and as O. XIII of the Code of Civil Procedure establishes beyond doubt, the Legislature has certainly expressed the view that the late production of a document in itself amounts to a circumstance casting suspicion on the document.

"Now the learned Subordinate Judge has already rejected these account books on the ground, as I suggest, that their late production was suspicious. What justification then was there in allowing Bishun Das to refresh his memory by referring to the suspicious entries in these account books? Now the vice of the procedure adopted by the Subordinate Judge is this, that he has attached the same value to the evidence of Bishun Das which he would have attached to the entries if they had been proved in the usual course. The Subordinate Judge refers to a stray passage in the evidence of the defendant to the effect that he has no ground to suspect the plaintiff's

account books. Grounding himself on that admission, the Subordinate Judge says as follows: 'Hence,' that is to say, as a consequence of the admission made by the defendant, 'the evidence of P. W. No. 3 which he gave after referring to the plaintiff's account books may well be believed and that evidence does prove that plaintiff did advance Rs. 5½ lakhs and also Rs. 31,128 odd for colliery expenses.'

"In my opinion, this is not a satisfactory way of dealing with the case..... I hold that Bishun Das should not have been allowed to refresh his memory by referring to the books of account which had been rejected by the Subordinate Judge on the ground, as I suggest, that they were suspicious, and that the evidence of Bishun Das is valueless on the point."

The plaintiff appealed to His Majesty in Council from the judgment of the High Court.

Mr. Wallach, for the Appellant.—The terms of the mortgage-bond are not hard and unconscionable.

The High Court should have passed a decree for specific performance of the mortgage on account of the defendant's indebtedness to the plaintiff. The trial Court was justified in allowing the plaintiff's witness Bishun Das to refresh his memory by referring to the account books which were kept by him and which were under his supervision.

JUDGMENT.

Lord Buckmaster.—Their Lordships have not had the advantage of hearing Counsel for the respondent on this appeal, but they have carefully considered the relevant documents, the evidence, and the judgments both of the Subordinate Judge of Dhanbad and those delivered in the High Court of Judicature at Patna, and they think that the appellants are entitled to certain relief refused by the High Court. The only question now raised relates to the agreement for a mortgage dated 5th February, 1921, and made between Kedarnath Daga, represented by the appellants, and the respondent. It is, therefore, unnecessary to consider the previous complicated transactions between the parties. The pleadings do not dispute that the purpose of this agreement was to arrange the terms upon which the respondent was to grant a mortgage of property, which had formerly been

the subject of an agreement for sale and partnership between the parties. This is indeed made plain by the document which refers to the proposed purchase, and the letters which precede it. Following on the agreement a draft mortgage was in fact prepared purporting to carry out its terms, was approved by Solicitors on behalf of the respondent, and the mortgage itself was actually engrossed and the stamp paid for by the respondent.

The property being identified and the terms of the loan being fixed, the document of the 5th February constitutes an agreement which equity would enforce, unless there were circumstances which the Court would consider sufficient to justify the unqualified refusal on the defendant's part to carry out its terms. To obtain this equitable relief, together with other claims since abandoned, the plaintiff, represented by the appellants, instituted these proceedings, and the defences put forward upon the only point now material are in substance two: The first, that an adjustment of account between the parties in respect of certain accommodation *hundis*, signed by the defendant, for the plaintiff's use was contemplated, and that the mortgage was conditional on this being done; and secondly, that the terms of the agreement are unconscionable, oppressive, and substantially unfair. That accounts were open between the parties may, in their Lordships' opinion, be accepted; the reference on the document itself which provides that money, over five and a half lacs of rupees, is to be paid on the execution of the mortgage itself suggests that the amount of indebtedness of the defendant was not finally fixed. The Subordinate Judge thought that five and a half lacs were in fact due, and he found this issue in favour of the plaintiff—the High Court have found that the actual amount due was four lacs forty-one thousand six hundred and fifty rupees, and while declining to give the plaintiff any security for this sum, offered him a personal judgment for the amount if he would amend his pleadings by making a definite claim for this relief. This he declined to do, and hence the present appeal. Their Lordships have not been in a position to decide the question of the true indebtedness between the parties; the materials are not before them for the purpose; for it is plain that to a large extent the evidence would depend upon examination of the books of the

various parties and the determination of whether the books themselves were trustworthy documents. There appears to have been the usual regrettable omission on the part of both parties to produce these books within the proper time, and in consequence the learned Subordinate Judge regarded with great suspicion the books the defendant produced, and he refused to allow the plaintiff's books to be put into evidence though he permitted him to refresh his memory by reference to their entries. This procedure has been most adversely commented on by the High Court, who regard the permission of the learned Judge as a wrong exercise of discretion. Their Lordships, however, think that the learned Subordinate Judge was right in the view he took, and s. 159 of the Evidence Act of 1872 is specific upon the point. The weight of the evidence, the objection to the document upon the ground that its not having been produced at the proper time renders its authenticity the subject of suspicion, and all other grounds upon which a document can be successfully impeached still remain open, but refusal to permit a man to refresh his memory by proper relevant contemporaneous documents might lead to a grave injustice. The High Court state that, in the circumstances, the evidence of the plaintiff was *valueless*, and they accept the defendant's view that the lesser amount only was due at the date of agreement. This controversy, as already stated, their Lordships are not in a position to decide, nor does it now become relevant, since the appellants are prepared to accept the lower figure, though asserting that the higher one is correct. The real question, however, was not so much the decision as between the two money claims but the determination of the issue correctly stated by the Subordinate Judge in the issues settled on the 24th August, 1921: "Are the properties described in schedules A and B of the plaint or any of them charged or mortgaged for the claims of the plaintiff or any portion thereof?" and had the defendant before this asked for determination of the real amount due and submitted to the execution of a mortgage for that sum, the litigation would have been ended except as to the question of amount. The High Court have, however, apparently regarded the question of amount as the determining factor of the whole dispute, and held that the claim for the larger sum was a gross and deliberate fraud, and

an attempt to fasten on the defendant a liability only due by regarding as given for value accommodation *hundis* to the extent of 1 lakh 20 thousand rupees.

It is to be noted that no such defence was raised by the defendant. He disputes liability for the lesser sums, alleges, that the parties were not *ad idem*, and relies on the other grounds already mentioned, but he nowhere charges fraud; and it would indeed be difficult to establish seeing that the defendant was independently represented by Solicitors throughout the whole transaction. The agreement as to interest is certainly high, but there appears no trace whatever of the defendant protesting against it, no issue is specifically directed to the point, nor is there any evidence to show that in the circumstances it was so unconscionable that effect ought not to be given to the agreement for payment. Rate of interest must vary with the risk run, of which there is no sufficient evidence, though the defendant himself says in examination-in-chief:—

"During the last 4 or 5 years I had to pay Rs. 3 lakhs to Rs. 4 lakhs on account of interest. I have to pay at high rate of interest, *i. e.*, at 18 to 24 per cent. per annum since September, 1920. The extent of my debt was Rs. 17 lakhs or 18 lakhs. My debt in September, 1918 or 1919, was Rs. 8 lakhs or 10 lakhs when I used to pay interest at Rs. 9 or Rs. 10 per cent. per annum. Since September, 1920, I have to pay interest at 18 to 24 per cent. per annum to the *hundi wallas* (who lend money on taking *hundis*); and in these circumstances their Lordships find themselves unable to say that the agreed rate was of such a character that they ought not to give effect to the agreement. It is true that in the defendant's evidence he objects to compound interest, but he says in plain terms that the rate of interest of the mortgage of which the memorandum was made on the 5th February was settled at 21 per cent. per annum. In these circumstances their Lordships think that there was a valid agreement charging the property with whatever sum was actually due, together with interest as the agreement provides, and that a proper mortgage ought to be executed to carry out these terms. The terms of that mortgage should be settled under the direction of the Subordinate Judge, but compound interest ought certainly not to be included, for it

was never agreed. They have only to add that the fact that the draft mortgage attempted to go beyond the terms of the agreement in this respect might be a good reason why that particular mortgage should not be executed, but it does not destroy the plaintiffs' claim under the agreement, for nowhere was the binding effect of the agreement made conditional on fixing the amount of the debt, so that it would be wholly inoperative, unless this was first done, and, indeed, the defendant himself says: "Nothing was settled as to when there would be adjustment of account." It was, in effect, an agreement to give a mortgage for the true amount of the indebtedness, whatever this might be; nor does the fact that the action was begun before the account was settled deprive the plaintiff of all right to relief. The true relief to which the plaintiff was entitled was (a) an account of the amount due, (b) the execution of a proper mortgage to secure this sum. (a) has now become immaterial, but their Lordships can find no sufficient ground for depriving the appellants of relief (b), and as the litigation has been in substance for the protection of the plaintiff's security they think the proper order as to costs is that the plaintiff's and the appellants' costs should be added to the security, and they will humbly advise His Majesty accordingly.

K. J. R.

Appeal allowed.

Solicitor for the Appellants:—Mr. H. S. L. Polak.

Note.—1. This decision settles an important point of practice which often arises in the subordinate Courts as to the legitimate use to be made of documents which are not, for some reason or other, admissible in evidence. For instance, s. 49 of the Indian Registration Act, 1908, and s. 35 of the Indian Stamp Act, 1899, lay down that certain documents shall not be admitted in evidence unless they have been duly registered or stamped, and yet it has been held that such documents may be handed to a witness to refresh his memory: see 8 Ind. Cas. 233 at p. 235; 51 P. L. R. 1910; 6 P. W. R. 1911 Per Sir Arthur Reid, C. J., and Mr. Justice Rattigan, and *Birchall v. Bullough*, (1896) 1 Q. B. 335; 65 L. J. Q. B. 252; 74 L. T. 27; 44 W. R. 300, Woodroffe and Ameer Ali's Evidence Act, 5th Edition, page 899.

2. It may be remarked that the document, of 5th February was not registered, but as it was merely an agreement to grant a mortgage, registration was not necessary: see s. 17, sub-s. (2) (v), Indian Registration Act, 1903, and 49 Ind. Cas. 231; 41 M. 939; 8 L. W. 438; 35 M. L. J. 489; 24 M. L. T. 315; (1918) M. W. N. 811.

3. There is some conflict of judicial opinion on the question whether the Court will decree specific

performance of a contract to take a loan of money on mortgage: see the authorities discussed in 49 Ind. Cas. 291; 41 M. 959; 8 L. W. 438; 35 M. L. J. 489; 24 M. L. T. 315; (1918) M. W. N. 811. In the case before the Privy Council, now reported, the object of the suit was not to compel the defendant to accept the loan, but to obtain the security for the money already advanced by the plaintiff, and that security having been promised by the document of 5th February, the defendant was held bound to fulfil it, and the decree which their Lordships passed in the plaintiff's favour was *in effect* for specific performance of the agreement for the mortgage: see Ghosh on Mortgage, 4th Edition, page 70 and Lord Halsbury's Laws of England, Vol. 21, page 75.—[K. J. R.]

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF NIGERIA.

June 27, 1927.

Present.—Viscount Haldane, Lord Atkinson, Lord Blanesburgh and Lord Warrington of Clyffe.

SUNMONU—DEFENDANT—APPELLANT
versus

DISU RAPHAEL, SINCE DECEASED (NOW REPRESENTED BY AWANOTU)—
PLAINTIFF—RESPONDENT.

Adverse possession—Joint family—Exclusive possession by one member—Possession for and on behalf of family—Acquisition of title under Statute of Limitation.

Where under the substantive law governing the parties, there is no individual ownership in land, the title to which is vested in the family, and the head of the family for the time being is a *quasi-trustee* for the members thereof, no title to the land can be acquired under the Statute of Limitation by mere length of possession. The party in possession (that is, the head of the family) is, in contemplation of law, holding for and on behalf of the family, and not on his own sole account. On his death, if one of his sons gets into possession, he too must be deemed to have got in consistently with a rightful title, that is to say, on behalf of his brothers and sisters and the family generally. Exclusive possession by him does not, therefore, confer on him a title under the Statute of Limitation. [p. 345, col. 2.]

Appeal from the Supreme Court of Nigeria.

JUDGMENT.

Viscount Haldane.—The appeal before their Lordships comes from the Supreme Court of Nigeria, and that Court affirmed a judgment of Mr. Justice Pennington, sitting as Judge of the Divisional Court.

The appeal is that of the defendant, and the defendant appeals on the ground that he was entitled to enforce his right to the property in question. The original respondent is dead and he is represented by Awanotu, a daughter, but she has not appeared on this appeal, whether from want of money or otherwise is not important. Anyhow those were the parties.

The claim was to land in Victoria Road at Lagos, and the claim was that of the plaintiff, who is called Disu Raphael, now deceased. Disu Raphael said that this was property which belonged to the family, and he claimed a declaration that the property was the property of Sule Raphael, deceased, his father, and he claimed it for himself and for the rest of the family of Sule Raphael. The defendant, Sunmonu, was a half-brother of Disu Raphael. They were both sons of Sule Raphael but by different mothers. It was claimed at one time that Sule Raphael had made a Christian marriage in Brazil with a Christian woman, and that consequently, according to the law of Nigeria, his property went according to English Law, so that his eldest son, Disu Raphael, would have been exclusively entitled. This, however, was not urged at the Bar, and could not have been successfully urged because both Courts concurred in finding that the Christian marriage was not established. There was, therefore, a native marriage, and, according to the native law the property which descended, that is the estate, went for the benefit of the family.

It is very important to have clearly in mind what the native law relating to the land in Lagos really is. It is the more important because there have been various misconceptions of that law in decisions from time to time, some of which have been cited in this case, but they were finally laid to rest by the decision in *Amodu Tijani v. Secretary of Southern Provinces Nigeria*. (1) a decision of this Board. At page 404* in the judgment of the Board the title to native lands is explained. It is stated that it is the characteristic of the native title that what has been called in native cases where similar questions arise, the radical title of the Crown applies, and the right of the native is a usufructuary right, and it is a usufructuary right which extends *prima*

(1) (1921) 2 A. C. 399; 90 L. J. P. C. 236.

*Page of (1921) 2 A. C.—[Ed.]

facie to the whole family. Their Lordships are aware that it is possible by special conveyancing to confer title on individuals in West Africa, but it is a practice which is not to be presumed to have been applied, and the presumption is strongly against it. *Prima facie* the title is the usufructuary title of the family, and whoever may be in possession of the legal title holds with it that qualification. The matter is very well stated in the report made by Chief Justice Rayner on Land Tenure in West Africa. It is a report made in 1898, and the passage to which reference is made is adopted by the Privy Council in the case of *Amodu Tijani v. Secretary of Southern Nigeria* (1) which is called the White Cap case. Chief Justice Rayner says:—

"The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family."

Their Lordships are aware that that was said of the title of the White Cap Chiefs. Their title was the question in that case, but the principle applies generally.

Sunmonu was sued in the way stated by Disu Raphael, and he pleaded possession, the Statute of Limitations, and also purchase and the grant of the primary title to it. The history of the primary title is this: Before 1895, when Sule Raphael died, he had bought the land from Agebodeh, who had a Crown grant of it dated 1866, that is, he had a Crown certificate; he had no conveyance. It does not appear to have been usual in those days for the Crown to make grants; they granted a certificate of title. That was acquired by Sule

Raphael from Agebodeh*, and he took over the Crown document at the death of Sule Raphael Sunmonu and other members of the family were in possession. Shortly afterwards the others departed, leaving Sunmonu in sole possession. In 1905 Sunmonu went and got a fresh primary title for himself. He surrendered the old one and got a new document comprising the land in question and additional land.

Now various things were set up. Sunmonu said he had purchased from his mother, the widow of Sule Raphael; but the Courts below agreed in pointing out that the lady could have no right to sell, and that, more than that, the Land Officer of the Crown, the Commissioner, would have had no power to grant a new title which varied or superseded the old one, and the new grant must, therefore, be regarded as made to Sunmonu on behalf of the family, and they also said that there was no evidence of acquiescence in exclusive occupation by Sunmonu to the exclusion of the other members of the family. The usufruct remained right through, whether they exercised it or whether they did not, and it was quite usual for somebody to be in possession as trustee for his family, and, therefore, his occupation was in contemplation of their right.

The Courts agreed in finding the facts as stated, and what they say is well expressed in the concluding paragraph of the judgment of Chief Justice Vander Meulen. The result is that Sunmonu must be taken to have got inconsistently with a native title and to have got in on behalf of his brother and sisters and the family generally.

In that state of things no Statute of Limitations could render any assistance to the appellant; there is no evidence about acquiescence, and the result is that their Lordships do not feel themselves able to disturb the judgments of the Court below, which are unanimous.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed. As the respondent has not

*There appears to be an error in punctuation here. The passage should read thus: "That was acquired by Sule Raphael from Agebodeh, and he took over the Crown document. At the death of Sule Raphael Sunmonu and other members of the family were in possession".—[K. J. R.]

appeared there will be no order as to costs.

K. J. R.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. Lawrence, Jones & Co

Note.—This decision follows the principle recognized in such cases as *Corea v. Appuhamy*, (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836 (an appeal from Ceylon) and 47 Ind. Cas. 626; 58 P. W. R. 1918; 64 P. R. 1818; 24 M. L. T. 389; 28 C. L. J. 437; 20 Bom. L. R. 1064; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.) (*Hardit Singh v. Gurmukh Singh*, an appeal from the Punjab Chief Court), namely, that "possession is never considered adverse if it can be referred to a lawful title."—[K. J. R.]

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF
TRINIDAD AND TOBAGO.

July 21, 1927.

Present:—Viscount Haldane, Lord Atkinson, Lord Blanesburgh, Lord Darling and Lord Warrington of Clyffe.
THE ROYAL BANK OF CANADA—
PLAINTIFF—APPELLANT

versus

JOSEPH SALVATORI—DEFENDANT—
RESPONDANT.

Construction of instruments—Principles.

The principles on which the Courts of Law act in construing an instrument in writing (and an Act of the Legislature is such an instrument), specially where its language is ambiguous, are these: In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used.

Observations of Lord Blackburn in *Wear River Commissioners v. Adamson* (1), relied on.

Appeal from the judgment of the Supreme Court of Trinidad and Tobago, dated the 24th February, 1926, dismissing with costs an action brought by the appellants against the respondent upon a guarantee signed by the latter and dated the 23rd March, 1921. By an order of the Supreme Court, dated the 21st June, 1926, final leave to appeal to His Majesty in Council was granted to the appellants.

JUDGMENT.

Lord Atkinson.—[For the purposes of this report, only the following extracts are material:—]

The instrument of guarantee is, with the exception of the last clause of it, a printed

document. Before dealing with the construction of its language, it is necessary to consider the condition of things out of which it sprung, and the objects apparently designed by the parties to it to be effected by it. It is only necessary to set out at length the first and last clauses of this deed of guarantee. They were as follows:—

Their Lordships do not think that the language of this deed is so ambiguous as the appellants contend that it is, but if it be so, then they think that the key to its construction is that laid down by Lord Blackburn, *Wear River Commissioners v. Adamson* (1). In the report he expressed himself thus:—

"...though no doubt the principles of construction of Statutes laid down by this House in the present case must have an important effect on those who have to construe that or any other enactment. My Lords, it is of great importance that those principles should be ascertained; and I shall, therefore, state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing; and a Statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used...."

Adopting that rule of construction, it is impossible, in their Lordships' view, having regard to the circumstances out of which the deed of guarantee arose, and in reference to which its language was used, to suppose that what was intended was that these broken and insolvent traders, the firm, should get no help from the Bank beyond leaving their account open, merely continuing to carry the liability, as Connell phrases it. The learned Judge, Mr. Justice Adrian Clark, said that the words "*continuing to deal with Antoni Brothers in the way of its business as a Bank*" must involve some bona fide fresh transaction between the parties." Their Lordships concur with him in this view. "They think it is impossible to confine these words to merely keeping the account of this firm open, that is,

(1) (1878) 2 A. C. 743; 47 L. J. Q. B. 193; 37 L. T. 543; 26 W. R. 217.

merely receiving payment from any one who chooses to pay in money to the Bank to the firm's credit...."

K. J. R.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. Ashurst, Morris, Crisp & Co.

Solicitors for the Respondent:—Messrs. Slaughter & May.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT OF AUSTRALIA.

July 4, 1927.

Present:—Viscount Haldane, Viscount Sumner, Lord Shaw, Lord Darling and Lord Warrington of Clyffe
GEORGE RICHARDS LAFFER—
DEFENDANT—APPELLANT

versus

FRANCIS ARNOLD GILLEN—PLAINTIFF
—RESPONDENT.

Contracts—Construction of agreements—Principles.

Where the question at issue is entirely one of construction of a particular agreement, it can only be properly answered after a consideration of all the surrounding circumstances, the position of the parties to the agreement, its subject-matter, and the apparent purpose and object thereof, and, in particular, of the provisions to be construed.

Appeal from the High Court of Australia.

The respondent, as plaintiff, instituted the present action against the appellant, as defendant, claiming damages. The action was tried by Poole, J., who by his judgment dated the 17th April, 1924, decided in favour of the respondent.

On appeal to the Full Court this judgment was reversed by Murray C. J., and Angus Parsons and Napier, JJ., who by their judgment dated the 12th August, 1924, allowed the appellant's appeal and ordered the respondent to pay the costs of the action.

The respondent appealed to the High Court of Australia, who, on the 17th December, 1925, by a majority (Higgins, J., dissenting), allowed the appeal and restored the judgment of Poole, J.

The present appeal was brought by special leave of His Majesty in Council.

JUDGMENT.

Warrington of Clyffe.—[The question turned upon the construction of an

agreement purporting to be made between the Minister of Repatriation of and for the State of South Australia contracting for and on behalf of His Majesty the King, thereafter called the vendor, of the one part and the respondent, thereafter called the purchaser, of the other part. For the purposes of this report, only the following extract from the judgment is material:—]

"The question is entirely one of construction, and in common with all such questions can only be properly answered after a consideration of all the surrounding circumstances, the position of the parties to the agreement, its subject-matter, and the apparent purpose and object thereof, and in particular of the provisions to be construed."

K. J. R.

Appeal allowed.

Solicitors for the Appellant:—Messrs. Sutton, Ommanney & Oliver.

Solicitors for the Respondent:—Messrs. Syrett & Sons.

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY.

June 16, 1927.

Present:—Viscount Haldane, Lord Shaw and Lord Warrington of Clyffe.

MANCHE ANEGE AKUE—APPELLANT

versus

MANCHO KOJO ABABIO IV—
RESPONDENT.

Land Acquisition Act (1 of 1894)—Rival claims to compensation—Burden of proof of title—Presumption in favour of person in possession.

Where land is compulsorily acquired by the Government for public purposes, and rival claims are made in respect of the compensation awarded for such land, the *prima facie* title to the money is with the party who was in sole and exclusive possession of the land at the time of its acquisition by the Government, and the onus is on the party claiming that he has a better or superior title to such money to prove such title.

Appeal from the Supreme Court of the Gold Coast Colony.

JUDGMENT.

Lord Warrington of Clyffe.—The subject-matter of the litigation in which the present appeal arises is a sum of money representing the purchase money.

paid by the Government of the Colony for certain lands taken by them for public purposes under statutory powers.

Rival claims were made to this money. The appellant, the Manche or Chief of Sempe, claiming on behalf of communities known as Sempe and Akumaji, asserts that those communities are entitled to share in the fund. The respondent, the Manche of James Town and also the Manche of Alata asserts, that he, as Manche of Alata, is solely entitled to the fund on behalf of that community.

On the 24th July, 1918, the Divisional Court, consisting of the Chief Justice, Sir Phillip Crampton Smyly rejected the claim of the appellant and gave judgment in favour of the respondent. On the 16th May, 1924, this judgment was unanimously affirmed by the Full Court, composed of Michelin, J., and acting Judges Gardiner Smith and Aitken. Leave to appeal from this judgment to His Majesty in Council was obtained on the 18th August, 1924.

The town of Accra consists of three divisions, of which one is James Town. Each division has a Manche, or Chief, who is himself subordinate to a superior Chief called the Ga Manche. The respondent is the Manche of James Town.

James Town is divided into three quarters, known as Sempe, Akumaji and Alata respectively, each with its own Manche subordinate to the Manche of James Town. The appellant is the Manche of Sempe. The respondent, as Manche of James Town, claims to have vested in him all property belonging to any of the three stools of Sempe, Akumaji and Alata. This claim was formerly disputed by the Manche of Sempe, but was upheld by a judgment of the Full Court in an action by the present respondent against one Quartey.

The question at issue is whether the lands, the purchase money for which is the subject of the litigation were lands of the three quarters of Sempe, Akumaji and Alata in Common or of the quarter of Alata alone.

According to a tradition which appears to be accepted by both sides, the Alata people came into the country with one Wetse Kojo, from Lagos in or about the year 1642. They assisted the Sempe and Akumaji people in their wars with a neighbouring tribe, and as the result the lands of the Sempe and Akumaji people were placed under the stool of Wetse

Kojo, and he and his successors thus became not only Manches of Alata, but also Manches of James Town. It was found as a fact by both Courts in the Colony that the lands in question were exclusively used and occupied by the Alatas, and it was admitted by Counsel for the appellant that the finding means that those lands were originally settled by the Alatas, the several villages and so forth being founded by them. This finding is accepted by the appellant.

It was further found by both Courts that by the custom of the Ga tribe land which had been exclusively used by the inhabitants of a particular quarter of James Town belonged exclusively to that quarter.

At the trial, the contest appears to have been mainly in reference to the question of the exclusive use and occupation by the Alatas, and it does not seem to have been seriously disputed that if this were established the result mentioned above would follow.

In their Lordships' opinion no ground has been shown for interfering with the decisions of the Courts below, and the appeal, therefore, fails.

The appeal might be decided on the further ground that inasmuch as the land was, when taken by the Government, in the exclusive use and occupation of the Alatas, the appellant must, in order to succeed, establish that he has a better title than the respondent; in other words, that the onus is entirely on him and that he wholly fails to discharge himself thereof.

On either ground the appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

K. J. R.

Appeal dismissed.

Solicitors for the Appellants:—Messrs. Ashurst, Morris, Crisp, & Co.

Solicitors for the Respondent:—Messrs. Monro, Saw & Co.

Note.—It does not appear that the law of Gold Coast is, in this respect, different from that which prevails in this country. It was decided by the Calcutta High Court as far back as the year 1868 that the person entitled to compensation is the person from whom the land is taken, i.e., to say, the party in possession at the time is *prima facie* entitled, until some one else establishes a better claim: see 10 W. R. 48 and 10 W. R. 391.—[K. J. R.]

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

December 8, 1927.

Present:—Viscount Sumner, Lord Atkinson,
Lord Sinha, Sir John Wallis and
Sir Lancelot Sanderson.

R. ARUNOHALA NAYADU—APPELLANT
versus

S R. BALAKRISHNA AND COMPANY—
RESPONDENTS.

Practice—Appellate Court—Finding of fact of trial Judge, not liable to be interfered with on appeal except for cogent reasons.

Where the trial Judge has had the opportunity of seeing the witnesses and hearing them give their evidence, he is in a much better position to gauge the truth and value of the oral evidence than the Judges of the Appellate Court, and, consequently, a finding of fact arrived at, on such evidence, by the trial Judge ought not to be interfered with by the Appellate Court except for cogent reasons.

Consolidated appeals from one judgment and two decrees of the High Court, Madras (Phillips and Venkatasubba Rao, JJ.) dated the 23rd April, 1924, reversing the judgment of the Subordinate Judge, South Malabar, dated the 29th September, 1920.

Mr. Dube, for the Appellant.

Messrs. De Gruyther, K. C., and Kurup,
for the Respondents.

JUDGMENT.

Sir Lancelot Sanderson.—[For the purposes of this report, only the following extracts from the judgment are material:—] The High Court held that the evidence of the cartmen relating to the delivery of the seven red cedar logs was worthless, and that it was extremely unsafe to rely upon a receipt which the appellant's witnesses alleged had been given by the respondent's servant, which was Ex. LXII (c).

The learned Subordinate Judge, who tried the suit and who had the opportunity of seeing the witnesses and hearing them give their evidence, said as follows:—

"There is no reason to think that Ex. LXII (c) was not signed by the Moopan and that the witnesses examined by the defendant (now the appellant) are giving false evidence. I believe the evidence adduced by the defendant and find that seven red cedar logs mentioned in invoice No. 143 were received by the plaintiffs (now the respondents)."

Their Lordships having considered the evidence, both oral and documentary, on this

question, are of opinion that no sufficient reason has been shown for interfering with the finding of fact of the learned Subordinate Judge, who was in a much better position to gauge the truth and value of the oral evidence than the learned Judges of the High Court.

In their Lordships' opinion, therefore, the appellant must be credited with the value of the seven red cedar logs, which appears from the evidence to have been Rs. 464.

K. J. R.

Appeal allowed.

Solicitors for the Appellant:—Mr. H. S. L. Polak.

Solicitors for the Respondents:—Messrs. Douglas, Grant & Dold.

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY.

May 5, 1927.

Present:—Viscount Haldane, Lord Shaw
and Lord Warrington of Clyffe.

KOJO PON—PLAINTIFF—APPELLANT
versus

ATTA FUA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 10—Security for costs of appeal—Security bond not properly executed—Authority of appellant's representative to sign bond—Appellate Court's duty to afford proper opportunity to appellant to cure defect—Adherence to mere technicalities—Defeat of substantial justice.

An Appellate Court made an order on the appellant for furnishing security for costs of the appeal within a specified time, and the appellant in compliance therewith gave security and executed the necessary bond, which was duly accepted by the Registrar of the Court. After various intermediate proceedings, the case finally came on for hearing before the Appellate Court, when the respondent took the preliminary objection that the security furnished by the appellant was not in strict compliance with the order of the Court, inasmuch as it had not been proved that the party executing the security bond on behalf of the appellant had authority so to do. The Appellate Court gave effect to this contention and forthwith dismissed the appeal without going into the merits of the case.

Held, that the refusal to hear the appeal merely on the ground of what might have been a mere

technicality about the bond led to a failure of justice, and that the Appellate Court should have afforded a proper opportunity to the appellant, by adjourning the appeal, if necessary, to remedy the defect, if any, in the security bond. [p. 351, col. 2.]

Where it appeared that the security bond was signed, not by the appellant himself, but by a person purporting to act as his representative, and the question arose whether such person had the requisite authority on behalf of the appellant to execute the bond:

Held, that the appellant was entitled to an opportunity to prove by affidavit or otherwise that the bond was properly executed and that the party executing it had authority in that behalf. [*ibid.*]

Appeal from the Supreme Court of the Gold Coast Colony.

The material facts appear from their Lordships' judgment.

JUDGMENT.

Viscount Haldane.—In this case their Lordships have the difficulty, which imposes the necessity of great caution, that the appeal comes here *ex parte*. Consequently they felt it right to look very minutely at what has been said and at the particular rules that concern it; nevertheless, on those rules and on what has transpired, they think that there is sufficient before them to enable them to deal with the case at once.

The appeal is brought from a judgment of the Supreme Court of the Gold Coast Colony, which had to entertain an appeal from the judgment of Sir Philip Cramp-ton Smyly, the Chief Justice. Sir Philip Cramp-ton Smyly had non-suited the plaintiff in an action on the ground of want of jurisdiction, and the appeal really involved the whole merits. It raised an elaborate question as to the title to native lands. When the present appellant proposed to appeal to the Supreme Court of the Gold Coast he had, of course, to conform with what the Rules of Court required; and he applied for and obtained from the Divisional Court conditional leave to appeal against the judgment of the Chief Justice, subject to certain conditions being fulfilled within one month of the date of his application. Among these conditions was this, that £100 was to be paid into Court to await any order as to costs that might be awarded to the respondent by the Appeal Court in the case of his success, or a bond was to be entered into with

two sureties to be justified in the sum of £50 each. It was on the 7th July, 1922, that that order was made, and the appellant proceeded to enter into the bond prescribed by the order. There is no doubt, their Lordships think, that it was quite in accordance with the rules to prescribe this. The Rules of Court are enlightened and comprehensive and they give practically all the powers that the Courts here have. Under O. V of the First Schedule to the Rules there is a direction that "the Court may in all causes and matters make any order which it considers necessary for doing justice," whether such order has been expressly asked by the person entitled to the benefit of the order or not."

Then there is a series of further rules contained in O. XI, which are, again, very comprehensive.

"When by the rules of the Schedules of this Ordinance any act may be done by any party in a suit, such act may be done either by the party in person, or by his Solicitor or agent, if it can be legally done by an agent."

Under O. LIII, of Sch. II, the appellant has to give security for costs of an appeal; but that obligation is imposed only in very general terms. There are specific directions as to the powers of the Appeal Court to require security for costs, and then, generally, that they may make any order necessary for determining the real question in controversy in the appeal, and that there is full jurisdiction over the whole suit as if the same had been instituted and prosecuted in the Appeal Court as a Court of first instance, with power to give any judgment and make any order which ought to have been made, and to make such further order as the case may require.

That being the law and the plaintiff having been ordered to give security for the costs of his appeal, the plaintiff proceeded to enter into the bond which he was directed to execute. He was represented through the proceedings by Kwabena Asiamah and Kwabena Asiamah, who conducted the proceedings for him, executed the bond. When the bond was dated the 10th July, 1922, it provided

security for the costs of the appeal to the respondent if they were given to the respondent, and then, it was executed by Kwabena and two sureties in the presence of Mr. White, the Chief Registrar to the Court, and it purported to be executed by Kwabena as the representative of Kojo Pon. That was as long ago as 10th July, 1922, and, whether or not the parties knew about it, the Court must be taken to have known that their Registrar had accepted the security.

The case came on by degrees, and finally it was reached for hearing by the Court of Appeal in April, 1924, and it was heard and judgment was delivered by Mr. Justice Michelin, Mr. Justice Hall and Mr. Justice Gardiner Smith upon the 10th April, 1924. These learned Judges accepted a point which their Lordships think they ought not to have accepted. It was argued by Counsel for the respondent, by way of preliminary objection, that the conditions of appeal had not been fulfilled; inasmuch as the bond for the costs of the appeal was not signed by the appellant, but by Kwabena, purporting to act as his representative. It was argued that the Court having granted only conditional leave to appeal, it was incumbent on the plaintiff himself to execute the bond, and Kwabena could not execute the bond, unless he had first obtained an order from the Court authorising him to do so. The learned Judges held that, as regards the bond to be entered into with two sureties to be justified in the sum of £50 each, no proof had been given of the authority of Kwabena to execute on behalf of the appellant; the authority of Kwabena ought to be strictly proved; and the bond must, therefore, be taken to have been invalid and that the defect was fatal to the appeal.

Their Lordships wish to say that in cases coming before them from the Dominions of the Crown, their first consideration always is to secure, if possible, that substantial justice is done. That may not always be possible. There may be conditions in the local law or in the rules which preclude the possibility of getting round technical obstacles and doing complete justice. But they think that in the case of the rules of procedure in the Gold Coast Colony there are no such obstacles,

The Court was invested with the widest powers, and it might have adjourned the hearing of the appeal until a proper bond was executed, or it might have said that an affidavit was sufficient; and that was the more incumbent on the Court because its own Registrar had accepted the bond executed by Kwabena on behalf of the appellant.

Under these conditions their Lordships think that to refuse to hear the appeal merely on the ground of what might have been a mere technicality about the bond was to fail to do justice as between the parties, and they are of opinion that the case must be remitted to the Court below to deal with it again, hear it, and, if necessary, get some formal proof of Kwabena's authority; but, as at present advised, their Lordships do not think that necessary inasmuch as Kwabena's authority was accepted by the Registrar, and inasmuch as he had acted right through, and nobody till the other day ever challenged his authority. However that may be dealt with by the Court below, if they think it necessary to deal with it at all. For the present it is enough to say that the case must go back and be heard out.

Then comes the question of what to do with the costs of this appeal. It has only been *ex parte* before the Board, and it may be that the appeal will not be fruitful; it may so turn out.

Their Lordships, therefore, think that the right course will be that the appellant's costs should be included in any costs he may recover in the Court below. If he recovers no costs in the Court below, he will not get any costs of this appeal, but he will not have to pay any costs. On the other hand, if he succeeds, he will get these costs. Their Lordships will humbly advise His Majesty accordingly.

K. J. R.

Appeal allowed.

Solicitors for the Appellant:—Messrs. Ashurst, Morris, Crisp & Co.

PRIVY COUNCIL.

APPEAL FROM HIS BRITANNIC MAJESTY'S
SUPREME COURT FOR CHINA AT SHANGHAI.

May 30, 1927.

Present:—Viscount Haldane, Lord Shaw
and Lord Warrington of Clyffe.

CARL FRANZ ADOLF OTTO INGENOHL

—PLAINTIFF—APPELLANT

versus

WING ON AND COMPANY (SHANGHAI),
LTD.—DEFENDANT—RESPONDENT.

Foreign judgments—Judgments in rem, conclusive effect of.

Generally speaking, it would be improper for a British Indian Court to review the judgment of a competent Foreign Tribunal. The broad principle applicable in such cases is that where the subject-matter is a *res* so situated as to be within the lawful control of the State under the authority of which a Court sits, and that authority has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within that jurisdiction, that decision is conclusive, whether, according to the law of another country, it might seem right or wrong.

Castrique v. Imrie (1), relied on.

Appeal by the plaintiff in an action brought in His Majesty's Supreme Court for China at Shanghai to restrain the respondents from passing off cigars not manufactured by the appellant as if they had been manufactured by him, and also to restrain the user of certain brands or trade marks used by the appellant to denote his own cigars by affixing them to other cigars, and the user, in the description of such other cigars, of certain words. The action was one to restrain passing off and also for infringement of trade mark.

During the course of the litigation an appeal was taken to the Supreme Court of the United States from a judgment of the Court of the Philippine Islands, and their Lordships of the Privy Council approved of the pronouncement of Holmes, J., (of the United States Supreme Court) to the effect that a judgment of the Hongkong Court, whether erroneous or not, was binding on the Philippine Courts and that the latter were not entitled to go behind it.

JUDGMENT.

Viscount Haldane.—[For the purposes of this report, only the following extracts are material:—] "Meantime, in August, 1922, the appellant had sued Olsen & Co. in the Supreme Court of the Philippine Islands to recover the costs awarded him by the Court in Hongkong.

The trial Judge decided in the appellant's favour and the Court of Appeal reversed this judgment, holding that the judgment of the Hongkong Court was erroneous and not binding on the Philippine Courts. Since then, on appeal to the Supreme Court of the United States, an appeal from this decision has been allowed. Holmes, J., who delivered the judgment of the Supreme Court, held, in language of characteristic precision, that it would be improper for a foreign Court to review the judgment of the Hongkong Court about the rights of the appellant in the trade marks and names in Hongkong. In this he appears to have been applying a broad principle which has been fully recognised in this country in such cases as *Castrique v. Imrie* (1), that where the subject-matter is a *res* so situated as to be within the lawful control of the State under the authority of which a Court sits, and that authority has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within that jurisdiction, that decision is conclusive, whether, according to the law of another country, it might seem right or wrong."

K. J. R.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. Henry, Hilbery & Sons.

Solicitors for the Respondent:—Messrs. Stephenson, Harwood & Tatham.

(1) (1870) 4 H. L. 414; 39 L. J. C. P. 350; 23 L. T. 48; 19 W. R. 1.

Note.—This case, although an appeal from China, follows the principles recognized by the English Courts, and, as pointed out by Collins, C. J., and Benson, J., in 20 M. 112; 7 M. L. J. 76; 7 Ind. Dec. (N. S.) 79, in matters of foreign judgments the Courts in this country are guided by very much the same principles as those adopted by the Courts of England.

As regards judgments *in rem*, and foreign judgments generally, see s. 41 of the Indian Evidence Act, 1872, and ss. 13, 14, Civil Procedure Code, 1908. —[K. J. R.]

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 105 OF 1927.

March 23, 1927.

Present—Mr. Justice Cuming and
Mr. Justice Graham.

CARMEN—PETITIONER

versus

O'BRIEN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 29-A, 528-A, 529-A—European British subject—Claim to be tried as such, when to be made—Duty of Magistrate.

A claim to be dealt with as a European British subject under ss. 29-A, 528-A and 529-B of the Criminal Procedure Code must be made before the trial or enquiry has actually commenced, and if it is not then made, it cannot be made at any subsequent stage. [p. 353, cols. 1 & 2; p. 355, col. 1.]

Per Cuming, J.—A Magistrate is not bound to ask an accused who is apparently a European British subject whether he claims to be tried as such, so far as cases coming within Chap. XLIV-A of the Criminal Procedure Code are concerned. [p. 355, col. 1.]

Criminal revision against the order of the Additional District Magistrate, 24-Parganas, dated the 10th January, 1927.

Mr. Swinhoe (with him Babu Bir Bhusan Dutt and Sudhirendra Nath Bose), for the Petitioner.

Mr. S. K. Sen (with him Babu Debendra Nath Bhattacharji), for the Opposite Party.

JUDGMENT.

Cuming, J.—The facts of the case out of which this Rule arises are briefly as follows. On the 18th of October the petitioner in this Rule obtained a warrant against the opposite party under s. 406 of the Indian Penal Code in the Court of the Police Magistrate at Alipura. On the 9th November the case was made over by the Police Magistrate, Mr. Mahmood Ali, to Mr. S. O. Gupta for disposal. Mr. S. O. Gupta is a Magistrate exercising the powers of a Magistrate of the Second Class. Mr. Gupta began the trial on the 9th November, when he examined one prosecution witness and adjourned the case till the 10th, when three more prosecution witnesses were examined. The trial proceeded also on the 22nd November, when the accused was questioned and the charge was framed. The learned Magistrate then asked the accused if he claimed trial as a European British subject. The learned Magistrate was apparently under the impression that he was obliged to ask an accused, who apparently was a European British subject, whether he claimed to be tried as such. I may point out here that such a procedure is no longer necessary, so far as a case

which comes within Chap. XLIV-A of the Criminal Procedure Code is concerned. The accused apparently then stated that he did not desire to be so tried. His Counsel then filed a petition claiming to be tried as a European British subject. Apparently he subsequently waived this claim and stated that he desired to cross-examine the complainant next day, and his client would waive his right to be dealt with as a European British subject. The case was then continued on the 24th November, when more witnesses were examined and cross-examined, and the case was continued on the 25th and 27th of November and 4th and 21st of December. On the 21st of December the accused once more claimed the right to be dealt with as a European British subject. The learned Magistrate holding that he had already been asked whether he claimed this right and had waived this right, rejected the application.

The accused then asked for time to move the District Magistrate or the Appellate Court for a decision on the point. This, however, was refused, and the case was continued. The accused then seems to have moved the Additional District Magistrate for a transfer of the case to the file of a First Class Magistrate, the contention of the accused being that as a European British subject under s. 29-A of the Criminal Procedure Code he was entitled to be tried by a Magistrate of the First Class. The complainant, opposite party, contended before Mr. Blair, the Additional District Magistrate, that as the accused had waived his right to be so tried he could not now re-assert it. Mr. Blair, however, held that the right might be exercised by the accused any time up to the time when the Court was going to pass judgment in the case. He further held that it was open to him to revive his claim even though he specifically abandoned it. In this view of the law he withdrew the case from the file of Mr. S. O. Gupta and made it over to Mr. Alfred Bose, a Magistrate exercising first class powers.

The complainant has moved this Court, and she contends first of all that the claim to be dealt with as a European British subject, in other words, in this particular case, that the case should be heard by a First Class Magistrate, must be made before the trial actually began; and, secondly, she contends that once the accused has waived his

right to be dealt with as a European British subject or in other words, to have his case tried by a Magistrate of First Class powers, he cannot revive his right.

The Rule has been granted on four grounds, first, that the learned Additional District Magistrate is wrong in holding that the claim to be tried as a European British subject, in a case contemplated by ss. 29-A, 528-A and 528-B of the Criminal Procedure Code, could be made at any time before judgment is delivered: secondly, that the learned Additional District Magistrate acted without jurisdiction in using the provisions of s. 528 of the Criminal Procedure Code, for the purpose of getting over an order which under the Code he could not do before the final orders in the case were passed: thirdly, that the learned Additional District Magistrate should have held that a claim to be tried as a European British subject, under ss. 29-A, 528-A and 528-B of the Criminal Procedure Code, had to be made at the very beginning of the trial, and if the claim so made was disallowed by the trial Court the remedy against the order disallowing the claim lay before the Court which would hear the appeal after a conviction or other order in the said case had been passed: and, lastly, that the accused having once waived his right, the learned Additional District Magistrate should have held that the accused having once waived his right could not re-assert it in a later stage of the same case.

The decision of this Rule turns upon the interpretation to be put upon ss. 528-A and 528-B of the Criminal Procedure Code. These sections are new, and hitherto have not formed the subject-matter of judicial interpretation. Hence the question may be considered as one of more or less of first impression. Section 29-A provides that "no Magistrate of the Second or Third Class shall inquire into or try any offence which is punishable otherwise than with fine not exceeding fifty rupees where the accused is an European British subject who claims to be tried as such." The point is, as I have already said, when that claim is to be made. Section 528-A provides that where, in any case to which the provisions of Chap. XXXIII do not apply, any person claims to be dealt with as a European or Indian British subject, or where any person claims to be dealt with as a European (other than a European British subject) or an American, he shall state the grounds of such claim to

the Magistrate before whom he is brought for the purpose of the inquiry or trial and such Magistrate shall inquire into the truth of such statement.....". Mr. Swinhoe, who has argued this case on behalf of the petitioner, has contended that these words make it quite clear that the accused must exercise his option to claim the privilege under s. 29-A of the Criminal Procedure Code before the trial actually commenced. Mr. Sen, who has appeared for the opposite party, on the other hand, contends, looking at the analogy of s. 451-A, that the accused may apply at any time before the judgment is pronounced by the Magistrate. He points out that under the old Code, under s. 451-A, this privilege might be claimed in a summons case at any time before the accused was heard in defence or in a warrant case before he entered on his defence, and the learned Counsel's argument is that, as no such limitations are put down in the present s. 528-A, the Legislature intended that the privilege might be claimed at any time before the judgment is pronounced.

Apart from the manifest inconvenience which must follow, if Mr. Sen's contention is correct, I think it is quite clear, reading the sections as we have them that the Legislature intended that the claim should be made before the trial or inquiry actually commenced. The words used are "he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial." I understand these words to mean that he should make his claim as soon as he is brought before the Magistrate for the inquiry or trial, that is to say, before the inquiry or trial is commenced. Mr. Sen argues from s. 528-B that the claim may be made at any time during the trial, because we find in that section the following expression: "If in any such case an European or Indian British subject or an European (other than an European British subject) or an American does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed," and Mr. Sen argues from that that the claim may be made at any time during the trial before the Magistrate. I do not think that these words really support Mr. Sen's contention. I am inclined to think, reading the section as a whole, that these words refer to the case of a person who has been tried or whose case has been inquired into, but

who has not claimed the privilege. Section 528-B deals, I think, with the case of a person whose case has reached either the appellate stage or the trial in the Court to which he has been committed.

I do not think that any useful purpose will be served by considering the sections as they stood in the various Acts at various times. The sections are, I think, by themselves reasonably clear. There is no doubt that the claim must be made before the inquiry or trial actually begins so far as a case which falls within Chap. XLIV-A is concerned.

That being so, it is unnecessary for us to determine whether the accused, having once waived his right to so claim, can revive that claim and be ordered to be tried as a European British subject. In the present case, not having made his claim when he was first brought before the Magistrate for the purpose of trial or inquiry, it was not open to revive or make it at any subsequent stage. In this case admittedly he made no claim at that stage.

The Rule is, therefore, made absolute. The order of the learned Additional District Magistrate is set aside, and the case will be re-transferred to the file of Mr. S. C. Gupta to be continued from that point where the learned Magistrate left off the trial of the case, and the case disposed of without any further delay.

Graham, J.—I agree with my learned brother. One of the points for decision is as to the stage when the claim to be dealt with as a European British subject should be made. The learned Counsel on behalf of the opposite party argued that that claim could be made at any time up to the delivery of judgment, and in support of his argument referred to the previous history of the Criminal Procedure Code, and to certain authorities.

It appears to me that unless the sections of the Code as it now stands are held to be obscure, we should not be justified in referring to the previous legislation. In my opinion on a proper construction of the sections of the Code, as it now stands, and in particular ss. 528-A and 528-B, it seems to be clear that the intention is that the claim shall be made at the commencement of the inquiry or trial as the case may be, and that if it is not then made it cannot be asserted at any subsequent stage. The question of status involves the mode or venue of trial, and it is in accordance

with the fitness of things that the claim should be made at the outset.

The authorities to which reference has been made relate to the former Code, and in particular to s. 451 of the old Criminal Procedure Code, which has now been repealed. They do not, therefore, give us any assistance.

In my judgment there was a failure in this case to make the claim at the time contemplated by the Code, possibly due to the fact that the provisions of the new Code on the subject were not at the time appreciated.

I concur in the order which my learned brother proposes to make, and agree that the Rule should be made absolute.

A. N. A.

Rule made absolute.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 722 of 1925.

July 20, 1927.

Present:—Sir George Claus Rankin,
Kt., Chief Justice, and Mr.
Justice Mitter.

BHODAI SHEIKH—DEFENDANT—
APPELLANT

versus

BARADA KANTA DUTTA—
PLAINTIFF—RESPONDENT.

Mortgage—Prior and puisne mortgages—Purchaser under puisne mortgage, whether entitled to unconditional decree for possession against purchaser under prior mortgage—Power of Court to order redemption—Multiplicity of suits, avoidance of.

In a suit for ejectment by a purchaser in execution of a decree on a puisne mortgage against a purchaser under a decree on a prior mortgage, the rights of the parties as purchasers under the two mortgage-decrees respectively should be determined and the plaintiff should be given a decree for possession only on condition of redeeming the defendant. [p. 356, cols. 1 & 2.]

Kalu Sharif v. Akhoy Charan Karmokar (1) and Bhagaban Chandra Kundu v. Tarak Chandra Basak (2), relied on.

Appeal against the decree of the District Judge, Murshidabad, dated the 10th February, 1925, affirming that of the Munsif, Jangipur, dated the 18th December, 1923.

Dr. Jadu Nath Kanjilal, Babus Subodh Chandra Dutt and Tridib Nath Roy, for the Appellant.

Babū Gopendra Nath Das, for the Respondent.

JUDGMENT.

Mitter, J.—This is an appeal from a decision of the District Judge of Murshidabad, dated the 10th of February, 1925, which affirmed a decision of the Munsif of Jangipur, dated the 18th of December, 1923.

The appeal arises out of a suit commenced by the plaintiff to recover possession of a plot of 2 *bighas* 6 *cottas* and odd in area. The case of the plaintiff is that this land originally belonged to one Jhabu Sheikh who mortgaged this plot along with three other plots to one Bogdad Biswas in the year 1900. In 1908 Jhabu mortgaged plot No. 1 with the plaintiff. The plaintiff instituted a suit on his mortgage and obtained a decree in the year 1915, and in execution of that decree he purchased plot No. 1 on the 19th of August, 1916. Sometime in 1920 Bogdad obtained a decree on his mortgage with reference to the four plots mortgaged to him and in execution of that decree he purchased the mortgaged property, namely, the four plots. On the 9th of December, 1920, he sold this property to the present defendant. The plaintiff alleges that he was dispossessed by Bogdad—the first mortgagee. There was a proceeding under Order XXI, r. 100 of the Code of Civil Procedure at the instance of the plaintiff in which he succeeded. On the 7th of March, 1921, the plaintiff recovered possession, but he was again dispossessed in June, 1921. He brought a suit under s. 9 of the Specific Relief Act in which he failed. Consequently he commenced the present suit for possession of the property, now in suit.

Both the Courts below have decreed the plaintiff's suit and granted him possession in respect of the disputed land.

In this second appeal it has been contended by the learned Advocate for the defendant that the plaintiff can only obtain possession conditional on his redeeming the first mortgage in which Bogdad, the original mortgagee, was interested and whose right has now passed to the defendant by his purchase. The question which we have to determine is whether the plaintiff is entitled to a decree for possession without any condition, or whether he can only succeed on his redeeming the first mortgagee or the defendant, who now stands in the shoes of the first mortgagee. But the lower Courts seem to think that this relief cannot be given to the defendant in the present

suit. I think that the Courts below are clearly wrong. It is not necessary to have another suit in which the right between the plaintiff and the defendant as purchasers in execution of the two mortgage-decrees respectively should be determined. The matter can be determined in the present litigation and to avoid multiplicity of suits it is desirable that the matter should be determined in the present suit.

In these circumstances, I think that the decree of the trial Court as affirmed by that of the lower Appellate Court should be varied by an order that the plaintiff would be entitled to recover possession conditional on his redeeming the first mortgage within a certain time to be fixed by the trial Court. The case, therefore, is remitted to the Court of first instance for the purpose of fixing the time during which the plaintiff would be allowed to redeem the first mortgage of the year 1900 and also for determining upon what terms he would be allowed to redeem.

Rankin, C. J.—I agree. I should like to say that, in my opinion, the true law in this matter is laid down in the case of *Kalu Sharif v. Akhoy Charan Karmakar* (1) and in the case of *Bhagaban Chandra Kundu v. Tarak Chandra Basak* (2). As regards the point about the order under O. XXI, r. 100, Code of Civil Procedure, the plaintiff at that time was in possession and the order under that rule was made originally in his favour because he could not have been ejected by the first mortgagee. There was no need to bring a suit to set aside that order which was perfectly right. Since then the plaintiff got out of possession and he failed under s. 9 of the Specific Relief Act and, therefore, he has come before the Court not merely on the basis of his own possession which is gone but on the merits of the claim, which makes all the difference. That makes applicable the two cases to which I have referred.

In this case the Munsif's order giving the plaintiff the costs of the trial must be varied and the order for costs before the Munsif will be that each party will bear his own costs. But the plaintiff must pay the costs of the two appeals and those costs will be added to the sum due on the mortgage, so that the plaintiff would have to pay those

(1) 62 Ind. Cas. 445; 25 O. W. N. 253.

(2) 100 Ind. Cas. 420; 45 O. L. J. 4; A. I. R. 1927 Cal. 259.

as a condition of redeeming. If the plaintiff, however, in the end fails to redeem, then he must pay the costs in all Courts.

A. N. A.

Appeal allowed;

Decree varied.

CALCUTTA HIGH COURT.

CIVIL REVISION Nos. 952 AND 953 OF 1926.

April 11, 1927.

Present:—Mr. Justice Panton and

Mr. Justice Mitter.

KRISHNA CHANDRA DUTTA

CHOWDHURY AND OTHERS—JUDGMENT-

DEBTORS—PETITIONERS

versus

DINA NATH BISWAS—DECREE HOLDER—

OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), s. 170—Patni tenure—Transfer of holding—Attachment of portion of holding under decree for arrears of rent against transferor—Claim by transferee, maintainability of—Transferee, whether representative of transferor—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58.

Section 170 of the Bengal Tenancy Act does not apply where a portion only of a tenure is attached in execution of a decree for arrears due in respect of the whole tenure. [p. 357, col. 2; p. 358, col. 1.]

Chandra Sekhar Patra v. Rani Manjhee (1), relied on.

A person who has purchased the interest of a *patni* tenant prior to a decree for rent obtained by the landlord against the tenant is bound by the decree, and is a representative of the judgment-debtor within the meaning of s. 47 of the Civil Procedure Code. He cannot, therefore, prefer a claim under O. XXI, r. 58 of the Code to an attachment of the tenure in execution of such a decree. [p. 358, col. 2.]

Surendra Narain Singh v. Gopi Sundari Dasi (4), relied on.

Where a *patni* tenure is transferred, until the transferee's name has been registered, the transfer does not affect the *zemindar's* right and, in spite of the transfer, the landlord may ignore the transferee and may continue to hold the recorded tenant responsible for the rent and other obligations imposed on the tenure. [p. 359, col. 1.]

Joykrishna Mukhopadhyā v. Sarfannassa (2) and *Luckhinarain Mitter v. Khettro Pal Singh Roy* (3), relied on.

Mr. Atul Chandra Gupta (with him Babu Jitendra Kumar Sen Gupta), for the Petitioners.

Babu Krishna Kamal Moitra, for the Opposite Party.

JUDGMENT.

Mitter, J.—This Rule was issued on the opposite party to show cause why

the order of the Subordinate Judge of Pabna, dated the 30th of July, 1926, refusing to entertain the claim of the petitioners under O. XXI, r. 58 of the Code of Civil Procedure, should not be set aside. The facts which have given rise to this rule are:—

That Ray Bahadur Dinanath Biswas, who is the opposite party to the Rule, is the 8-annas owner of certain *mehals* and he created a *patni* tenure in respect of 9-annas share of his interest, treating the 8-annas as 16-annas, in favour of the Sanyals; that on the 22nd of *Falgun*, 1317 B. S., the Sanyals sold the *patni* tenure by registered deeds of sale to the petitioners before this Court; that notwithstanding notice of purchase of *patni* by the petitioners, the *zemindar* brought a suit for rent in respect of the said *patni* against the Sanyals, who had parted with their interest in the *patni* at the date of the said suit and obtained a decree for arrears of rent on the 7th of July, 1925; that the decree-holder *zemindar* made three applications for execution, the last of which was on the 1st of May, 1926; that in this last application, the decree-holder, opposite party, instead of applying for attachment and sale of the *patni* tenure, under Chap. XIV of the Bengal Tenancy Act, applied for attachment and sale of only one-fourth share of the said tenure; that the said one-fourth share of the tenure was attached in pursuance of the application of the decree-holder and the petitioners preferred a claim to the attachment of the said share of the *patni* under O. XXI, r. 58, of the Code of Civil Procedure, before the Subordinate Judge of Pabna.

The learned Subordinate Judge rejected the claim holding that the claim was not maintainable by reason of the provisions of s. 170 of the Bengal Tenancy Act. It may be mentioned here that the Subordinate Judge arrived at this conclusion 'not without great hesitation'. In support of this Rule, the learned Advocate for the petitioners has argued that the decision of the Subordinate Judge is wrong and that he has put a wrong interpretation under s. 170 of the Bengal Tenancy Act in holding that that section applies not merely when a tenure or holding is attached in execution of a decree for arrears due thereon, but also when a portion of a tenure is attached in execution

of a decree for arrears of the whole tenure. It seems to us that this contention is right. Section 170 of the Bengal Tenancy Act runs as follows:

"Sections 278 to 283 (O. XXI, rr. 58-63) (both inclusive) of the Code of Civil Procedure shall not apply to a tenure or holding attached in execution of the decree for arrears due thereon". The words "tenure" or "holding" mean—the whole of the tenure or holding and not part of the tenure or holding. The intention of the Legislature seems to be that in order to attract the operation of s. 170, cl. (1), not only should the decree be for arrears of rent of the tenure, but that it should be executed as a rent-decree; i. e., by the attachment and sale of the entire tenure. It is true that the word "tenure" includes a portion of the tenure, but, in order to understand the meaning of the section, the general scope of the chapter in which it occurs must be taken into consideration. Sections 158-B (1), which is the first section of Chap. XIV of the Bengal Tenancy Act, says:

"Where a tenure or holding is sold in execution of a decree for arrears of rent due in respect thereof" (omitting immaterial portions) "the tenure or holding shall, subject to the provisions of s. 22, pass to the purchaser, if such decree was obtained by (i) a sole landlord, or (ii) the entire body of landlords, or (iii) one or more co-sharerlandlords, who has, or have, sued for the rent due to all the co-sharers in respect of the entire tenure or holding and made all the remaining co-sharers parties defendant to the suit".

In other words, the scheme of the chapter is that if a decree is a decree for rent, in the true sense of the term, then the entire tenure will pass in execution of such decree. Sections 160 and 161 deal with the encumbrances which a purchaser of the entire tenure cannot avoid except under certain conditions. Section 162 says "When a decree has been passed for an arrear of rent due for a tenure or holding, and the decree-holder applies under s. 235 [O. XXI, r. 11 (2)] of the Code of Civil Procedure for the attachment and sale of the tenure or holding in execution of the decree, he shall produce a statement showing the pargana, estate and village in which the land comprised in the tenure or holding is situate, the yearly rent payable for the same

and the total amount recoverable under the decree".

This section also shows that attachment and sale of the entire holding was contemplated in execution of a decree for rent. It does not appear from any of the provisions of the chapter that a portion of the holding could be sold, in execution of a decree for rent. We think, therefore, the contention of the petitioners should prevail. The point raised, however, is not covered by authority. It should seem, however, that there are observations in the case of *Chandra Sekhar Patra v. Rani Manjhee* (1) which would indirectly lend support to the view we take. There the question arose that, where a rent-decree had been obtained and the defaulting tenure was attached, whether the provision of s. 170 could apply? The learned Judges held that s. 170 applied and made the following observations which are pertinent to the present question: "The lower Court has held that, as a matter of fact, he had attached the tenure in respect of which the arrears had been decreed. Some question has been raised before us to the effect that what was attached was not the tenure, but interest of the judgment-debtor in the land. Looking, however, at the terms of the application, we are not prepared to say that the attachment was not of the tenure itself."

From these observations one can infer that if it could be shown in that case that the interest of the judgment debtor in the tenure and not the tenure was attached, the Court would have answered the question in the negative and would have held that s. 170 had no application to such a case. Whether I am right in drawing this inference or not from those observations, for the considerations to which I have referred as to the scope of Chap. XIV, I think the Subordinate Judge's view is wrong.

Although s. 170 of the Bengal Tenancy Act does not bar the entertainment of the claim in the present case, O. XXI, r. 58 of the Code of Civil Procedure cannot govern the present case and the petitioners are not competent to prefer an objection to the attachment under the provision of the said rule. The petitioners, as I shall show presently, are representatives of the judgment-debtors within the meaning of

s. 47 of the Code of Civil Procedure and objections to attachment raised by a party to the suit in which the decree under execution was passed or by his representative fall within the scope of s. 47. Objections to attachment raised by a third party come under O. XXI, r. 58.

The tenure in question is admittedly a *patni* tenure. By s. 3 of the Patni Regulation (VIII of 1819) the tenure is "capable of being transferred by sale, gift or otherwise, at the discretion of the holder, as well as answerable for his personal debts, and subject to the process of the Courts of Judicature in the same manner as other real property".

By s. 5 of the Regulation, the transfer, however, is subject to the payment of fee and security to the landlord and until the conditions mentioned in the said section are fulfilled the landlord has a right to "refuse to register, and otherwise to give effect to such alienations, by discharging the party transferring his interest from personal responsibility, and by accepting engagements of the transferee".

It is open to the transferee to seek his remedy in the Civil Court to compel the *zemindar* to give effect to the transfer if the security tendered is not accepted by the landlord. But until the registration of his name has been effected the transfer does not affect the *zemindar's* right and, in spite of the transfer, the landlord may ignore the transferee and may continue to hold the recorded tenant responsible for the rent and other obligations imposed upon the tenure. As has been pointed out by Sir Omer Petheram, C. J., in *Joykrishna Mukhopadhyaya v. Sarfannassa* (2), that until the fee (as required by s. 5) has been paid, the *zemindar* shall not be bound to register the transfer and further than that, until the transfer has been registered, he shall not be bound to recognise the transfer in any way—that is to say, until his demand has been satisfied and the registration has been effected, the old tenant remains his tenant.

Their Lordships of the Judicial Committee in the case of *Luckhinarain Mitter v. Khettro Pal Singh Roy* (3) laid down that until the assignment has been registered or the assignee has been accepted by

the *patnidar* as his tenant, the assignor is not discharged from liability and such liability may be enforced by the sale of the *dar-patni* in execution of a decree against him for the rent.

In the present case the petitioners, who have purchased the judgment-debtor's interest prior to the decree for rent obtained by the landlord are bound by that decree and as such are representatives of the judgment-debtors within the meaning of s. 47 of the Civil Procedure Code. This view is in consonance with the view taken by this Court in the case of *Surendra Narain Singh v. Gopi Sundari Dasi* (4). The petitioners, therefore, being representatives of the judgment-debtors can raise objections to the attachment under s. 47 of the Code. They cannot, as we have already stated, raise objection to the attachment under O. XXI, r. 58, as they cannot be said to claim the property on their own account as a third party (not being a party to the suit or his representatives) could raise. It has been suggested to us by the learned Advocate for the petitioners that their application before the lower Court might be treated as one under s. 47 of the Code and dealt with as such, but we are not prepared to do that, as the objections under s. 47 might not stand on the same footing as objections to the claim under XXI, r. 58. The former class of objections may cover other and different grounds. We, therefore, discharge the present Rule and in doing so we observe that it will be open to the petitioners, if so advised, to raise objection to the attachment in question under s. 47 of the Civil Procedure Code.

In the circumstances of the present case each party will bear its own costs.

This judgment will govern Rule No. 953 of 1926

Let the records be sent down at once.

Panton, J.—I agree.

A. N. A. Rules discharged.
(4) 32 O. 1031; 9 O. W. N. 824.

(2) 15 O. 345; 7 Ind. Dec. (N. S.) 814.

(3) 20 W. R. 380; 13 B. L. R. 146; 24 W. R. 407n; 3 Sax. P. C. J. 273 (P. C.).

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 2152 of 1922.

May 17, 1926.

Present:—Mr. Justice Chotzner.

KESSORAM PODDAR & Co.

PLAINTIFFS

versus

SECRETARY OF STATE FOR INDIA—

DEFENDANT.

Government of India Acts, 1915, (5 & 6 Geo. V, c. 61); 1916 (6 & 7 Geo. V, c. 37); 1919 (9 & 10 Geo. V, c. 101), ss. 20 (2), 29 (5), 32—Defence of India (Consolidation) Rules, 1915, R. 11A—Contract by Government servant—Liability of Secretary of State—Principles—Verbal contracts, validity of—Commandeering order—Act of State—Civil Procedure Code (Act V of 1908), s. 80—Notice to Secretary of State—Contents—“Cause of action”—“Notice as to future cause of action”, validity of—Contract for sale of goods—Refusal to take delivery—Suit for damages—Limitation.

A contract on behalf of the Secretary of State for India must be in writing and must be signed by a person upon the permanent establishment of the Secretary of State who has been specially empowered in this behalf. Verbal contracts and contracts other than those specified in s. 29 (5) of the Government of India Act, even if established, have no effect. [p. 381, col. 1.]

Young v. Leamington Corporation (9) and other cases, relied on.

The Secretary of State can be sued as a body corporate as provided in s. 32 (1) of the Government of India Act. [p. 381, col. 2.]

The Secretary of State is liable for damages occasioned by the negligence of servants in the service of Government, if the negligence is such as would render an ordinary employer liable. The test really is whether the contract was a Sovereign act or was one which a private individual could have entered upon in his ordinary business pursuits. If it is the former, the Secretary of State is not liable, but if it is the latter he can be sued in the same way that the East India Company could have been sued for acts done in their capacity as traders and not as the Sovereign power. [p. 382, col. 2.]

A commandeering order is one which no one but Government can make, and being an act of the Sovereign power, the Secretary of State cannot be sued in respect of it. [p. 382, col. 2.]

Although the object of s. 80 of the Civil Procedure Code is merely to inform the defendant substantially of the ground of complaint and the words ‘cause of action’ in the said section should not be construed in a narrow sense, yet it is necessary to state the cause of action with some precision. [p. 384, col. 1.]

Secretary of State for India v. Perumal Pillai (16), distinguished.

Where a notice under s. 80, Civil Procedure Code, in respect of a contract for sale of goods alleged to have been entered into by a Government servant stated that no instructions had been given for the delivery of the goods and that unless the requisite orders for delivery were given legal proceedings would be adopted:

Held, that the notice was invalid inasmuch as it was in respect of a cause of action which had not already arisen. [*ibid.*]

A contract for sale of goods was alleged to have been made by a Government servant on the 26th

August, 1918. His superior officer issued a Circular on the 2nd February, 1919, stopping all further deliveries. A suit for damages for breach of the contract was filed in June, 1922.

Held, that in the absence of anything in the contract to show that the delivery was postponed to a later date, the breach of the contract must be held to have occurred in February, 1919, when the Circular stopping deliveries was issued, and that the suit was, therefore, barred by limitation. [p. 384, col. 2.]

Messrs. N. N. Sircar, S. M. Bose and S. C. Roy, for the Plaintiffs.

Messrs. L. P. E. Pugh and T. Ameer Ali, for the Defendant.

JUDGMENT.—In this suit Kessoram Poddar & Co. sues to recover from the Secretary of State for India in Council, Rs. 23,35,835 together with interest Rs. 10,44,613-4 being the loss and damage sustained by the plaintiff firm by reason of the defendant's failure and neglect to pay for, or take delivery of, certain goods bought by the defendant from it. The purchases are said to have been made by one Charles Sutherland Waite, an officer of the Indian Munitions Board, Bengal, on four dates, namely, 4th, 14th, 17th June, and 26th August, 1918.

It appears that the Indian Munitions Board, Simla, was established on the 1st March, 1917, and the office of the Controller, Munitions, Bengal, was opened in June that year. Mr. Peterson of the Indian Civil Service was the first Controller, being appointed on the 30th June. He continued to hold office till the 19th April, 1919. Under him were two Assistant Controllers, Mr. Nixon of the Indian Civil Service and Dr. Meek of the Educational Service. Nixon left office on the 2nd February, 1918. Meek succeeded Peterson on 19th May, 1919. There were also four Deputy Controllers one of whom was Mr. Waite, who was appointed in November, 1917, and went on leave on 23rd January, 1919. His services were dispensed with on 20th February, 1919.

The plaintiff firm opened their metal department in March, 1918, and Mr. A. H. Ghaznavi was in charge of it. From May, 1918, Ghaznavi began calling on Waite for orders and it is alleged that prior to the purchases now in suit, he had received orders from Waite for goods costing Rs. 27 lakhs, for which payment has been made.

The plaintiff firm's case is that Waite's method of purchase was not to call for

tenders from merchants having war materials to supply or to make out written contracts for such goods as he wished to buy but to take the list submitted by the firms (of whom there were at least 100 different European and Indian representatives), discuss the price and after discussion, put tick marks in pencil against such items on each list as he wanted, noting, in some cases, also the price agreed upon and that these tick marks indicated that he had bought the goods so ticked. Thereafter, when he wanted delivery of the goods purchased, he would send a delivery order through his office requiring the seller to deliver the goods at the Narcaidanga depot or at such other place as might be specified in the order, but owing to the congested state of the depots months often elapsed before such delivery orders were issued. He would also purchase goods by what was popularly known as a "commandeering" order. It appears that under the rules framed under the Defence of India Act, certain classes of goods such as corrugated iron sheets, galvanized plates, barbed wire and the like, could not be sold by merchants except under license from Government and when a commandeering order was issued, the goods had to be delivered at such places as were specified therein. Such an order could only be signed by the Controller of Munitions himself. In such cases the price of such goods was agreed upon but where there was a dispute, the price was ultimately settled by reference to arbitration. The restrictions under these rules were withdrawn in December, 1918. Waite had authority to buy both for stock and indent and could buy ahead for stock on the basis of the previous three months' requirements. In the exercise of these powers the plaintiff firm says that on the four dates mentioned above, he purchased the goods from it in the manner indicated. In some cases, delivery orders were issued and the goods were delivered and paid for, but in the case of the rest, no delivery orders were issued though the plaintiff firm repeatedly asked for them and it was always ready and willing to deliver the goods. Subsequent to the 26th August, it is said, that there were further purchases by Waite from the plaintiff firm and it is also said that in September, 1918, for instance, some scrap iron was bought and paid for.

The Armistice was signed in November, 1918, and on 13th December, 1918, Mr. Keatinge, Controller of Hardware, Metals and Implements, wrote to the plaintiff firm cancelling an order for seven items placed with them by Waite on the 16th August, 1918. The plaintiff firm replied on the 18th, denying the Controller's right to cancel the order and giving reasons which the Controller declined in his letter to accept. To this, the plaintiff firm replied on 3rd January, 1919: "The order was a contract and, therefore, delivery or non-delivery thereunder was to be regulated by the provisions of the law." On the same date, Mr. Peterson wrote: "The materials delivered at the time prior to the issue of the letter cancelling the order have been taken into account, but with regard to other materials it will be necessary for you to prove to the satisfaction of the Controller, Hardware, that these were in your possession when the letter cancelling the order was received by you." The plaintiff firm apparently succeeded in satisfying Keatinge, as, on the 15th January, he wrote a letter in which the following expression occurs: "This will, as explained by your representative to me, complete all outstanding orders placed with you by the Deputy Controller" (that is, Waite).

On 1st February, 1919, the Controller in a circular letter to all English and Indian firms wrote as follows:

"Would you kindly note that no deliveries should be made after the date of receipt of this letter or of any others placed with you by the Deputy Controller (Inspection) without first of all making a reference to me and obtaining my permission."

The effect of this letter was to discontinue all deliveries. The plaintiff firm's case is that it does not affect the previous purchases made by Waite for indent although he had been forbidden on the 20th August, 1918, from purchasing for stock. The plaintiffs' case further is that in November, 1918, they had received Waite's promise to take delivery of all goods purchased by him by July, 1919. The question of limitation would, therefore, not arise as Waite admits that the dealers would hold the goods till he called on them for them. This he never did. The plaintiff firm through their attorneys, Messrs. Morgan & Co., wrote a letter

on 26th July, 1919, to the Controller giving particulars of the goods alleged to have been purchased by Waite and threatening a suit in the event of necessary delivery orders not being issued. A copy of the letter was sent to the Financial Secretary, Government of Bengal, Secretary, Munitions Board, and Controller of Hardware. In their letter to the Financial Secretary, the plaintiff firm gave the requisite notice under s. 88 of the Civil Procedure Code. Dr. Meek, the new Controller, replied on 29th July offering an interview but this offer was not accepted.

On the 22nd December, 1919, the premises of the plaintiff firm were searched by the Police, apparently with a view to prosecution, and all books and papers were seized. The documents were scrutinised by the authorities and Ghaznavi was asked for answers to certain inquiries which he gave. In the end no prosecution was launched. The papers were returned to the plaintiff firm in March, 1922, and in the following June this suit was filed. The plaintiffs' case is that during all this time Government never repudiated their claim.

The Secretary of State in his written statement denies that Waite was his agent or was competent to bind him by the alleged purchases or that there was any contract between him and the plaintiff firm in fact or in law. He denies the purchases by Waite and the plaintiff's loss by reason of the breach of contract. He avers that in February, 1919, the Munitions Board declined to receive goods or orders placed by Waite without reference to the controller. Thereafter, the plaintiff firm had notice and the cause of action, if any, is barred by limitation.

In para. 10, he says that the transactions alleged can give rise to no cause of action against the defendant inasmuch as the same relate to the exercise of Sovereign powers, namely, the purchase of munitions for the purposes of war, and do not relate to trade.

In para. 11 he says that the formalities required by law to create a contract binding on the defendant have not been complied with.

In para. 12 he says that for a considerable period prior to the transaction alleged in

the plaint, the plaintiff firm had been systematically defrauding the Government of India by supplying goods at exaggerated prices under false weights and measures and quantities and that the quotations put forward by the plaintiff firm as amounting to a contract were part and parcel of the same scheme of fraud and can give rise to no cause of action.

With regard to the allegations contained in this paragraph, they are further explained in the particulars furnished by the defendant in February, 1925, as meaning that the plaintiff firm and Waite entered into a conspiracy to defraud Government in various ways by antedating the orders showing purchases by Waite purporting to have been made before his authority had been withdrawn and by short delivery.

The following issues were framed:—

(I) Was the purchase of munitions for the war an act of State? Can any legal liability arise in relation to such purchase?

(II) Was there any legal and binding contract operating under s. 20 of the Government of India Act? If not, is there any liability on the defendant?

(III) Did Waite in fact enter into any agreement to buy the goods in the plaint mentioned?

(IV) If so, has such agreement any legal effect to bind the defendant?

(V) Did the said Waite agree also that delivery should be made when called for?

(VI) Did Mr. Waite or any successor of his promise that orders would be given in due course as alleged in paras. 3 and 4 of the plaint?

(VII) If issues Nos. 5 and 6 be answered in the affirmative, is defendant in any way affected thereby?

(VIII) Was there refusal to take any more goods, and if so, on what date or dates?

(IX) Is the suit barred by limitation?

(X) Was the statutory notice duly served?

(XI) Was the plaintiff ready and willing to perform?

(XII) Was there a fraudulent conspiracy to defraud the Munitions Board?

(XIII) To what damages, if any, is the plaintiff entitled?

The original lists upon which the present claim is based consists of 11 sheets of paper marked at Waite's examination on commission in London (Exs. 1A to K). Number 1 is on a plain piece of paper in Ghaznavi's handwriting and the remainder are type-written on the office paper of Kessoram

Poddar & Co., 15, Olive Row. Numbers 1, 3, 5, 6, 7, 9 and 11 bear tick marks or pencil lines indicating, according to the plaintiffs' case, that all the goods so marked were purchased by Waite. Numbers 1, 2, 3, 4, 5 and 11 have various endorsements in Waite's handwriting which according to the plaintiffs' case are his orders to the office how to deal with the goods thus purchased.

I now proceed to consider the items *seriatim*.

4th June 1918, Sheet No. 1. Six out of the seven items on this page have blue and black pencil marks against them and against the item 250 tons corrugated iron sheets there is a note in black pencil by Waite "Make out order for this on Kessoram Poddar & Co., 15, Olive Row." For this item a commandeering order (Ex. A) was issued wherein Rs. 25 per cwt. was fixed as the price but the price allowed on arbitration was Rs. 32. Exhibits C1 to C5 show delivery of the goods and Exs. D1 and 2 and Exs. E1, 2 and 3 are the receipted bills. The plaintiffs' case is that the remaining five items were purchased by Waite at the same time without orders of delivery being issued so that the plaintiff firm is entitled to their value.

14th June. There is a tick mark in black pencil against an item on sheet No. 3, *viz.*, 2½ tons galvanised plain sheets and 4½ tons galvanised wire. Below in Waite's handwriting appears a note "Make out order for 2½ tons galvanised sheets at Rs. 77 per cwt. Commandeer tin sheets against demand." The plaintiffs' case is that they received delivery order for 2½ tons galvanised sheets on the 20th June (Ex. F1) for which they were paid. In regard to the 6,445 cases tin sheets covered by the commandeering order they supplied in all 2,450 cases (Exs. C6 and 7, Exs. D3 and D6 and Ex. E4), for which they have been paid and they claim the value of 3,995 cases for which delivery orders have not been issued.

17th June. Sheet No. 2 contains an offer of 500 tons corrugated iron sheets for immediate delivery. Underneath there is some indistinct order in blue pencil in Waite's handwriting "Make out 'O' order for 500 tons. First ask how many 6 ft., 7 ft. (illegible), 9 and 10 ft. I will inspect sheets." The plaintiffs' case is that in spite of the commandeering order no delivery order was ever received by them and as

they could not sell the goods so commandeered without license from the Board, the goods have been left on their hands and they are entitled to their value.

23rd August. Sheet No. 4 is a letter from the plaintiff firm offering Waite certain goods on which appears Waite's handwriting in red pencil "Put up cases relating to these." On sheet No. 5 there is a green pencil line against item mild steel round bars. Against the 2nd and 3rd items which are bracketed is a note by Waite "Have we met all demands." Against item galvanised wire there is a green pencil line with a note by Waite "Have we demands for others but 14." Against item galvanised barbed wires, there is a green pencil line with a note by Waite "Have we any outstandings." On sheet No. 6 against four items galvanised plain sheet there is a cross mark in red pencil against the first and fourth items with "Rs. 90" at the side. Against two items "Aluminium sheets" there is a red pencil line against both with "Rs 6/lb." at the side. There are red pencil cross marks against four other articles on this page. On sheet No. 7 there are 11 items mild steel sheets and a green cross mark against the 1st, 3rd, 5th and 7th items. There is a red line against item 5,070 cases tin plates. On sheet No. 9 there is a red pencil line against the first two items mild steel round bars, aggregating 566 tons. On sheet No. 11 there is a red line against 8 items of unequal angles and 5 items unequal legs against which Waite has written "Take this lot at Rs. 64" this entry being in red pencil except the price which is in blue pencil and there is a red mark against the last item 40 tons unequal legs.

The plaintiffs' case is that although this list was typed on the 23rd August it was actually submitted to Waite on the 26th August. On that day Waite purchased all the goods specified but delivery orders were issued in respect of only three items; 10 tons galvanised plain sheets specified in sheet No. 6 and 65 tons aluminium ingots on the same sheets and the first seven items of unequal angles on sheet No. 11 and for these payments have been received. As regards the rest no delivery orders have been issued. The plaintiff firm says that they are entitled to their value.

In support of these allegations the plaintiff firm has examined two witnesses; one is Mr. Stoddart who was Waite's assistant in the Munitions Board at Calcutta, and the other is Mr. Ghaznavi who as I have said was head of the metal department of Kessoram Poddar & Co. The firm appears to be in very low water at present. According to Ghaznavi, Kessoram Poddar has lost all his money and though he avers that Kessoram Poddar is making money again, Kessoram Poddar has not come into the box to explain how. Ghaznavi's remuneration as Manager, he states, was a quarter of the total profits. He was himself in the Insolvency Court from 1915 till last year (1925) when he entered into a composition paying three annas in the rupee when the order was annulled. He says in one place (Q. 465) that his pecuniary interest in this suit is Rs. 50,000 or perhaps Rs. 1 lakh, as he has still to pay merchants who supplied him with the goods. But here he seems to be inaccurate, as the result of his discharge from the Insolvency Court frees him from all liability to his creditors. He was questioned as regards certain dealings which he had with regard to getting a member of the Bar to stand security for him.

475 Q.—You have got a brother?

A.—Yes.

476 Q.—One of you got a member of the Bar to stand security for you or for him as the case may be and then when you were called upon you said, all your property was *wagf*?

A.—That is not so.

477 Q.—Who was it?

A.—Myself.

478 Q.—Did you get a member of the Bar to stand surety for you?

A.—He is a particular friend of mine (QR). Not only stand surety but he paid money from his own pocket to save me to a large extent.

479 Q.—You represented that you were giving security on your estate in Dacca?

A.—Not a bit of it. He stood guarantee.

480 Q.—Did you set up that these estates could not be liable for your personal debts because they were *wagf*?

A.—No.

481 Q.—Did you ever raise the question of *wagf* about that?

A.—No.

482 Q.—Did not the Allahabad Bank buy your properties from the Official Assignee

and didn't you set up that those were *wagf*?

A.—Not those properties. You are making a mistake. The Bank wanted to sell properties which were really *wagf*. It was a mistake on their part. It was pointed out to them and they did not press it against that property when they found out.

483 Q.—There was a question with a large amount of property which was claimed by creditors or purchasers?

A.—No creditors claimed these properties.

484 Q.—Did the Allahabad Bank say there were certain properties which were liable to them and you said they were *wagf*?

A.—I never said it was *wagf*. They themselves moved in the matter.

485 Q.—Then your surety was left to meet the liabilities?

A.—Not with the Allahabad Bank.

It is plain from these admissions that Ghaznavi is not a man of high financial integrity and evidently he is vitally interested in the result of this suit. Stoddart was appointed Waite's assistant on the 1st May, 1918, and was made permanent a month later. He explains his duties in answer to Q. 12: they were generally to assist Capt. Waite in his work as well as to make out orders, indents, keep records and look after the office generally and though this apparently was not part of his duties, he states that he kept a private record of his own of all purchases made by Waite in the office (Q. 26). Before the war Stoddart was employed in the United States of America as verifying officer on the lakes which he explained means that he counted the number of packages at the different steamer stations on the lakes and this he did for 4 months when he joined the war. After the Munitions Board was dissolved he has taken up as he says in answer to Q. 476 the work of broker in Dodge and Seymour, Waterloc Street. He goes round, he says, for indents and he gets a salary of Rs. 150 a month and commission of 1 per cent; and if he works really hard he may make Rs. 300 a month. Thus it is apparent that neither from his previous career nor for his present occupation can it be inferred that Stoddart is beyond all question incorruptible. That the Government at one time did not regard him as such is proved by the fact that he

was prosecuted with some others in connection with the Munitions Board frauds.

175 Q.—I believe there was a prosecution against you at the instance of Government?

A.—Yes.

177 Q.—Do you now remember when the prosecution started?

A.—You are taking me very far back.

178 Q.—Were you convicted or acquitted?

A.—To tell you the truth I never took the trouble to find out. I did not know. I was not convicted anyhow. I have never read the judgment.

179 Q.—You were neither sent to Jail nor fined?

A.—No.

A person who can give answers of this kind seems to me to stand self-condemned. The impression he conveyed to my mind was that he had come to Court with a carefully rehearsed story which was founded partly on fact and largely on fiction, and that he had made up his mind never to return an answer which might be construed as in any way conflicting with that story and further, that his eagerness to aid the plaintiff was so great that he was sometimes led into most palpable absurdities, as for instance, when he said that not only Waite but he and others of the subordinate staff including even the head clerk of the office were competent to commandeer goods at their pleasure.

I now proceed to consider his evidence. He first deals with Waite's system.

15 Q.—What was his (Waite's) system?

A.—He generally made marks on papers submitted by different firms or else he made remarks on the indents himself or he told us "Make out order for so and so" verbally which was majority of cases.

20 Q.—Confine yourself to hardware and metals and things of that kind. Was Captain Waite buying only for stock or also for indents?

A.—For stock, indent and also for commandeering.

He is not sure if he saw the lists Exs. 1A to K; but he said that such lists after being marked were handed to him.

32 Q.—What would you do when you received the lists?

A.—I generally marked down those items that Capt. Waite marked off in pencil which was a sign to me that he had accepted these goods from merchants as purchased.

33 Q.—You would enter that in what book?

A.—In my private book. I had several private books.

34 Q.—Why do you call it a private book?

A.—Because Capt. Waite was not a business man and I kept it for my own information so as to save time when I wanted any information of my own.

He was asked about Waite's endorsements.

43 Q.—Assume that you were dealing with this list and you read this endorsement "Have we any outstanding"—what would that convey to you?

A.—Several meanings but the principal one was that we had given orders to several people but who had failed to supply although they said they had stocked these goods and on their failure to supply we bill from here or if we had the goods already booked against anything else, this was the only information to Mr. Waite asking him whether he need indent for more.

This answer was given not in cross-examination as might be supposed but in answer to learned Counsel in chief. He was further asked about other endorsements made by Waite such as "Have we demands for others but 14", "Have we met all demands", "Put up cases" and so on. The witness had here got into unexpectedly deep water and he had to take refuge in the lame explanation that all these endorsements mean precisely the same thing.

55 Q.—Would Capt. Waite ask you to put up cases referring to these demands unless he had got the goods?

A.—What he meant really was that he had purchased the goods. The purchase of the goods had nothing to do with putting up cases.

That is the whole burden of this witness' song that Waite purchased first and enquired afterwards whether it was necessary for him to make purchases.

In cross-examination he was questioned on these answers.

226 Q.—You say that these all mean the same thing: "Have we met all demands", "Have we demands for others but 14", "Have we any outstandings"—You suggest that in munition language all that means the same thing?

A.—Yes.

227 Q.—"Put up cases referring to these demands"—that all means the same thing?

A.—Yes, which means regarding all the items. (Q. R.) that means "Put up cases against all the items that the man has present, every bit."

223 Q.—What I am suggesting is this: Apart from munition language, "Put up cases" means "let me see the indents?"

A.—Indents and demands and deliveries.

233 Q.—What I suggest is this: What he wanted to know is what indents had been made and how far these indents had been complied with?

A.—Yes.

234 Q.—You suggest that he asked for that information as to what indents they were and whether they had been complied with or not, but he bought the goods before he got it?

A.—Yes.

The witness was taken through the lists (Exs. A to K) and in regard to each item ticked he said that such item had been purchased irrespective of the endorsements at the side. He was cross-examined on several of these points:—

270 Q.—Did you in these books take into account anything but the orders that were issued?

A.—That is all that was noted in those books, the goods on which demands were made for delivery.

273 Q.—You were telling me that there are two books. You now say when you made out an order it was entered in this book. I am suggesting to you that the only thing, goods, which were entered in the indent book or in the stock book were goods for which the office had issued orders. Is that correct?

A.—Yes, that is correct.

274 Q.—These were official books?

A.—Yes.

275 Q.—For the purpose of official books, therefore, the office took no account of Waite's ticking on the stock list or of your private book?

A.—The office took note of my book when it was necessary for their help.

276 Q.—What you told me is this. The office is keeping two official books, in those books the office is entering the orders that have been issued and nothing else. I am suggesting to you that that being the fact, the office had no concern with Waite's ticks on lists? Is that correct?

A.—The office did not make any special note of Waite's ticks for the simple reason that these papers were filed in the office

in a file called the tender book. Any time the office or Waite wished to refer to it was always brought forward.

He was asked (Q. 279) whether for the purposes of entering up the order it would not be necessary to refer to his private book at all and he answered "No".

With regard to the endorsements he was asked:

450 Q.—I want to put to you another reading of this, "Have we met all demands;" I suggest to you what it means is that I am aware there is some indent or demand. I don't know whether it is fully met or not: please ascertain?

A.—The translation first is, the line is that we have purchased them and the remark is just what you have just said.

453 Q.—I suggest to you that without enquiring first he would not possibly purchase?

A.—He has purchased the lot.

617 Q.—You said when Mr. Waite put a tick the goods were purchased and when you saw a tick, you put it in your private book but when it got to the regular office staff and the office records they only took account of the orders that were issued?

A.—Yes.

618 Q.—They did not trouble about the ticks?

A.—No.

619 Q.—I suggest to you that the real thing was the order?

A.—No. I think the contract is the real order.

620 Q.—I suggest that there was nothing your office took any notice of, except the actual issue of the order?

A.—No; they took notice of the ticks. Then we were aware that these things were taken and we had to pull from them.

It is perfectly plain from this evidence, though it had to be wrung from the witness by reluctant admissions, that the only goods which were considered to have been bought by Waite were those for which delivery orders were issued. The witness was asked about the commandeering orders which were issued on certain items. He was shown Ex. A and the endorsements thereon "Make out C order for 500 tons, first ask how many 6 ft., 7 ft. (illegible), 9 ft., 10 ft. I will inspect sheets, C. S. W."

96 Q.—When you would get such a note of Waite you have already said that you took it to mean that the goods have been taken?

A.—Yes.

97 Q.—Make out C order—that means a commandeering order?

A.—Yes.

98 Q.—Who would make that out?

A.—We would make it out and the Controller would sign it.

99 Q.—That would not be signed by Waite?

A.—No.

100 Q.—So far as dealers were concerned, the people who were selling, who was the person who used to tell them that such goods of theirs have been commandeered?

A.—So far as I was concerned, I could do that myself; if I saw any goods which I thought we required I would make enquiries.....

Then he was asked with regard to the commandeering order for 6,445 cases. "Commandeer tin sheets against demand" in the entry of the 14th June.

109 Q.—What does that mean?

A.—It means that these 6,445 cases were commandeered by the Munitions Board and if there was any demand from Simla and we had not sufficient stock in the depot he ordered more. Most probably Mr. Ghaznavi may have told Capt. Waite that he had some more in stock otherwise how could he demand more, if he had not any more.

In cross examination he was asked—

421 Q.—"Against demand"—what does that mean? Does it mean against demands that we have or invoices that we have or does it mean if there is a demand?

A.—It means that if we have any other demands beyond the 6,445 cases we were to put a note up to him to say that more was required.

422 Q.—Then you say that "commandeer tin sheets against demand" means that the whole of the 6,445 cases is to be commandeered and as much more as you want?

A.—If we had demands for them.

424 Q.—I am suggesting on the contrary that it means that these sheets are to be commandeered if there is a demand and not otherwise?

A.—I don't agree.

In my judgment there is no doubt that

when these endorsements were made at the side of the items they meant exactly what they said and no more or no less. When a person who is in possession of his senses says "have we any outstanding" it means "are there indents which we have still to satisfy" but for it to be supposed that a person will buy goods in enormous quantities without knowing whether any demand exists seems to me absolutely unwarrantable. Stoddart was further asked whether there was any other method of purchase than by ticking and he said that people sometimes handed in their lists and left them with him.

698 Q.—You said that Waite would put a tick on these and these orders would be issued like that and sent to these firms—that was the routine?

A.—Yes.

699 Q.—There would be no direct conversation or purchase by conversation?

A.—Sometimes there would be.

700 Q.—As a rule these firms used to hand their lists in and await the result without seeing Waite?

A.—Yes.

701 Q.—With regard to those persons there was no buying by tick marks?

A.—Oh yes, they bought by tick marks.

702 Q.—If they did not get tick marks?

A.—Then it was understood that the goods were not taken.

703 Q.—They put in their lists and waited for these orders to come?

A.—Yes and there were tick marks. If there were no tick marks, they would know the goods were not taken.

704 Q.—I am putting to you the case of the Russa Engineering—they send you a list saying—we have such and such goods at such price and are waiting delivery—they get an order form—they never see Waite. Do you say that these persons bought by tick marks?

A.—No, they get orders direct.

705 Q.—They did not buy by tick marks?

A.—No.

706 Q.—Therefore you could quite well buy by putting in your list and getting these orders?

That would be a feasible way of doing business?

A.—I don't follow.

707 Q.—I am suggesting that these people had nothing to do with buying by ticking?

A.—You are referring to a statement that

I made where I said that firms that were busy came at a time when Waite could not be approached, and I went in person and produced the slips to him and he would say—we don't require this or we will take this. Accordingly I would advise the party who was waiting at the waiting room that such and such was the case.

It is not necessary in my judgment to enter into minute particulars of all that this witness has said. He has clung to his story from the beginning to the end, and the opinion that I formed of his evidence and the way he gave it was that he was wholly unreliable.

I now proceed to consider Mr. Ghaznavi's testimony. Mr. Ghaznavi is a clever business man with all his wits about him. His demeanour in the box showed that he suffered from no lack of confidence and as he has everything to gain and nothing to lose by the result of the case, he has some justification for his attitude.

His evidence covers very much the same ground as Stoddart's, but is necessarily much more comprehensive. He repeats the story about Waite's practice of purchase by ticking and ignores Waite's endorsements showing that certain enquiries were to be made before delivery orders were to issue on the ground that these were merely directions to the office as to what steps they were to take and did not affect the prior purchase of the goods which had been made by the tick marks at the side. He says in answer to Q. 16 that his firm has already recovered about Rs. 27 lakhs for supplying materials which Waite purchased by putting cross marks or a line against a particular item. He further says that the arrangement between them was that delivery should be given only when Waite called for it. He says that about a hundred firms sold their goods in the same way that he professes to have done. I may note in passing that he has not examined any member of such firm to support his story. He was taken through the lists (Exs. 1A—K) and stated in detail the various goods which Waite purchased by ticking. I have already set these out in full.

With regard to the memorandum of 4th June he was asked about the commandeering order (Ex. A) as showing that he delivered the goods covered by it and was paid for it—a statement which is supported by the challans and the bills.

As regards the memorandum of 14th June he says that Waite told him that he wanted the tin sheets, of which there were 6,445 cases, badly, and he wrote "Commandeer tin sheets against demands," and also took the remaining $2\frac{1}{2}$ and $4\frac{1}{2}$ tons. As regards the $2\frac{1}{2}$ tons witness has proved that he delivered the goods and was paid for them. As regards the 6,445 cases he has proved that he had delivered 2,450 cases and had been paid for these.

With regard to the memorandum of 17th June he says he offered 500 tons, upon which Waite said "I take these" and wrote out "Make out commandeering order." This was never received with the result that he has not been able to dispose of the goods.

As regards the memorandum of 23rd August he says that on sheet No. 5 of the list Waite took all the articles marked in green pencil, on sheet No. 6 he took all the articles marked with red cross or red lines and the words "Rs. 90" and "Rs. 6 alb" are in Waite's handwriting. He says that all these 10 tons galvanised plain sheets were delivered and paid for at the rate of Rs. 90 and that the 65 tons aluminium ingots were also delivered and paid for. On sheet No. 7 Waite took the articles marked with a cross in green pencil or with a red line. On sheet No. 9 he took the first two items. On page 11 he took all the articles marked with a red line and the item at the foot marked with a cross, and he wrote "take this lot No. 64" against all but the last item. He says that delivery was given of the first seven items and payment was made, as to the rest no delivery order was sent and the price of those goods is payable by Government.

He was then shown a delivery order No. 2788A (Ex. 3) for 10 tons galvanised plain sheets shown on page 6 of the list, and the corresponding entry in the register (Ex. 2A) which is dated 16th August. He was asked by his learned Counsel to explain how goods purchased on the 26th August could have been delivered on an order, dated 16th August. His reply was: "I do not know, it may have been the officer put the date from the previous list. I am guessing"—(Q. 235).

Then he was asked:—

237 Q.—Did you know that as a matter of fact on the 20th or 21st August there had been any limitation on the power of Waite to buy for stock?

A.—Nothing whatever.

He was asked at Q. 246 whether he had made any demands for delivery orders and he said he asked Waite, Stoddart and Keatinge who referred him to the Controller.

He was then asked about his correspondence with Keatinge and his explanation to Keatinge's statement that "this will, as explained by your representative to me, complete all outstanding orders"—was that it referred to all outstanding delivery orders (Q. 251).

He was then questioned about Peterson's circular letter of 1st February stating that no deliveries were to be made without reference to him, and he said in answer to Q. 259 that he continued demanding orders from Stoddart and Peterson verbally. He was asked (Q. 262) what Peterson had told him and his answer was:—

"Peterson said: Waite has left his department in a chaotic condition and I must look through all that before I can say certainly. You have to wait. The depôt is absolutely congested, we cannot take over the goods unless we clear the depôt."

He was again asked whether Waite had promised him delivery orders:

352 Q.—Before January 1919 did he say anything at any other time?

A.—In November I think he said before Mr. Peterson—Peterson went to see Waite at his office; and also in December he said: "My dear fellow, here is the armistice, we have several places congested, we have to wait." I said—How long? He said, "No longer than 4 or 5 months." I said "That is a long way off." He said "I cannot help it", "we are simply full up; let us clear these goods and we will take delivery." I said: "Give me some time within which I can expect you to take delivery." He said: "Not longer than July." Then when I saw him again in January, I said I hear you are going away. He said: "Yes, only for a month or two."

353 Q.—Do you know when he came back?

A.—He never came back at all.

354 Q.—You did not meet him at all after January 1919?

A.—The last time I met him was at the station when he was going to Ooty to see him off—that was in January 1919.

355 Q.—Did Mr. Peterson at any time

tell you that he will not take these goods or give you delivery orders?

A.—Never.

356 Q.—And when you as you said were verbally making a grievance before Peterson, did he any time repudiate them?

A.—No question of grievance, I demanded from him to take delivery.

357 Q.—Did he repudiate?

A.—No.

In the beginning of July Ghaznavi states that he interviewed Messrs. Morgan & Co. and had his claim formulated in their letter of 26th July, 1919. After sending it he says he got a reply from Dr. Meek stating that he did not doubt the statements but would like to see the originals (Q. 279.)

Then he explains that all his papers were seized by the Police on 23rd December, 1919, (Q. 281) and were not restored to him till the 20th March, 1922, and he says in Q. 301:

"After the papers were returned in March 1922, even up to that moment was there any suggestion in writing or verbally by anybody on behalf of the Government that your claim was a bogus one or there was no contract?—No."

He further states of his own personal knowledge that the Police enquired of his vendors and his banker as to his purchases and also of Cox's and at the bonded warehouse to find out whether he had the goods in his possession, and that they were satisfied that the goods were there. He further states that he was continually asked by the Police to explain entries in his books and that he did so, and that he kept copies of the questions and answers. He further states that he gave notice to the Government to produce a great quantity of correspondence but that none of it has been produced.

Then he was asked:—

401 Q.—When Mr. Waite was buying goods from you, was he in the habit of telling you whether it was meant for stock or for indent?

A.—No.

402 Q.—What did he do?

A.—He would say "I will take this." He never said for stock or indent—that was for him to decide.

403 Q.—Suppose one day he had taken 100 tons from you and put his tick mark and so on, whether that will be taken to,

wards stock or towards indent, would that be told you?

A.—No.

404 Q.—You were not interested in it.?

A.—Not at all.

405 Q.—You only wanted to sell your goods and get your money?

A.—Yes.

Waite had only authority to buy for stock up to the last three months' average and his authority to do so was taken away from him on the 20th August, 1918. Ghaznavi affects an airy indifference as to this point as to whether the authority still remained with Waite, though, as I shall have to show a little later the question was one of very great importance.

He was asked about an answer given by Waite:—

408 Q.—You know that Waite has said in his examination amongst other things that a cross mark or line does not necessary indicate that he had purchased, but it meant that he wanted to consider them as convenient sizes or things of that kind. Is that correct?

A.—No, it is not correct. If the other lists are produced by the other side I can show that every time he put his mark on a particular item we got delivery orders for that.

409 Q.—The remarks that are made here, were you in any way interested in them?

A.—It has nothing to do with us—it is for his office.

410 Q.—If you sold any goods to Waite or rather he agreed to take them what was your experience? Would delivery orders be issued at once?

A.—No.

411 Q.—Would you sometimes have to wait for a fairly long time?

A.—Yes, quite a fairly long time.

412 Q.—How long?

A.—Sometimes for two or three months, sometimes immediately—there was no fixed rule.

434 Q.—You remember the circular of 1st February addressed to all merchants not to take delivery of goods?

A.—Yes.

435 Q.—As a matter of fact you went on supplying to Government long after that?

A.—Yes. We supplied right through 1919 and possibly 1920 also.

436 Q.—The circular letter is 1st Febru-

ary and you supplied goods in March, April, May, June 1919?

A.—Yes.

437 Q.—Have you got here documents which will show that you supplied goods and were paid for them?

A.—Yes.

438 Q.—Did you also supply in July, August, September, October 1919?

A.—Yes.

439 Q.—Of fairly large amounts?

A.—Yes.

440 Q.—You supplied as late as 17th December 1919?

A.—Yes.

441 Q.—In every month in 1919 you obtained money from Government and delivered the goods?

A.—Yes, from the Munitions Board."

In cross-examination he was first asked by Mr. Pugh as to his previous history to which I have already referred.

He was then questioned about commandeering orders:

495 Q.—Then we may strike out of your claim all the claims on which Waite has written: "make out commandeering order"?

A.—Why?

496 Q.—Because of your own showing he could not have bought them from you?

A.—Not a question of buying in that sense. I was saying that he had to adopt that particular procedure in those circumstances. Purchase there was but a particular method had to be adopted in purchasing the goods.

515 Q.—When he said he was going to commandeer, a commandeering order would follow?

A.—It followed always.

516 Q.—And very promptly, same day probably?

A.—No.

517 Q.—How long after?

A.—May be a day or two or three days.

And he says in answer to Q. 546 that commandeering order would apply, so far as the list before the Court went, only to the tin plates and the C. I. sheets.

Mr. Pugh made a point as to the difference between an ordinary sale and a sale which was the result of a commandeering order, and Ghaznavi was asked:

576 Q.—The elements [(in an ordinary sale) are voluntary action on both sides, offer and acceptance?

A.—Yes.

577 Q.—And price fixed?

A.—Yes, or fixable.

578 Q.—Do you say commandeering is the same thing?

A.—I still think it is the same thing, unless the seller wants to hide away the goods or wants not to sell, then you use that instrument of getting that property against his will."

He was then asked—

627 Q.—Assume that these items in which he said he would make a commandeering order were to go out, how much of your claim would disappear?

A.—That will have to be worked out, I cannot say offhand.

628 Q.—All the tin sheets which you are claiming under order of 14th June will go out?

A.—Yes.

629 Q.—Also 500 corrugated iron sheets in the letter of 17th June?

A.—Yes.

Then he was asked—

600 Q.—Take the list of 14th June—"commandeer tin sheets against demand." Is that a commandeering order?

A.—Yes.

601 Q.—You know quite well it is not. You know commandeering order had to be signed by Peterson?

A.—Yes, I did not know then.

I shall have more to say about commandeering orders, but this much I may say now that whenever Waite wrote "commandeering order" upon an invoice, the formal order had to be signed by Peterson as the Controller, and nobody else in that office except Peterson could sign that order, and that Peterson only signed the order if he was satisfied that the goods were wanted.

Ghaznavi was asked what was meant by Waite's endorsements "Have we met all demands?" and the like and his answer was (Q.609) that he could not say one way or the other.

611 Q.—What do you understand by "commandeer tin sheets against demand?"

A.—All I understand is my tin sheets have been bought and the rest is for the department and Mr. Waite to say what it means.

He elaborates this answer in reply to question 636:

"Don't you think it would be a more intelligent thing to do to find out first whether

he wanted this before buying it instead of buying first and then finding out afterwards?—He knows his requirements. He knows that he wanted this. That is why he purchased it. Then he says "find out if this will cover" 115 tons is not of all one size—it is of different sizes—9 sizes.

651 Q.—An indent which is not satisfied may be called an outstanding; would you not accept that as an outstanding?

A.—Yes, it may be said in that way, you may take it in the way you have read it.

652 Q.—Mr. Waite has said that he did not buy anything except those on which he said "make out order?"

A.—That statement is false.

653 Q.—And he says he put these remarks on these lists with a view to get certain information from his office before he decided to buy the goods?

A.—The fact remains that on these marks we got orders. The Rs. 27 lakhs worth of goods we delivered were ordered by these marks—there was no other contract except by these marks.

He was then asked why he did not file his suit in July:

725 Q.—In July you had all your documents?

A.—Yes.

726 Q.—Therefore there was nothing to stop your filing a suit?

A.—You forget the two months' notice.

728 Q.—That will take it to September?

A.—The High Court was closed.

729 Q.—Then November?

A.—Mr. Langford James was instructed to draw the plaint.

730 Q.—He takes months always to draw plaints?

A.—Not only months, sometimes more than that.

After that he says his papers were seized by the Police in December and so he could do nothing till after they were returned in March 1922.

749 Q.—How long could you keep your suit out of limitation by asking for orders which you did not get?

A.—I never took that point into consideration. I went on asking as long as I could and when I found they were delaying and shilly-shallying I immediately asked Morgan & Co. to file a suit.

Then he was shown Messrs. Morgan & Co.'s letter of 26th July, 1919, and asked:

755 Q.—You are treating it that the goods

have been specifically ordered or commanded?

A.—Yes.

757 Q.—You are not saying “they are to be delivered in future?”

A.—Why should I say that? That is an arrangement with Waite.

762 Q.—Did you consider that the contract had been broken when this letter was being written?

A.—No, it was not broken then. We asked for delivery. If they had taken delivery the matter would have ended.

763 Q.—You asked for delivery and if they had asked for it, you would have delivered and the contract would have been carried out?

A.—Quite so.

764 Q.—So the contract was not at an end according to you?

A.—This letter was not repudiated. They did not say: “We won't take your goods.”

765 Q.—I am asking you whether the contract was at an end at this time?

A.—No. Because they never repudiated.

766 Q.—When was it broken?

A.—I was advised after two months I think, since 2 months' notice was required.

767 Q.—Then you say the breach was 2 months after this letter?

A.—Yes.

Then he was asked how it was that if Waite definitely promised to take delivery in July no mention of it appears in Morgan & Co.'s letter, and he said it may not appear. He was further questioned on the point:

777 Q.—Nor does it appear in your plaint?

A.—I do not remember now.

(As a matter of fact it does not appear in the plaint.)

He makes a suggestion in answer to Q. 825 that para. 4 of the plaint gave some hint about it. But so far as I have been able to understand that paragraph it does not bear out the suggestion. He was asked in Q. 852:

I want to draw your attention to one or two things there. You have not mentioned there the definite promise to supply in July, to give the orders by July, 1919?

That was put to Capt. Waite long before this?—I think that was in November.

It is not there?—It is not there, and Mr. Taylor knew that.”

858 Q.—The next thing I want to draw your attention to is that there was no suggestion or any demand on Peterson or a

conversation with Waite in the presence of Peterson?

A.—Where?

859 Q.—In these particulars?

A.—No.

860 Q.—Nor in the cross-examination of Waite?

A.—Yes.

861 Q.—In the presence of Peterson?

A.—I do not know about that.

862 Q.—I suggest to you that Mr. Peterson's name was not mentioned in that connection at all till yesterday, I mean Friday?

A.—Mentioned to whom?

863 Q.—In any letter or document or cross-examination or on commission or any pleading or anywhere?

A.—That was a matter for the lawyers to know.

Then he was asked:

861 Q.—You see this letter that you wrote on the 3rd January, 1919. That was in connection with the order which Mr. Keatinge claimed to cancel?

A.—Yes.

869 Q.—There had been an order given and Mr. Keatinge wrote and said it had to be cancelled, you remonstrated, and eventually he took delivery?

A.—Yes.

871 Q.—You are making out a case there that the order cannot be cancelled because the order is a contract?

A.—I am making out nothing of the kind here.

873 Q.—I will read it and point it out to you?

A.—It is referring to the delivery order, that is all.

874 Q.—I will read you this passage: “What we want by saying you cannot cancel.....by the provisions of the law”—Did you or did you not say that the order was a contract?

A.—What, that must have been a lawyer's contract. I could not understand all that legal phrase. It was never disclosed although we wrote that letter dealing with the legal aspect of the whole thing.

876 Q.—Do you say it was a lawyer's draft?

A.—Very likely, I do not know. I may not have been there at that time. I do not remember who drafted that letter.

Later on he was asked whether Waite did not enter into written contracts because he could not do so, and he replied that he bought crores of rupees worth of goods

from the market by ticking. He was asked :

963 Q.—You see three items in your list which were not carried in by you to 26th August. There are delivery orders which are dated 15th and 16th August ?

A.—I see that.

984 Q.—Actually they reached you on the 4th and 6th September ?

A.—Quite so.

The matter was left there apparently, though it seems strange that an order which was actually issued from the office on the 15th or 16th August should take so long to get to Olive Row.

He was asked about Mr. Peterson's circular letter :

997 Q.—There is that circular letter of Peterson which says no deliveries are to be made without reference to him ?

A.—Quite a sensible letter.

998 Q.—Did you represent the matter to Peterson and say that Waite had bought a lot of goods ?

A.—He said: " When you want to deliver outstanding orders or orders placed with you by Waite, just inform me before doing so because I am in charge of his department."

999 Q.—Have you got any letter which you wrote to Peterson to say there are these outstanding goods bought on tick marks and I want to deliver them ?

A.—That has been my misfortune, going there daily and interviewing these people, not putting them in writing.

1000 Q.—You have no writing ?

A.—No. We used to call there almost daily for orders, deliveries and so on.

1008 Q.—When you came back with your ticked lists did you enter up these purchases in a book ?

A.—No, I used to preserve those copies.

1009 Q.—In your office same as in the Munitions Board Office no account was taken of these tickings in any book ?

A.—It was not necessary so far as I was concerned in my office. The lists were there.

1010 Q.—You had books in great detail both in English and in the vernacular ?

A.—I could not say in great detail, but in the ordinary course of business certain books were kept.

1011 Q.—I suggest to you the reason why these so-called contracts of yours are not entered up in the Munitions Board books

or in your office books is that they were not contracts at all ?

A.—No, no contracts were written up in our office. We used to preserve the list and when we used to tender the goods in Keatinge's time we used to keep the tenders.

The question then is what value is to be attached to evidence of this kind. I have given it very close and careful attention, and in my judgment it discloses so incredible a state of things as not to be worthy of acceptance. Had it been a true account I have no doubt that the plaintiff firm could have produced many witnesses, respectable merchants, who had dealt with the Munitions Board during the time when it was in existence and who would unhesitatingly have come forward to say that goods were purchased in large quantities by Waite by no other means than by ticking lists and that there were no formal contracts or anything of the kind. It is plain that what the Munitions Board looked to by way of check upon purchases made were the delivery orders issued. They did not accept nor is there any record in the office books to show that they regarded purchases by ticking as real purchases. There is one thing which is perfectly evident and that is this, that if Ghaznavi had believed that he was making contracts for the sale of very large quantities of war material, he must have made entries in his own books. It has been said that Waite was unbusinesslike. No body can say that Ghaznavi was unbusinesslike, and for him to pretend that orders covering large sums would be treated with so little care as not even to merit an entry in his ordinary account books seems to me preposterous. The burden of proof in this case is on the plaintiff, and upon the evidence before me I am not satisfied that he has succeeded in discharging that onus.

At the same time I think it my duty to say that the evidence which has been adduced on the side of Government is not satisfactory. With regard to the purchase, the only material witness examined on behalf of the Government is Waite himself. Keatinge's evidence, to which I shall refer later, does not deal directly with Waite's method of purchase although he deals with another question of importance. It seems to me that when the credit of an important branch of a

Government Department, such as the Munitions Board, is assailed, it was the duty of Government to examine the superior officers who were in charge of that branch. Both Mr. Peterson and Dr. Meek were apparently available in Calcutta. As successive Controllers of the Board in Calcutta, they might be expected to know the procedure that obtained in the office. They could certainly have told the Court whether Waite's alleged practice of purchasing by ticking was authorised and whether goods were delivered and paid for accordingly. More important still, Peterson could certainly have told the Court whether Ghaznavi's interview with Waite was held in his presence and whether Waite's alleged promises were also so made. Even though it be found that the surrounding circumstances are sufficient to refute Ghaznavi's allegations, the position would have been rendered more certain and infinitely clearer if there was Mr. Peterson's sworn evidence on the record that the allegations made were in fact wholly untrue. No doubt the determination not to put the Controlling Officers in the box was not taken without due consideration, but, in my judgment, the decision was unwise and lays Government open to charges to which it should not have been exposed. As I say the only witness examined is Waite, who, according to the particulars furnished by the Government Solicitor, "has entered into a conspiracy" with the plaintiff firm "to defraud the Government." A party to a suit presumably calls a witness to represent him to the Court as worthy of credit. What is to be said when the witness is, according to the party's own showing, of no repute? It might perhaps be said that if he had not been called, an inference adverse to Government would have been inevitable, and it might perhaps also be said that as regards the transactions which form the subject-matter of this claim, no one else was competent to testify, but what reliance can be placed upon his evidence? Mr. Pugh intimated to the Court that he did not propose to call evidence to prove the alleged conspiracy between Waite and the plaintiff firm but that does not rehabilitate Waite. Can it be said, as Mr. Sircar for the plaintiff firm has put it, that on this occasion only he has spoken the truth? It is surely not open to Government to say that though he is disreputable he is still

a witness of truth. At the highest his evidence can only be considered as showing that he is not the imbecile that Ghaznavi makes him out to be.

He was examined on commission in London on 15th May, 1924, nearly six years after the transactions upon which the present suit is based took place. As Mr. Sircar has referred in some detail to his evidence it is necessary for me to consider it for what it is worth.

He was asked:—

10 Q.—I want first of all to go to your general method of business. Were the orders as a rule verbal or in writing?

A.—Which orders do you mean? Mine or the orders I received?

11 Q.—The orders you gave to Kessoram Poddar & Co.?

A.—Invariably in writing.

11 Q.—Supposing there was an urgent matter, would you sometimes give an oral order?

A.—Yes.

13 Q.—When you gave an oral order, what happened then?

A.—It was confirmed by a written order.

20 Q.—I will put the question quite definitely to you. As far as you know, is this claim a claim for goods that you ordered?

A.—As far as I know some of the goods might have been ordered but certainly not all.

He was asked certain questions about the lists. I refer to pages of Exs. 1A to K, though these are not specified in the evidence. Q. 21 relates to sheet No. 1 of the list, Q. 23 to sheet No. 3 and Q. 26 to sheet No. 11.

21 Q.—There is an item of 250 tons of C. I. sheets. You agree to that?

A.—Certainly. From my note it was my intention to order it.

22 Q.—I see that your note there is "Make out order for this"?

A.—Yes.

23 Q.—In connection with the order of the 14th June there is a note by you: "Make out order for 2½ tons of galvanised sheet." I suppose you would say that probably that was ordered?

A.—It shows that it was my intention to make out an order. Whether an order was made out or not I cannot say.

26 Q.—In the case of No. 11 there is a note by you against "unequal angles and

unequal lengths" and the note is "Take this lot Rs. 64?"

A.—Yes.

27 Q.—In face of that is it possible that that order was given?

A.—"Take this lot" means that a certain lot was picked by me and it was the order to the office to make out an order for those quantities that I had taken.

28 Q.—That refers to the first four items in the list?

A.—As far as my memory goes, and as far as the list goes.

In cross-examination Waite admits that when dealers brought in lists he could tell them at the time what goods he would buy and then the forwarding of the official order was a matter of course. He explains that he made marks on the lists showing that the articles had some important bearing.

51 Q.—The mark would have some significance?

A.—Yes, some important bearing. Either that I would have to pay some particular attention to it or that it was something that might be required—a useful size for instance.

52 Q.—Or that that was the article you intended to indicate as the one you would purchase?

A.—I would purchase if required. I would not say that I would purchase, because if it was for purchasing I would simply say "Take this."

He elaborates this in answer to Q. 61. :—

61 Q.—Were you in the habit of scoring with blue pencil?

A.—Sometimes I was, and at other times I would not make any marks. As I have said, if these items were of important sizes, or important demands, those blue marks would signify that I wanted to buy them in case of necessity, but it would not necessarily mean that I had ordered the goods or intended ordering them.

62 Q.—It does not necessarily mean that?

A.—No.

The plaintiff's case is definitely put to him in questions Nos. 63 to 76, and he denies its truth.

76 Q.—You marked against the various items, after discussing the price, the goods you purchased from him?

A.—That I would purchase?

77 Q.—No, that you there and then agreed to purchase from him?

A.—I do not agree to that because I would have made a note then just as I have made in the case of the corrugated sheets. The case was again put to him in question No. 94. :—

94 Q.—The items marked were the items that you had bought?

A.—No, I do not agree to that. It went forward to my clerk for him to make out that order for the corrugated sheets; I cannot go beyond that.

Then he was asked:—

102 Q.—When you sent your order, if a formal order went forward from the Munitions Department, that would really be an order for delivery?

A.—Yes.

103 Q.—I notice in the first item of 4th June—"12 tons mild steel angles. Delivery ready." What would that mean?

A.—That means he has got them in stock ready to deliver them.

104 Q.—You would ask them, to retain those for you?

A.—If I wanted them, certainly I would.

105 Q.—At the interview?

A.—Yes, if I wanted them.

106 Q.—You would tell him to keep them?

A.—Yes. I might have told him: "Keep those 48 hours," or I might have told him: "Keep them altogether and I will take them."

107 Q.—If you told him to keep them altogether and you would take them, that would mean that he was to hold them for you?

A.—Yes.

108 Q.—Until you specified the delivery?

A.—Yes.

Then he was asked about commandeering orders for 500 tons of C. I. sheets.

110 Q.—Does "Make out O. order" mean: make out commandeering order?

A.—Yes.

111 Q.—Would that be an intimation to the plaintiffs that you were commandeering these goods?

A.—It was no intimation to the plaintiffs at all, it is just information for my office.

112 Q.—Assuming he saw you write that, would it mean that to him?

A.—It would mean that a commandeering order was being applied for.

113 Q.—For them?

A.—For them.

114 Q.—And that they were not at liberty to dispose of the goods?

A.—Oh yes, they could do what they liked with them until they received the commandeering order.

125 Q.—You never had power to make out a commandeering order?

A.—No.

126 Q.—You might on occasions buy goods from sellers, agree to the price with them and in order to make doubly sure of delivery say: "I shall make out a commandeering order?"

A.—No, I do not think I ever did that.

127 Q.—You might do that?

A.—It is possible.

128 Q.—So far as the purchaser was concerned, he would then know that those goods were ear-marked for the Government?

A.—Yes, but of course there was no need for a commandeering order if he agreed to the price.

340 Q.—If you recommended a commandeering order, before the commandeering order actually appears, was the seller perfectly entitled to deal with his goods as he liked?

A.—Yes. I do not say that he would know I was commandeering because the custom invariably was that immediately you spoke about commandeering, the goods were hidden away.

He was asked whether he could purchase for stock and indent and he said he could and in answer to Q. 147 he said:—

147 Q.—In making purchases for stock you either might make them by way of what I may call bargain and sale or by way of commandeering?

A.—No; there was no commandeering for stock; commandeering was only for immediate demands.

He was then asked:

150 Q.—After you have made your notes upon the document containing particulars of goods, the matter became a matter of routine. I take it?

A.—Yes.

He was then asked about "commandeering tin sheets against demands."

154 Q.—The note upon that is, "make out order for $2\frac{1}{2}$ tons galvanised sheets at Rs 77 per cwt. Commandeer tin sheets against demand—O. S. W. 14th June, 1918?"

A.—Yes.

155 Q.—That would mean, would it not that there was to be an order, that you had bought $2\frac{1}{2}$ tons galvanised sheets and that with regard to the tin sheets comprising

6,445 cases, you intended to have them commandeered?

A.—If a demand existed.

156 Q.—Against demand?

A.—Yes.

157 Q.—I suggested to you that you commandeered tin sheets against demand?

A.—Yes.

159 Q.—I suggest that "commandeer" meant that you wished to place your embargo on it?

A.—If demand existed.

161 Q.—So far as the plaintiffs were concerned it meant that they were not at liberty to part with them?

A.—Oh No. I would not say that because a demand might not have existed.

162 Q.—Surely "against demand" meant that you were going to commandeer?

A.—If the demand existed I was going to commandeer. If the office told me that the demands had been met there would have been no commandeering order.

In answer to Q. 166, he repeats that a demand must exist before he could commandeer:—

168 Q.—Did you never take tin sheets into stock?

A.—You cannot commandeer. You can purchase but there must be a demand in existence for a commandeering order.

Then the case was put to him with regard to items of 16th June.

172 Q.—I must put to you that with regard to all the items contained in the offer of the 14th June you agreed to buy them all from Mr. Ghaznavi and you sent on this note to your own department as an instruction to carry out certain purchases?

A.—It does not necessarily follow that I intended to buy them. I intended to buy the $2\frac{1}{2}$ tons and as regards the others, if a demand existed my instructions were to commandeer.

185 Q.—So far as the seller was concerned, if you had agreed to buy the goods from him it would not matter whether you had commandeered the goods or whether you sent a formal order for delivery, would it?

A.—No.

218 Q.—That completes the list. I now come back to the letter of the 23rd August upon which is the note: "Put up cases referring to these details with your signature"—What does that mean?

A.—A case in that instance means a demand.

219 Q.—“Put up cases referring to these details?”

A.—Yes, an indent.

220 Q.—What does it mean?

A.—That is for the office to bring those cases to me.

221 Q.—Bring what cases?

A.—The cases referring to those details.

222 Q.—Do you mean the cases of goods?

A.—The office cases, the original indent. It is called a case.

He was asked in cross-examination (Q. 333 seq.)

333 Q.—In fact did you get demands from other departments for goods?

A.—Yes.

334 Q.—When you got this list did you want to see whether there were any outstanding demands that this offer would fulfil?

A.—Yes, any of the items in it which would be covered by the demands.

He was then questioned about the interview with Ghaznavi in November:

251 Q.—I suggest to you that in the month of November Mr. Ghaznavi saw you and you said to him that you would take delivery of the goods by the following July?

A.—November of what year?

252 Q.—That was in November 1918?

A.—Yes, in July I was not in the Munitions Department.

253 Q.—Are you suggesting that there was not an interview between Mr. Ghaznavi and you in November 1918?

A.—No, I do not think so, because I was not in office in 1918.

256 Q.—Were you attending at the office?

A.—No, not in the month of November. I was laid up in bed—a cripple.

271 Q.—I am suggesting to you that in November you had an interview with Mr. Ghaznavi at which a man named Chatterjee was present?

A.—From memory I cannot possibly re-call it.

272 Q.—And at that interview Mr. Ghaznavi was asking you to take delivery of the goods you had bought?

A.—I have not the slightest recollection of that.

273 Q.—And that you said that now the armistice had taken place it made things rather awkward, but you would take delivery of all the goods by July?

A.—I have not the slightest recollection of it.

274 Q.—Will you say that that conversation did not take place?

A.—Yes, I will say that.

At that time it appears at all events there was no suggestion that Mr. Peterson had been present at the interview.

294 Q.—What was to become of the goods which you had bought for which you gave no delivery orders?

A.—I had not bought them if I had not given delivery orders. I had given orders for the office to issue orders for the goods that I had bought.

295 Q.—Supposing the office had not issued the orders?

A.—Then, of course, it is for Mr. Ghaznavi to claim for it.

296 Q.—That is what he is doing?

A.—As far as I was concerned, once my order was given that was sufficient.

That ends Waite's evidence. Whatever his character may be, and howsoever little worthy of credit he may be in consequence, it is in my judgment plain that he had some sort of method in his conduct of business. He was not the incompetent fool Ghaznavi pretends. As I say I can place no great reliance upon his evidence from the fact that he is obviously a man of no repute. At the same time, what he says is reasonable and is, therefore, at all events more probable than what Ghaznavi had to say.

I now turn to the evidence of Mr. Keatinge who was examined *de bene esse* on the 3rd March last. He was Controller of hardware, implements and materials in 1918 and on the 20th August he sent a telegram to the Controller, Calcutta: “Kindly instruct Minister and Deputy Controller, Inspection, not to make any further purchases of hardware, implements and materials for stock without reference to me.” Waite was then the Deputy Controller, Inspection. A copy of this was sent to Mr. Nixon, the Assistant Controller, who sent it to Waite who initialled it on the 22nd August (Ex. 2). Keatinge proves the correspondence which is to be found in part III of the brief between himself and the plaintiff firm. It begins with the letter of 13th December, 1918, wherein he cancelled certain orders placed by Waite with them on the 16th August and these are the first seven items on page 11 of the list of the 20th August. This was followed by Kessoram Poddar's protest of the 18th December and their letters of the 3rd and 8th January, 1919, and resulted in the revo-

cation of the cancellation. This was contained in his letter of 15th January to Messrs. Kessoram Poddar & Co.—“The Assistant Controller in charge, Narcaidanga Depôt, will take over such quantities of the material as you have delivered at the depôt to date and the further lot which you hope to deliver at the depôt next week at latest. This will, as explained by your representative to me, complete all outstanding orders placed with you by the Deputy Controller (Inspection). The “representative” here mentioned.....in the letter is admittedly Ghaznavi.

Keatinge was asked:

45 Q.—Were you given to understand that the delivery of the balance under that particular order would complete all transactions?

A.—Yes, complete all outstanding orders.

46 Q.—Between the plaintiff firm and the Board?

A.—Yes.

47 Q.—Give his Lordship the reason why you agreed to accept the balance of this particular order?

A.—It is rather difficult for me to do so; it was so long ago. It was represented to me by this gentleman that there was this outstanding and I suppose there was a certain amount of feeling—perhaps we considered the materials were all in his hands and we decided to take it over. But I cannot say now what was my particular reason. It was so far back.

48 Q.—Did you give your consent to accept that balance on the basis of all outstanding orders being completed?

A.—Distinctly.

Then in cross-examination it was put to him:

50 Q.—I am suggesting to you that what was happening was this that supposing 100 tons had been sold by Kessoram Poddar to the Secretary of State, if an order was sent for delivery of 10 tons he would have to deliver these 10 tons only. I am suggesting that the order would specify what goods had to be delivered?

A.—I don't quite follow.

53 Q.—I am asking you to assume that the Government had agreed to buy 100 tons of goods of a particular kind. Was the practice this, that probably next week an order would be sent for delivery of 10 tons, after a few days for the balance of 90 tons, or say only for 50 tons, leaving 40 tons to be delivered afterwards? Was that the practice which was followed?

A.—Not to my knowledge, decidedly not. He was then asked by the Court:

59 Q.—How do you understand that sentence: “This will complete all outstanding orders?”

A.—I understand that cancelled all outstanding orders. If there were any outstanding orders they were cancelled by this letter.

He was then asked whether he had seen Ghaznavi and he said he came to see him on several occasions.

63 Q.—Do you remember if he ever made any grievance that he was not getting more order for delivery?

A.—No, I have no recollection.

It is perfectly plain, therefore, from Mr. Keatinge's evidence that when he saw Ghaznavi he told him he would take delivery of the seven particular items which appear in page 11 of the list and that he understood that at that time, that would complete all transactions and that there were no more outstanding orders for which Government was liable to the plaintiff firm. I have no doubt that Ghaznavi fully understood that that was the true state of things. It seems, therefore, idle for Ghaznavi now to say that matters were not concluded but that the letter refers only to delivery orders and did not apply to purchases made by Waite before that date. If that had been so, why did he not tell Keatinge at the interview that in addition to these seven items which were now to be paid for, there were also 360 tons on page 11 for which delivery orders were still waiting? Why did he not tell him that all the other items now claimed were still in hand pending receipt of the delivery orders? Keatinge was apparently in a melting mood and prepared to pass anything without much enquiry. Why did Ghaznavi not tell him then and there that Waite who was then at Ootacamund would explain everything to him if he still entertained any doubt? It is plain that Ghaznavi had an unequalled opportunity of getting paid for all the goods alleged to have been purchased by Waite and the inference to be drawn from his conduct is in my judgment clear that at that time Ghaznavi was satisfied that all outstanding orders had been settled and that he had no further claim on Government.

In commenting upon this evidence Mr. Sircar has referred to the entry on page 11 of Exs 1A to K: “Take this lot Rs. 64” and

he says that the seven items are covered by Keatinge's letter of the 13th December, 1918, and since they have been delivered and paid for by Government, Waite was, therefore, wrong when he stated that his pencil line was only against four items and had been subsequently extended to cover the remaining items on that page. As, therefore, fraud has no longer been pleaded by the Government as a defence to this suit, it must be taken to be admitted that the order for 200 tons and six other items of 160 tons is still outstanding. In reply, Mr. Pugh pointed out that delivery order No. 2814A (Ex. 4) bears date 16th August, 1918, though the list was not handed to Waite till the 26th August. In his letter of the 13th December Keatinge purported to cancel all outstanding orders but on the plaintiff's remonstrance he agreed to take delivery of the balance, not knowing that the delivery orders had been antedated and not suspecting any irregularity.

It is not for me to conjecture how nearly Rs. 6½ lakhs of public money which was paid for these items was paid without a proper enquiry having been made, if not by Keatinge himself, then by some other competent officer. Had such enquiry been made it must have been evident that the order made on the 16th August for delivery of goods which could not have been bought before the 26th August must have been antedated. Had the enquiry been pursued, it would have been discovered that Waite's authority to buy against stock was withdrawn on the 20th August. Had the register been inspected, it would have been found that the order appears at the foot of a page and that the last preceding entry was No. 2814 and the one that follows at the top of the next page was No. 2815 and that this particular order had been numbered 2814 A. Had the register been more closely examined it would have been found that there were two other similar instances, namely, 2788A and 2819A, where a capital letter was added to the number of the delivery order that in both of these cases the order was inserted at the foot of the page and that both of them were in favour of Kessoram Poddar. The inference to be drawn is, in my judgment, irresistible that these orders were smuggled into the register to show that Waite had ordered the goods before he had been deprived of his authority and that a huge fraud had been perpetrated by the plaintiff

firm upon Government in collusion with some one in the office. The orders were, however, passed as good orders and paid for, it being recognized that Waite's purchases by ticking were valid if they were followed by delivery orders.

With regard to Waite's note on page 5 of the list: "Have we met all demands," Mr. Sircar points out that 10 tons were delivered and paid for. If the remark meant that he would not buy till he was satisfied that he had met all demands why should 10 tons be taken? Mr. Sircar's contention has been that the market was rising daily, so Waite, whether acting honestly or dishonestly, would be likely to buy in what he did not require in anticipation of a further rise when goods were actually required. In my view the construction which these words naturally bear are simply that Waite meant "I want 10 tons now, which I take; do we want any more?" Similarly, in regard to the first note "have we demands for others but 14", Mr. Sircar points out that there was a delivery order for 5 tons and that this purchase was by reason of the line against it. If that is so, it must follow that Waite bought all the items, and having bought all the items, asked the office whether any more were wanted. I should construe the words as meaning "I know there are demands for 14; do we want others than 14?" With regard to the aluminium ingots which appear on page 6 of the list, Mr. Sircar points out that these were covered by delivery order No. 2819A (Ex. 5) and paid for which shows that if there was a contract it must have been by ticking. Waite said that he was buying for indent which authority he retained till October 1918 (Q. 225) but that though he had originally intended to buy for indent, he had changed his mind subsequently and converted the goods so purchased to stock. There can be no doubt that these articles were purchased by tick marks followed by the antedated delivery order and that is also true of the galvanised plain sheets which is covered by delivery order No. 2788A to which I have already referred.

There are thus two conflicting versions to be considered; the plaintiff's version that Waite made a purchase merely by saying "I take this" and putting a tick against the item he wanted, and Waite's version that he ticked off on the lists what he considered of interest or of importance for future

use but when he actually wanted to buy, he issued directions to his office "Take this", "Make out delivery order or commandeering order." Despite Waite's character I cannot but hold that this is the more reasonable explanation and I think I may go so far as to say this that even if Waite's evidence be ignored, Ghaznavi's story is so improbable as to deserve no credence. That a man in charge of a Government Department, however dishonest or however unbusiness-like he may be, would buy before he knew that the goods were wanted at all, seems incredible. Waite could buy for stock based on three months' previous indents and also for indents which had not been executed and that no doubt is what he meant when he noted on the 26th August "put up cases relating to these 'demands' or in other words "let me see the indents which have come in with the necessary orders." It is proved by Keatinge that the Munitions Board took no notice of anything else but the actual delivery orders. Ghaznavi has no books to show that he regarded tick marks as indicating concluded purchases. He says that he has his copy of the list and that is enough for him, but, as Mr. Pugh has pointed out, in the list attached to Messrs. Morgan & Co.'s letter of the 24th July, the tick marks do not appear while in the list annexed to the plaint, all Waite's remarks are not entered. Mr. Sircar has urged that Ghaznavi's statement that 27 lakhs worth of goods had been taken over and paid for, has not been controverted. These goods were purchased by ticking Ghaznavi's earlier lists and the plaintiff firm has called upon the defendant to produce those lists and also Stoddart's private books. Nothing has been produced and no one has come from the office to swear that these books could not be found. This leads to an inference adverse to the defendant: *Murugesam Pillai v. Gnana Sambanda Pandara Sannadhi* (1), *Ram Prasad v. Raghunandan Prasad* (2), *Sri Raja Parthasarathy Appa Rao v. Secretary of State for India* (3) and is in accordance with s. 114 of the Evidence Act.

(1) 39 Ind. Cas. 659; 40 M. 402; 21 M. L. T. 288; 32 M. L. J. 369; 15 A. L. J. 281; 1 P. L. W. 457; 5 L. W. 759; 21 C. W. N. 761; 19 Bom. L. R. 456; 25 C. L. J. 589; (1917) M. W. N. 487; 44 I. A. 98 (P. C.).

(2) 7 A. 738; A. W. N. (1885) 160; 4 Ind. Dec. (N. S.) 838.

(3) 21 Ind. Cas. 871; 38 M. 620; (1913) M. W. N. 959; 14 M. L. T. 514; 26 M. L. J. 39.

I agree with Mr. Sircar that these lists were relevant to the enquiry and if in existence should have been produced. If they were not in existence there should have been some evidence on the defendant's side to prove it, but I am not prepared to infer from their non-production that a method of purchase was then in vogue which has not been established here. As I have said before, had it been a fact, Ghaznavi could have produced some trustworthy person from the hundred firms dealing with the Munitions Board to support him. Mr. Sircar next urges that there has been no repudiation of the contract alleged in Messrs. Morgan & Co.'s letter of the 26th July, 1919. On the other hand, Dr. Meek in his reply on the 29th July says. I cannot question your statement in any way. "I only want to see exactly what Mr. Waite has written."

It is necessary to read this letter:

"In your letter you state that Mr. Waite has made some definite written remarks on certain papers which your clients hold. Would you very kindly ask your clients to bring all the papers to me, so that I may see exactly what Mr. Waite has written. I am not questioning your statement in any way, but only want to see the originals in order that I may decide what action to take. I shall be in office between 11 A. M. to 1 P. M. on any date this week, but if these hours are not suitable I shall be quite glad to make a definite appointment with your clients."

It is, therefore, clear that though at that time Dr. Meek could not, of course, question the statements made because he had not seen the papers he wished to see the originals to decide what action to take, and he offered to make an appointment with the plaintiff firm for the purpose at any time convenient to them. The plaintiff firm, however, took no notice of the invitation, though, if the claim had been a genuine and true claim, the chance would obviously have been welcomed. That being so, to construe a courteous offer to make an appointment as being equivalent, if not to an acknowledgment of a contract or at all events to a non-repudiation, seems to me unwarrantable. The most emphatic repudiation lay in the action of Government when on the 23rd December the Police seized all the plaintiff's books and papers evidently because they intended to see

whether there was evidence sufficient to prosecute the firm criminally.

The next question is, supposing as a fact Waite had purchased goods by ticking, had he authority to do so? Is his act binding on the Secretary of State? Mr. Pugh has referred to s. 20 of the Government of India Act which deals with the revenues of India and cl. 2 (c) relates to the liabilities to which these revenues are subject. He refers to s. 29 which lays down the contracts which may be made by or on behalf of the Secretary of State. Clause 5 of that section provides how these contracts are to be made and who is competent to make them:

"Provided that any contract for or relating to the manufacture, sale, purchase or supply of goods, or for or relating to affreightment or the carriage of goods, or to insurance, may, subject to such rules and restrictions as the Secretary of State in Council prescribes, be made and signed on behalf of the Secretary of State in Council by any person upon the permanent establishment of the Secretary of State in Council who is duly empowered by the Secretary of State in Council in this behalf. Contracts so made and signed shall be as valid and effectual as if made as prescribed by the foregoing provisions of this section. Particulars of all contracts so made and signed shall be laid before the Secretary of State in Council in such manner and form and within such times as the Secretary of State in Council prescribes."

Now, it is plain that according to this section the contract to be valid must be in writing and must be signed by a person who has been specially empowered to sign it. That person must be upon the permanent establishment of the Secretary of State. Mr. Pugh observes that Waite was not on the permanent establishment nor was he specially empowered in that behalf. Any authority that he had to deal with Munitions at all was derived from Peterson who delegated certain of his own powers to him. Moreover, where the Statute says that the contract to be valid must be in writing, verbal contracts, even if established, have no effect. Mr. Pugh has referred to a number of cases in support of this, viz., *Shivabhajan v. Secretary of State for India* (4), *Srinibas Prosad Singh v. Kesho*

Prosad Singh (5), *Kinlock v. Secretary of State* (6), *Grey v. Charusila Dasi* (7), *Ashbury Railway Carriage & Iron Co. v. Riche* (8), *Young v. Leamington Corporation* (9) and *Doya Narain Tewary v. Secretary of State for India* (10).

Mr. Sircar contends that it is not the plaintiff firm's case that the Secretary of State has signed the contracts or that somebody else has signed them for him. The Secretary of State is liable because he is the person to be sued when the plaintiff wants to get his money out of Indian revenues. The plaintiff says that these were purchases by a servant of the Government of India which were in some cases paid for by the Government of India and for which in the present case the Government of India is liable. Here the Government of India had decided that it would buy goods in the open market like any tradesman. Mr. Sircar relies on s. 20 (2) (c) of the Government of India Act and s. 32 (1) and (3): "There shall be charged on the revenues of India alone, all expenses, debts and liabilities lawfully contracted and incurred on account of the Government of India." Section 32 (1) says that the Secretary of State in Council may be sued and may sue as a body corporate and cl. (3) provides that "the property for the time being vested in His Majesty for the purposes of the Government of India shall be liable to the same judgments and executions as it would have been liable to in respect of liabilities lawfully incurred by the East India Company if the Government of India Act, 1858, and this Act had not been passed." Mr. Sircar contends that though there is no contractual relationship between plaintiff and the Secretary of State, yet under s. 32 (1), the Secretary of State has to be sued as a body corporate and under cl. (3) he is liable in the same way that the East India Company would have been liable. He has referred to *Sarat Chandra Das v. Secretary of State for India* (11), *Secretary*

(5) 9 Ind. Cas. 862; 15 C. W. N. 475; 13 C. L. J. 365; 38 C. 754.

(6) (1880) 15 Ch. 1 on appeal (1882) 7 A. C. 619; 51 L. J. Ch. 885; 47 L. T. 133; 30 W. R. 845.

(7) 7 Ind. Cas. 247; 38 C. 53.

(8) (1875) 7 H. L. 653; 44 L. J. Ex. 185; 33 L. T. 451; 24 W. R. 794.

(9) (1883) 8 A. C. 517; 52 L. J. Q. B. 713; 49 L. T. 1; 31 W. R. 925; 47 J. P. 660.

(10) 14 C. 256; 7 Ind. Dec. (N. S.) 170.

(11) 9 Ind. Cas. 859; 38 C. 376; 13 C. L. J. 360; 15 C. W. N. 470.

of *State for India v. Hari Bhanji* (12) and *Kishen Chand v. Secretary of State for India* (13).

There can, I think, be no question that the Secretary of State can be sued as a body corporate as provided in s. 32 (1) of the Government of India Act. As was pointed out in *Doya Narain Tewary v. Secretary of State for India* (10):

"A suit brought against the Secretary of State is not one against any person or any real body corporate, but is one brought against a nominal defendant, such nominal defendant being put upon the record merely to enable the plaintiff to obtain the remedy secured to him by s. 65."

It is plain from s. 32 (3) that "the property for the time being vested in His Majesty for the purposes of the Government of India shall be liable to the same judgments and executions as it would have been liable to in respect of liabilities lawfully incurred by the East India Company."

The position has been explained in the case of *Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India* (14) the head-note of which says:—

"The Secretary of State...is liable for damages occasioned by the negligence of servants in the service of Government if the negligence is such as would render an ordinary employer liable." The test really is whether the contract was a Sovereign act or was one which a private individual could have entered upon in his ordinary business pursuits. If it is the former, the Secretary of State is not liable, but if it is the latter he can be sued in the same way that the East India Company could have been sued for acts done in their capacity as traders and not as the Sovereign power.

Where commandeering orders are concerned, I think the position is plain. Power was taken by Government under the Defence of India (Consolidation) Act (? Rules), 1915, and under r. 11A (a) an officer specially authorised in this behalf is enabled by an order in writing to require the owner of any particular class of goods (these goods were specially notified by Government) to place them at the disposal of Government (12) 5 M. 273; 6 Ind. Jur. 403; 2 Ind. Dec. (N. S.) 190.

(13) 3 A. 829; A. W. N. (1881) 87; 6 Ind. Jur. 323; 2 Ind. Dec. (N. S.) 540.

(14) 5 B. H. O. R. App. 1.

*Head-note of 5 B. H. O. R.—[Ed.]

at such time and place as was specified in the order, making disobedience to the order punishable at law. Provision for payment of the price by reference to arbitration is also made. In this case, therefore, there can clearly be no ordinary commercial contract for sale and purchase, because one of the parties may be unwilling to surrender his goods and yet may be compelled under the commandeering order to do so. He has no option once the order has been made and issued. He is bound to place his goods at the disposal of Government when called upon to do so. The only right he has is that if he does not accept the price offered by Government he can have it settled by arbitration. The arbitrator's order is final. Plainly, therefore, a commandeering order is one which no one but Government can make, and being an act of the Sovereign Power, the Secretary of State evidently cannot be sued in respect of it.

It has, however, been argued by Mr. Sircar that the process of acquisition by Waite has been exactly the same whether it has been by delivery orders or by commandeering orders, and the contract in either case was a good contract, though the method of payment may be different. A sale is a good sale though no price may be fixed at the time of the purchase, when the arrangement is that the price will be subsequently settled by a particular agency, *Valpy v. Gibson* (15).

I do not think this argument is well founded. Waite had no authority to issue a commandeering order. That could only be done by Peterson, who as Controller was specially authorised in that behalf. When, therefore, Waite wrote "make out commandeering order" and the like, he was really giving instructions to his office to make out the order in anticipation of Peterson's sanction. But until the order was signed by Peterson and served on the owner, it had no legal or binding effect and the owner might, if he had been so inclined, have disposed of the goods in any way he pleased. Ghaznavi says, it is true that a person holding goods which came under the special class notified could not sell these goods without a license from the Government. That, no doubt, is so. But the embargo on this class of goods was withdrawn in December, 1918, and it

(15) (1847) 4 C. B. 837; 16 L. J. C. P. 241; 11 Jur. 826; 136 E. R. 737; 72 R. R. 740;

is idle to say now that after that date Ghaznavi could not have disposed of these goods in any manner that suited him.

A further question then arises whether contracts other than those specified in s. 29 (5) of the Government of India Act can be held to be binding on the Secretary of State. In my judgment they cannot. In *Young v. Leamington Corporation* (9) where the Statute provided that where the subject-matter of contract exceeds £50 in value, contracts must be under seal, and when the contract was not under seal it was held to be bad and unenforceable. Lord Bramwell said at page 528* :

"The Legislature has made provisions for the protection of rate-payers, shareholders, and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into."

If these principles are applied to the present case it may be said that while there is no magic in a written contract, it is a safeguard which has been laid down by the Statute for the protection of the public revenues. When, therefore, a Statute lays down certain mandatory provisions in regard to the framing of contracts between the Secretary of State and a private individual, it is no answer to say that because the provisions were ignored on particular occasions and payments were made on contracts which were not in conformity with the Statute, that that should be taken as a precedent which will be binding upon the Secretary of State in every case. In my judgment, contracts to be binding upon the Secretary of State, must be made in strict conformity with the provisions laid down in the Statute. If they are not so made, they are not valid as against him.

I now proceed to consider the question of the sufficiency of the notice under s. 80 of the Civil Procedure Code, with which the question of limitation is bound up. This section says :—

"No suit shall be instituted against the

Secretary of State for India in Council... until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government..... stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims."

In this case the notice was given to the Financial Secretary to the Government of Bengal on the 26th July.

Mr. Pugh argues that if the alleged breach of contract took place, then, the notice is good. But if the plaintiff firm wishes to get out of limitation by saying they had not to deliver till called on to do so, then there was no cause of action of which they could give notice and the notice was "bad."

Mr. Sircar replies that there was no question of giving delivery till asked for, and therefore, under s. 93 of the Contract Act the plaintiff was not bound to deliver until such application was made. Further, under s. 46 of the Contract Act plaintiffs had not to perform their engagements until after a reasonable time, and it is argued that the joint effect of these sections is to free the plaintiffs from liability to deliver at any time, reasonable or otherwise, until they were called upon to do so. It was for Waite to indicate when and where the delivery was to be made, and until he did so, the plaintiff firm had not to move, and limitation had not begun at all. The delay of seven months, therefore, could not be held to be unreasonable in view of the congestion which prevailed in all the Government depôts. Further, Mr. Sircar has urged that the words "cause of action" as used in s. 80 should not be too strictly construed. He relies on *Secretary of State for India v. Perumal Pillai* (16), *Jehangir M. Cursetji v. Secretary of State for India* (17), *Jones v. Bird* (18) and *Manindra Chandra Nandī v. Secretary of State for India* (19). He points out that in the letter of 26th July the plaintiffs had stated their grounds of complaint and as the object of the section is merely to intimate to the Secretary of State the

(16) 24 M. 279; 11 M. L. J. 117.

(17) 27 B. 189; 5 Bom. L. R. 30.

(18) (1822) 5 B. & Ald. 837 at p. 844; 106 E. R. 1397; 1 Dowl. & Ry. 497; 24 R. R. 579.

(19) 5 C. L. J. 148; 34 C. 257.

*Page of (1883) 8 A. C.—[Ed.]

details of the complaint and to give him two months within which to make amends, *Perumal's case* (16) is directly in point as the claim had arisen after the notice was given.

It is quite true as was explained in *Perumal's case* (16) at page 282* that the cause of action should not be taken in a narrow sense, the object of the section being merely to inform the defendant substantially of the ground for complaint. But it is, in my judgment, equally true to say that the section requires the cause of action to be stated with some precision. Now, what is the cause of action stated in the attorney's letter of the 26th July? In the third paragraph, it is said "no instructions have been given to our client for delivery of the goods", and lower down: "Unless our clients are given the requisite orders to deliver the materials, which Capt. S. C. Waite agreed on behalf of the Munitions Board to take over, they will have no course but to adopt legal proceedings." The letter does not say the cause of action is a breach of the contract between the Board and the plaintiff firm. The breach is still *in futuro*, and depends upon the definite refusal of the Government to issue the delivery order. That being so, the cause of action does not appear to have arisen at the time of the notice and the notice must, therefore, be invalid. If, on the other hand, the plaintiff's case that there was a stipulation that the goods were not to be delivered till called for, is true, a term must be inferred from the contract or read into it, but there is in fact no such term. If such a term is to be inferred, it must be a reasonable term, i. e., it must be within a reasonable time of the receipt of the last order of the 26th August, 1918. It is plain from Keatinge's letter of 15th January, 1919, that he regarded "all outstanding orders" placed with the plaintiff firm as finished. This was followed by Peterson's notification of the 2nd February, stopping all further deliveries. The suit was not filed till June, 1922. It was, therefore, plainly the duty of the plaintiff firm to show that there was a term in the contract by which delivery was not to be called for up to July, 1919, that is to say, ten months after the contract. This, in my judgment, he has failed to do and Ghaznavi's statement that Waite promised to take delivery in July is falsified by the fact that the suggestion neither

appears in his attorney's letter threatening the suit nor in the plaint itself. There is, also the undoubted fact that Waite went on leave in January, 1919, to Ghaznavi's knowledge, and that his services were dispensed with in February following. Ghaznavi was perfectly aware of that too, and if his claim had been well-founded he must have pressed it as soon as he heard that Waite was no longer in a position to issue the delivery orders which Ghaznavi says he promised him the previous November. In my judgment, the breach of alleged contract should be held to have occurred on 1st February, 1919, when Peterson issued his circular letter, and limitation began to run from then, and as the suit was not filed within three years from that date it is barred by limitation.

I, therefore, answer the issues as follows:—

Issue No. I.—First part, Yes, in so far as commandeering orders were concerned, Second part, No.

Issues Nos. II, III and IV.—No.

Issues Nos. V, VI and VII.—No.

Issue No. VIII.—Yes, 15th January, 1919, and 2nd February, 1919.

Issues Nos. IX and X.—Yes.

Issue No. XI.—No evidence was led by the defendant. I answer this issue in the affirmative.

Issue No. XII.—No evidence was led by the defendant. I answer this issue in the negative.

Issue No. XIII.—None.

The result, therefore, is that the suit will stand dismissed with costs on scale No. 2, including costs of the commission and reserved costs, if any.

[*Note.*—An appeal was preferred from the above judgment but it was dismissed on March 14, 1927, for want of prosecution.—*Ed.*]

A. N. A.

Suit dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1210 OF 1923.

November 23, 1927.

Present:—Mr. Justice Broadway and
Mr. Justice Jai Lal.

ABDUL GHANI—DEFENDANT—

APPELLANT

versus

SANSAR CHAND AND ANOTHER

—PLAINTIFFS AND HUKAM CHAND

—DEFENDANT—RESPONDENTS.

Hindu Law—Alienation—Mortgage—Father's right to mortgage ancestral estate for antecedent debt—'Antecedent debt,' meaning of.

An alienation by a Hindu father of the undivided family estate for an antecedent debt is binding on the estate. [p. 386, col. 1]

An antecedent debt means a debt, antecedent in time as well as in fact, that is to say, that the debt must be truly independent and not part of the transaction impeached. [*ibid.*]*Brij Narain Rai v. Mangla Prasad Rai* (2), followed.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 6th February, 1923, modifying that of the Senior Subordinate Judge, Jullundur, dated the 2nd May, 1921.

Mr. Niaz Muhammad, for the Appellant.

Messrs. Fakir Chand and Chandar Gupta, for the Respondents.

JUDGMENT.

Broadway, J.—This and the connected second appeal arise out of two cases instituted by the sons of one Hukam Chand for a declaration that certain alienations made by their father Hukam Chand would not affect their reversionary rights on his demise. The defendant in one case was Abdul Ghani who had purchased 64 *kanals* 5 *marlas* of land from Hukam Chand on the 9th of June, 1905, for a sum of Rs. 2,500. In the second case the defendant was one Sardar Ali who had purchased certain property from Hukam Chand for a sum of Rs. 4,700 on the 13th of January, 1917. The learned District Judge recorded one judgment in both cases although the trials were separate, and found necessity established for Rs. 1,000 in the case against Abdul Ghani, and in the case against Sardar Ali decreed the plaintiffs' suit in full. Abdul Ghani and Sardar Ali have preferred two separate appeals to this Court and we have heard Mr. Niaz Muhammad on behalf of Abdul Ghani, and Mr. Badri Das on behalf of Sardar Ali, while Mr. Fakir Chand and Chandar Gupta appeared for the plaintiffs-respondents.

The case of Abdul Ghani need not de-

tain us long. The findings are clear that Hukam Chand and his sons were members of a joint Hindu family and that the property alienated was ancestral. These are pure findings of fact. Similarly, it was found that no necessity whatever had been proved for Rs. 1,500 out of the Rs. 2,500 alleged to have been paid by the appellant Abdul Ghani. Mr. Niaz Muhammad was constrained to admit that there was no evidence whatever on the record as to necessity *qua* this sum of Rs. 1,500, and I would, therefore, dismiss this appeal with costs.

The matter is not quite so clear in the second appeal, namely, the one by Sardar Ali. The learned District Judge finds that the sum of Rs. 4,700 was made up of four items:—

	Rs.
(a) Paid to Saif-ud-Din, previous mortgagee.	2,500
(b) Deposited with the vendee for payment to Saif-ud-Din in case any excess was found to be due to the mortgagee in (a)	200
(c) Cash paid before the Sub-Registrar	1,900
(d) Registration expenses	100
TOTAL	4,700

Qua the Rs. 1,900, there is no evidence of necessity whatever and the view taken by the learned District Judge must, therefore, prevail.

As to the item payable to Saif-ud-Din the position is this. In 1915 Saif-ud-Din advanced this sum of Rs. 2,500 on a mortgage to Hukam Chand, and in 1917 Sardar Ali was to pay off this item together with any further sum that might be found due for which purpose he retained Rs. 200 of the sale price. As a matter of fact Saif-ud-Din was paid a sum of Rs. 2,631-12-6. The learned District Judge, apparently following *Sahu Ram Chandra v. Bhup Singh* (1) came to the conclusion that although the debt to Saif-ud-Din was 'antecedent' it was the duty of the vendee Sardar Ali to establish that the debt for which the mortgage had been executed in 1915 was

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

for necessity. Their Lordships of the Judicial Committee considered *Sahu Ram Chandra v. Bhup Singh* (1) in *Brij Narain Rai v. Mangla Prasad Rai* (2) and in order to make the position clear formulated, at page 104* of the report, the propositions which they desired to lay down as a result of their examination of the authorities. It was there held that:—

"(1) The managing co-parcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity; but

(2) If he is the father and the reversionaries are the sons he may, by incurring debt, so long as it is not for an immoral purpose lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached."

Now, the transaction impeached in this litigation is the sale to Sardar Ali and, therefore, the debt paid off by Sardar Ali to Saif-ud-Din was clearly an independent one and, therefore, 'antecedent' within the meaning of that expression as used by their Lordships of the Judicial Committee. It was contended, however, that the fact that this debt was an antecedent one merely shifted the onus on to the plaintiffs-respondents to prove that the debts were immoral and that, therefore, on the findings in this case the learned District Judge's decision should be upheld.

Now, it is true that the learned District Judge has found that Hukam Chand was extravagant, vicious and generally of an immoral character, but this finding relates to his character as established in 1917. Admittedly there is nothing on the record to connect the debt incurred by Hukam Chand under this mortgage with any of his vicious propensities or activities. It was urged, however, that it was sufficient to

(2) 77 Ind. Cas. 689; 46 A. 95; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; A. I. R. 1924 P. C. 50; 33 M. L. T. 457; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 232 (P. O.).

*Page of 46 A.—[Ed.]

discharge the onus to prove that he was generally of immoral character without any business in which he could have invested the money raised by him under the mortgages. In support of that contention reliance was placed on *Jaswanti v. Tej Narain* (3) in which it was remarked that there is a presumption that a loan has been raised for an "immoral purpose" if it is proved that at the time of raising the loan the borrower was living a licentious life, beyond his means, indulging in drink, riot and debauchery and that at the same time he was without any business or occupation upon which the money might legitimately have been spent. *Ram Rattan v. Basant Rai* (4) is an authority which appears, to some extent at any rate, to conflict with this view, for it was held in that as well as in certain other cases that the burden is not discharged by showing that the father lived an extravagant or immoral life and that there must be a direct connection between the debt and immorality set up by the son. I do not think it necessary to examine these two authorities in order to ascertain whether they are reconcilable for it seems to me that in this case it has not been proved that when the debt in question was incurred, that is to say, the mortgage was executed, Hukam Chand was leading such a licentious life as is contemplated by *Jaswanti v. Tej Narain* (3).

I would, therefore, accept the appeal of Sardar Ali and modify the decree by granting the plaintiffs-respondents a declaration to the effect that this alienation would not affect their reversionary rights to the extent of Rs. 1,968-3-6. I would leave the parties in this appeal to bear their own costs in this Court.

Jai Lal, J.—I agree.

R. L.

A. N. A.

Appeal accepted.

(3) 41 Ind. Cas. 192; 10 P. R. 1918; 120 P. W. R. 1917.

(4) 64 Ind. Cas. 121; 2 Lah. 263; 3 Lah. L. J. 563.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1371 OF 1927.
November 22, 1927.

Present:—Mr. Justice Tek Chand.

NANAK CHAND AND ANOTHER—PLAINTIFFS
—APPELLANTS

versus

GAMAN—DEFENDANT—RESPONDENT.

Landlord and tenant—Encroachment by tenant—
Landlord's right to encroachment—Presumption.

Where during the continuance of the tenancy, a tenant encroaches upon land belonging to a third person, his possession of the land so encroached upon is *prima facie* for the benefit of the landlord unless it appears by some evidence that the tenant, at the time the encroachment was made, intended it for his own exclusive benefit. The presumption in such cases is that encroachments made by the tenant are a part of the holding, and on the termination of the tenancy the tenant must render them up to the landlord whether he has directly undertaken to do so or not.

Andrews v. Hailes (1), *Earl of Lisburne v. Davies* (2), *Tepu Mahammad v. Tefayit Muhammad* (3) and *Ammu Ammal v. Puthiarambath Moidin* (4), referred to.

Second appeal from a decree of the District Judge, Gujranwala, dated the 19th February, 1927, affirming that of the Subordinate Judge, Fourth Class, Gujrat, dated the 25th June, 1926.

Mr. Sahib Dayal, for the Appellants.
Mr. Iftikhar Ali, for the Respondent.

JUDGMENT.—This dispute relates to a small plot of 14 *marlas* in area, being a part of *Khasra* No. 1057 which represents the *abadi* of the village. The facts found by the learned District Judge are as follows:—

The plaintiffs-appellants are the owners of *Khasra* Nos. 1512, 1513 and 1514 the last of which adjoins the *abadi*. In 1914 they leased these fields to one Fazal Din tenant for cultivation and it appears that at that time Fazal Din encroached upon the adjoining portion of the *abadi*. This encroachment was, however, removed soon after. Later, Fazal Din ceased to cultivate the land and the plaintiffs let fields Nos. 1512, 1513 and 1514 to Gaman respondent as tenant under them. Gaman also encroached upon the *abadi* which adjoined these fields and took possession of the plot measuring 14 *marlas* which is now in dispute. Gaman has since been ejected by the plaintiffs from fields Nos. 1512, 1513 and 1514 but he still continues in possession of the portion of the *abadi* encroached upon.

The plaintiffs sued to recover possession of this plot from Gaman but the learned District Judge has dismissed the suit, holding that the plaintiffs had acquired no proprietary right in it and cannot oust the *quondam* tenant even though his possession is unlawful.

In my opinion the learned District Judge's decision cannot be sustained as on the findings of facts arrived at by him the plaintiffs were legally entitled to a

decree. The proposition of law is firmly established that where during the continuance of the tenancy a tenant encroaches upon land belonging to a third person, his possession of the land so encroached upon is *prima facie* for the benefit of the landlord. In such cases the presumption is that encroachments made by the tenant are a part of the holding and on the termination of the tenancy the tenant must render them up to the landlord whether he has directly undertaken to do so or not. See *Andrews v. Hailes* (1) where Lord Campbell has elaborately discussed the principles underlying the rule and the judgment of Willes, J., in *Earl of Lisburne v. Davies* (2). The law on the subject is thus summed up by Woodfall in his standard work on Landlord and Tenant (20th Edition) at page 894: "Encroachments made by a tenant from the adjoining waste during the term are *prima facie* for the benefit of the tenant and *afterwards* of his landlord, unless it appears by some evidence that the tenant at the time they were made intended them for his own exclusive benefit." The view taken by the Indian Courts is in accord with this rule. See *Tepu Mahammad v. Tefayit Mahammad* (3) and *Ammu Ammal v. Puthiarambath Moidin* (4). In this case Gaman respondent has led no evidence to displace this presumption and there are no materials on the record from which it can be inferred that he intended to make the encroachments for his sole benefit.

I, therefore, accept the appeal and setting aside the decree of the learned District Judge, decree the plaintiffs' suit with costs throughout.

R. L.

Appeal accepted.

(1) (1853) 22 L. J. Q. B. 409; 2 EL. & BL. 349; 17 Jur. 621; 1 W. R. 366; 118 E. R. 797; 95 R. R. 593.

(2) (1866) 1 O. P. 259; 1 H. & R. 172; 35 L. J. O. P. 193; 12 Jur. (N. S.) 340; 13 L. T. 795; 14 W. R. 333.

(3) 29 Ind. Cas. 216; 19 C. W. N. 772.

(4) 43 Ind. Cas. 677; (1918) M. W. N. 38.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1238 OF 1927.

December 2, 1927.

Present:—Mr. Justice Agha Haidar.

TEK SINGH AND OTHERS—ACCUSED.

—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 366, 376—Acts disclosing offences of kidnapping and rape—Conviction for both, legality of.

Where the series of acts proved against the accused establishes two distinct offences falling under ss. 366 and 376 of the Penal Code, the accused can be convicted separately for both the offences, [p. 389, col. 2.]

Ghulam Muhammad v. Emperor (1), followed.

Criminal appeal from an order of the Magistrate, First Class, exercising enhanced powers under s. 30, Criminal Procedure Code, Lahore, dated the 30th September, 1927.

Mr. L. Saunders, for the Appellants.

Diwan Ram Lal, Assistant Legal Remembrancer, and Mr. Mulk Raj, for the Respondent.

JUDGMENT.—Tek Singh, Jiwan Singh and Pala Singh have been convicted under ss. 366 and 376, Indian Penal Code. Their sentences are (1) under s. 366, four years' rigorous imprisonment and Rs. 100 fine each and (2) under s. 376, three years' rigorous imprisonment and a fine of Rs. 100 each. The sentences are to run consecutively. The other two persons, namely, Indar Singh and Sohawa Singh have been each convicted under s. 342, Indian Penal Code, and ordered to pay a fine of Rs. 150 each. They have all appealed to this Court and their appeal has been fully argued by Mr. Saunders while the case for the prosecution has been carefully placed before me by Mr. Ram Lal.

The story for the prosecution is that a young woman named Gulab Kaur who is a widow was going to take part in the birth ceremony of her brother's son to a certain village early on the morning of the 15th of July, 1927. She was accompanied by her two daughters and one son, the age of one of the daughters, namely, *Musammatt Tej Kaur* being 11 years. Her mother-in-law *Musammatt Raj Kaur* accompanied her a short distance to see her off and she was also accompanied by *Khushal Singh*, the son-in-law of *Musammatt Raj Kaur*. The story goes on that when she reached a certain village pond the present appellants rushed out of some bushes and pounced down upon the

woman and lifting her up in their arms took her to the house of Tek Singh where Tek Singh, Jiwan Singh and Pala Singh committed rape upon her by turns. Naturally there was a hue and cry and the villagers were attracted to the spot and the woman was let out when the door was opened at about sun rise. Her children were detained outside the *kotha*, somewhere in the *dehliz* and Sohawa Singh and Indar Singh, according to the prosecution, gagged their mouths so as to prevent their raising an outcry. *Khushal Singh* who according to his own evidence is 55 years old was secured by a turban having been tied round his neck so as to prevent his escape.

This is the main story for the prosecution. We have to see how far this story has been proved in its various stages by the evidence produced on behalf of the prosecution. No First Information Report was originally lodged at the *thana* which is at a distance of only three miles from the scene of the occurrence. But we find that on the 22nd of July, 1927, *Musammatt Gulab Kaur* came to Lahore and made a statement before the Assistant Superintendent of Police. This officer sent this statement to the *thana* to be recorded as a First Information Report. He further ordered that the Police should take up the investigation. A point was urged very seriously by Mr. Saunders that the statement before the Assistant Superintendent of Police was a belated one and that it throws considerable doubt upon the *bona fides* of the complainant party. We have, however, the evidence of *Khushal Singh* who gives the details of the circumstances as to how the father of the girl accompanied by some others went to the Police Station and in the absence of the Sub-Inspector of Police, the Head Constable who happened to be in charge of the *thana* refused to take down the report. This statement receives support from the statement of the Sub-Inspector Sant Singh (P. W. No. 5) who says that in the course of the investigation it came to his knowledge that the Head-Constable who at the time was at the *thana* did not record the report though the relatives of the woman asked him to do so. There is also another way of looking at the matter. If the complaint had been a false and unfounded one there was no point at all in *Musammatt Gulab Kaur*'s coming all the way from her native village to Lahore to make a statement before

the Assistant Superintendent of Police, in this case a European Officer. A report at the nearest Police Station would have served the purpose equally well and would have saved her a good deal of trouble and expense. I accept the explanation given by the witnesses for the prosecution and hold that the defence cannot derive any advantage from the lateness of the report.

Mr. Saunders further argues that two names seem to have been added in the statement of this woman before the Court and that the name of one Arjan Singh has been omitted. These persons whose names have been subsequently added have not been convicted and, therefore, it cannot be said that merely because two men have not been convicted the whole list of the accused persons given by the woman should be taken to be false and an imaginary one. As to the main question a good deal of argument was addressed to me on behalf of the appellants that the woman was a bad character and had been carrying on a liaison with Tek Singh accused. Reliance to a large extent was placed upon the statement made by Tek Singh from the dock. I am not prepared to place any reliance upon it. After all, it is the statement of a criminal who is at bay and wants to throw mud all round in order to save his own skin. The evidence for the defence on this very point is very vague and unconvincing. It is, in any way, not such as a Court of Justice would take into consideration for the purpose of imputing immorality to a woman. Whatever her character may have been, so far as the materials on the records are concerned, it has not been established that the woman was of a loose or immoral character. The learned Magistrate seems to have been considerably impressed by the evidence of the child *Musammatt Tej Kaur*. I have read the statement of this witness very carefully and, in my opinion, there is a ring of truth about it. She is a child of tender years and it is hardly likely that she would be used as an instrument for the purpose of bolstering up a false case against the appellants. If a false case were intended to be made up against the appellants older people would have been available to give evidence with greater confidence. Mr. Saunders also argued that the woman is described by the learned Magistrate as a stalwart *Jat* woman of 27 and, therefore, it is unlikely that she should yield to her seducers easily. This

argument is a very familiar one and there is no doubt that if a single grown up woman in fairly good health is really determined to resist any attempt to rape her, her assailant would find it difficult singly to commit the offence. But here we have got a case of at least three persons two of whom are below 30 and the third *Pala Singh* is variously described as a man between 40 and 50. They are said to have been armed with *chhavis* and *gandasas*. Besides these three men there was further reinforcement awaiting outside. It is, therefore, intelligible that by threat and show of force they would be able to overcome any possible resistance that the woman might offer. A further argument was advanced on behalf of the appellants that it is highly improbable that Tek Singh and Jiwan Singh who are brothers should commit such an offence at about the same time on the same woman and that three persons should take their turn in committing the particular offence with which they are charged. It is difficult to judge people of this class with the ordinary standard of clean living and clean thinking people and all that I can say is that there is no limit to human depravity. Judging from the record it appears that these appellants belong to that depraved class of human beings who are devoid of all sense of decency.

A further point was urged that the three accused could not be convicted separately under ss. 366 and 376, Indian Penal Code, the argument being that the series of acts constituted one and the same transaction and, therefore, the appellants could not be convicted twice over. A certain decision by a learned Judge of this Court was cited in argument, but I prefer to follow a judgment of Mr. Justice Broadway reported as *Ghulam Muhammad v. Emperor* (1) because independently of the judgment this was exactly my own view. The proved facts in the case established two distinct offences falling under ss. 366 and 376, Indian Penal Code, respectively.

The sentence that has been inflicted upon the appellants is by no means severe and it is a pity that the Courts do not inflict much severer sentence upon criminals of this class. But the sentence of fine cannot be justified. It simply means this that the relations of the accused persons would be hard hit when

(1) 99 Ind. Cas. 344; 7 Lah. 484; 28 Cr. L. J. 136; 28 P. L. R. 802; A. I. R. 1927 Lah. 83.

the latter are in Jail. I, therefore, remit the sentences of fine so far as the appellants Tek Singh, Jiwan Singh and Pala Singh are concerned but I maintain their conviction and sentence of rigorous imprisonment under both the sections and I dismiss their appeal.

In the case of Indar Singh and Sohawa Singhall that I can say is that they have been dealt with very leniently as, in my opinion, they deserved much severer punishment. I, therefore, simply dismiss their appeal.

R. L.

A. N. A.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 368 of 1927.

November 23, 1927.

Present:—Mr. Justice Tek Chand.

Musammāt ATMA DEVI THROUGH Sodhi CHARAN SINGH, *Mukhtar Khas*—

PLAINTIFF—PETITIONER—

versus

Musammāt SHIB DEVI *alias* DHAN

DEVI—DEFENDENT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 11, 151, 152—Amendment of clerical or arithmetical errors in decree or judgment—First application disposed of on merits—Subsequent application, competency of—Res judicata—Power-of-attorney—Mukhtarnama authorising filing of appeal in High Court—'Appeal', whether includes revision.

A Court is competent to entertain successive applications for amendment of clerical or arithmetical mistakes in judgments or decrees and a decision of a prior application of this kind does not operate as *res judicata* in subsequent applications, but if an application for amendment has been heard and disposed of on the merits the Court will not, except in exceptional circumstances, entertain a subsequent application for substantially the same relief.

Langat Singh v. Janki Koer (1), followed.

Where a *mukhtarnama* authorises the filing of an appeal in the High Court the word 'appeal' should be liberally construed and should be taken to include revision also.

Petition for revision of the order of the Additional District Judge, Amritsar, dated the 18th January, 1927, dismissing the application filed by the petitioner for amendment of the decree passed by the Subordinate Judge, First Class, Amritsar, on 25th January, 1922.

Mr. Charan Singh, for the Petitioner.

Mr. Din Dayal Kapur, for the Respondent.

JUDGMENT.—This is a petition for revision of an order dismissing an applica-

tion under s. 152/151, Civil Procedure Code, for amendment of certain alleged clerical and arithmetical mistakes in the judgment and decree passed in favour of the plaintiff in 1922 on foot of a mortgage.

For the respondents two preliminary objections are raised. Firstly, it is contended that this petition for revision had not been properly instituted as Sodhi Charan Singh, Advocate, who filed the petition as the *mukhtar khas* of the petitioner had not been authorised in the *mukhtarnama* to institute a petition for revision. I have referred to the *mukhtarnama* which is on the record and find that it authorised the *mukhtar* to prefer an appeal to this Court. Technically speaking the power to prefer a revision is not specifically given in the *mukhtarnama* but, in my opinion, the power to prefer an appeal to this Court must be liberally interpreted and it must be held that Sodhi Charan Singh was competent to lodge a petition for revision. I, therefore, overrule this objection.

Secondly, it is objected that an application for correction of the alleged clerical and arithmetical mistakes was presented by the petitioner on the 18th of November, 1924, and after notice to the respondent, was dismissed on the merits on the 11th of December, 1924. In these circumstances it is contended that another application for substantially the same relief is not competent. I have heard the learned Counsel for both parties in respect of the alleged arithmetical mistakes which are stated to have accidentally crept in the judgment and have also examined the application for amendment, dated the 18th November, 1924, above referred to. In my opinion the two applications are substantially the same and in view of the decision of the previous application and the long delay in presenting the present application the lower Court was justified in dismissing it. As laid down in *Langat Singh v. Janki Koer* (1), a Court is competent to entertain successive applications for amendment of clerical or arithmetical mistakes in judgments or decrees and a decision of a prior application of this kind does not operate as *res judicata* in subsequent applications, but if an application for amendment has been heard and disposed of on the merits, the Court will not, except in exceptional circumstances, entertain a subsequent application for sub-

(1) 12 Ind. Cas. 151; 39 C. 265; 14 C. L. J. 481.

stantially the same relief. In my opinion no such exceptional circumstances are made out in this case.

I, therefore, hold that the order of the lower Court was correct and dismiss the petition for revision. Having regard to all the circumstances of the case, however, I would leave the parties to bear their own costs in both the Courts.

R. L.

Petition dismissed.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 177 of 1927.

December 16, 1927.

Present:—Mr. Justice Broadway.

MR. H. BHARUCHA—ACCUSED—

PETITIONER

versus

THE MUNICIPAL COMMITTEE, LAHORE

—COMPLAINANT—RESPONDENT.

Punjab Municipal Act (III of 1911), s. 153—Use of premises as brothel—Order directing vacation of premises, legality of—Proper order.

A Magistrate has no power under s. 153 of the Punjab Municipal Act to order a person who is using his premises as a brothel to vacate the premises altogether. The proper order to be passed under the section is one directing such person to discontinue using the premises as a brothel.

Case reported by the Additional Sessions Judge, Lahore, with his No. 76 of 31st October, 1927.

FACTS appear from the following report of the Sessions Judge:—

REPORT.—Mr. H. Bharucha, a Parsee gentleman, is carrying on a Hotel known as Albion Hotel on the Nicholson Road, Lahore. The Municipal Committee of Lahore complained against him under s. 153 of the Punjab Municipal Act, 1911, that the said Hotel was being used as a brothel and was visited by disorderly persons. The case was tried by Mr. Phailbus, Magistrate, First Class, who considered the evidence produced in the case by both the parties and came to a finding that the Hotel was in fact used as a brothel, that there was a boarding house in the upper flat of the building and a temple and a mosque in its vicinity and that the neighbours had been disturbed at night by the disorderly behaviour of drunken people in the Hotel.

On this finding, the learned Magistrate ordered "that Mr. Bharucha should vacate the premises within five days."

This is a petition for revision against the said order.

Only three points have been argued before me. The first is that there is no sufficient proof that the Hotel is used as a brothel. This is, however, a finding of fact which has been recorded by the Magistrate after considering the evidence and is not open to question on revision. Then it is complained that there was no notice under s. 153 of the Punjab Municipal Act declaring the area to be a prohibited area. This argument hardly needs any notice, as there was no prosecution under s. 152. The proceedings have been under s. 153 and the same could be taken within the whole of the Municipal area, provided the conditions laid down in the said section were fulfilled, which does appear to be the case here.

The last contention is that the Magistrate could not order the petitioner to vacate the premises. This is conceded by the learned Counsel on behalf of the Municipal Committee. He agrees that under this section the order should only have been that Mr. Bharucha should, within five days, discontinue the use of the Albion Hotel as a brothel and so arrange that there should be no undue noise and disorderly behaviour therein.

The records are, therefore, submitted to the High Court with a recommendation that the order of the Magistrate directing the Hotel premises to be vacated, be set aside, and that an order substituted instead to the effect that the Albion Hotel should cease to be a brothel and should no longer be accessible to disorderly persons and that the said order should be carried out within five days.

ORDER.—Accepting the recommendation of the Referring Court I set aside that portion of the Magistrate's order as directing vacation of the premises and in lieu thereof direct that the petitioner discontinue using the Albion Hotel as a brothel and so arrange the carrying on of his business as to avoid undue noise to the detriment of his neighbours. This he must do within five days.

A. N. A.

Order set aside.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 1417 of 1927.

November 10, 1927.

Present:—Mr. Justice Jai Lal.

GOPAL MAL—JUDGMENT-DEBTOR

—APPELLANT

versus

FIRM GOPAL SINGH-HARI

SINGH THROUGH SANTOKH SINGH

—DECREE-HOLDERS—RESPONDENTS.

Instalment decree—Acceptance by decree-holder of overdue instalment—Waiver of default clause.

It is open to a decree-holder to expressly state when accepting an overdue instalment that he does so without prejudice to his rights which have already accrued owing to the default or to show by his conduct at the time of accepting the instalment that he does not waive his right under the default clause. In the absence of such indications to the contrary tender by the debtor and acceptance by the creditor of an overdue instalment must be deemed to amount to a waiver and condonation of the default. [p. 393, col. 2.]

[Case-law discussed.]

Miscellaneous second appeal from an order of the District Judge, Amritsar, dated the 7th August, 1926, 11th April, 1927, affirming that of the Subordinate Judge, Third Class, Amritsar, dated the 30th November, 1925.

Mr. Anant Ram, for the Appellant.

Mr. Faqir Chand, for the Respondents.

JUDGMENT.—In a decree for the payment of money it was provided that the amount decreed shall be payable by instalments and that in default of payment of any one instalment the whole of the amount due under the decree would become payable forthwith, with the addition of Rs. 50. It seems that the first instalment was paid in Court two days late and the amount so paid was realised by the decree-holder. The second instalment was paid before the due date. The third instalment which was payable on the 10th of October, 1925, was paid by the judgment-debtor to one Shiv Ram who, it is alleged was an agent of the decree-holder, on the 20th of October. It now transpires that Shiv Ram paid this amount on the same date to the decree-holder. There is, therefore, no dispute that the instalment due on the 10th of October was tendered to the decree-holder on the 20th of October and accepted by him. The decree holder, on the 26th of October, 1925, executed the decree for the whole of the balance due thereunder alleging that by paying the third instalment ten days late the judgment-debtor had made a default in

the performance of the conditions of the decree. The Executing Court declined to entertain the objection by the judgment-debtor to the contrary and held that there had been a default by the judgment-debtor. On appeal the District Judge without deciding the dispute with regard to the third instalment held that the first instalment was admittedly paid two days later and, therefore, there has been a default and the whole amount due under the decree had consequently become payable.

From this order the judgment-debtor appealed to this Court and I remanded the case on the 27th of May, 1926, holding that the acceptance by the decree-holder of the over due instalment after the due date amounted, in this case, to a waiver of the default clause and that, therefore, the view of the District Judge was incorrect. It was represented to me at the hearing of that appeal that the third instalment was paid to Shiv Ram before the due date, and as it was not stated before me that Shiv Ram had paid the amount to the decree-holder on the same date I remanded the case to the District Judge with direction to decide whether Shiv Ram was an authorised agent of the decree-holder and whether the amount was paid to him before the due date.

The District Judge has now held that Shiv Ram was not an agent of the decree-holder and has dismissed the appeal. The judgment-debtor has presented this second appeal. It is admitted by both parties that the facts now stated by me are the correct facts. I must accept as conclusive, the finding of the District Judge, that Shiv Ram was not the agent of the decree-holder; it must, therefore, be held that in paying the amount of the instalment to the decree holder he was acting as the agent of the judgment-debtor. It is, therefore, obvious that in view of my decision that ordinarily the acceptance by the decree holder of an over due instalment after the due date amounts to a waiver of the default clause, it was not really necessary to remand the case.

The learned Counsel for the respondent raised a preliminary objection that the findings of the learned Judge below were findings of facts and, therefore, a second appeal was not competent and in support of this contention he cited a judgment of the Judicial Commissioner of Sind reported as

Bahadur v. Gelomal (1). There might have been some force in this contention, were it not for the fact, that the view of the learned District Judge is opposed to my judgment remanding the case to him. I am not examining the correctness or otherwise of the facts found by the District Judge, but only the legal inference to be drawn from those facts.

Incidentally the ruling cited by the Counsel is against his contention on the merits of the appeal because it was held in that case that the acceptance by a creditor of an over due instalment after the due date does amount to a waiver of the default clause. The same view was taken in *Ram Nath v. Gio* (2) which case related to a default clause contained in a mortgage bond. But, in my opinion, there is no difference so far as the point at issue is concerned, between a bond and a decree making the amount due payable, by instalments with the default clause. In *Khairuddin v. Atu Mal* (3) which is a Full Bench judgment of the Chief Court of the Punjab, the following remark appears at page 553*:

"It has been held that if the plaintiff accepted payment of one or more sums as an instalment or instalments due under the bond such acceptance amounts to a waiver and puts an end to the cause of action which had accrued."

I have not been shown any subsequent ruling either of the Chief Court of the Punjab or of this Court taking a different view to that taken in these two cases. The learned Counsel for the respondent relied upon the Full Bench judgment of the Bombay High Court in *Kashiram v. Pandu* (4) in which a different view was alleged to have been taken, but I have been unable to discover where the difference lies. In that case Jenkins, C. J., held that acceptance of an over due instalment may have the effect of estopping the creditor from enforcing the default clause but that there may be circumstances which may negative the operation of an estoppel and Aston, J., expressed himself strongly in favour of the proposition that under the circumstances the creditor must be deemed to have waived his right under the default clause.

(1) 59 Ind. Cas. 607; 14 S. L. R. 128.

(2) 101 P. R. 1880.

(3) 183 P. R. 1883 (F. B.).

(4) 27 B. L. 4 Bom. L. R. 688 (F. B.).

*Page of P. R. 1883—[Ed.]

Badri Narayan v. Kunj Behari Lal (5) and *Jiwan Balchsh v. Mubinal Haq* (6) also support this view. It is, of course, open to the decree-holder to expressly state when accepting the instalment that he does so without prejudice to his rights which have already accrued owing to the default or to show by his conduct at the time of accepting the instalment that he does not waive his right under the default clause. In the absence of proof to the contrary tender by the debtor and acceptance by the creditor of an over due instalment must be deemed to amount to a waiver and condonation of the default.

On the facts that have now transpired and in view of my opinion on the legal point involved in this case I hold that the default by the judgment-debtor in the payment of the third instalment on the due date has also been waived by the decree-holder.

The result is that I accept the appeal and setting aside the orders of the Courts below dismiss the application for execution of the decree. The appellant will have his costs throughout.

R. L.

Appeal accepted.

(5) 18 Ind. Cas. 731; 35 A. 178; 11 A. L. J. 224.

(6) 73 Ind. Cas. 794; A. I. R. 1923 Lah. 678.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2091 OF 1923.

December 1, 1927.

Present:—Mr Justice Broadway and
Mr. Justice Jai Lal.

BISHEN CHAND AND OTHERS—DEFENDANTS
APPELLANTS

versus

Musammat BISHEN DEVI AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 7—Suit for redemption—Court's duty to award interest up to date fixed for redemption.

The provisions of O. XXXIV, r. 7, Civil Procedure Code, are mandatory and a Court is bound to direct a mortgagor on redemption of the mortgaged property to pay interest to the mortgagee up to the date fixed for redemption by the Court.

First appeal from a decree of the Senior Subordinate Judge, Lahore, dated the 15th June, 1923.

Mr. Tirath Ram, for the Appellants.

JUDGMENT.

Broadway, J.—The only point for determination in this appeal is whether the mortgagors on redemption of the mortgaged property should be directed to pay the mortgagee's interest up to the date fixed for redemption by the Court. The Court has only allowed interest up to the institution of the suit, as it considered that the interest already allowed, was sufficient. In doing so the learned Senior Subordinate Judge, Mr. Ghulam Yazdani, appears to have lost sight of r. 7 of O. XXXIV of the Civil Procedure Code which is mandatory on this point.

The respondents filed cross-objections urging that costs should not have been allowed to the appellants on the ground that the appellants had raised various pleas which ought not to have been raised by them. On the other hand, it appears that the plaintiffs-respondents claimed to redeem the property for a far less sum than was due, and in these circumstances I do not think that the order of the Court as to costs should be interfered with. The cross-objections are, therefore, dismissed.

The appeal is accepted and the appellants are allowed the sum of Rs. 864, the interest claimed. No order as to costs in this Court. This sum of Rs. 864 must be paid by the 1st of February, 1928.

Jai Lal, J.—I agree.

R. L.

Appeal accepted.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL

No. 2922 OF 1926.

November 1, 1927.

Present:—Mr. Justice Harrison and
Mr. Justice Tek Chand.

RUP SINGH—DEBTOR-INSOLVENT—
APPELLANT

versus

THE OFFICIAL RECEIVER, JHANG
AND ANOTHER—RESPONDENTS.

*Provincial Insolvency Act (V of 1920), ss. 27 (2),
43—Application for discharge—Power of Court to
extend time fixed at the instance of creditors or suo
motu—"Period specified by Court", meaning of.*

*It is open to an Insolvency Court to extend the
period specified in the order of adjudication within
which the debtor is to apply for his discharge on the
application of the insolvent himself or on the applica-
tion of the creditors or suo motu. [p. 395, col. 2.]*

*K. K. S. A. R. A. Chettiar v. Maung Myat Tha (1),
followed.*

Where the period within which an insolvent is to apply for discharge has been extended under s. 27 (2) of the Provincial Insolvency Act, the words "period specified by the Court" in s. 43 of the Act mean not the period specified by the Court in the first instance but the period as extended by the Court under s. 27 (2). [p. 395, col. 2.]

Miscellaneous first appeal from an order of the District Judge, Jhang at Sargodha, dated the 27th May, 1926.

Mr. D. C. Ralli and Lala Jagan Nath Aggarwal, for the Appellant.

Messrs. M. L. Puri and S. L. Puri, for the Respondents.

JUDGMENT.—The following question has been referred to this Division Bench by Jai Lal, J.:—

"Whether it is open to an Insolvency Court to extend the period specified in the order of adjudication within which the debtor is to apply for his discharge, either on the application of the creditors or *suo motu*, or whether the power of extension given by s. 27 (2) of the Provincial Insolvency Act can be exercised only on an application by the debtor?"

Since this order of reference was written a judgment of the Division Bench of the Rangoon High Court has been published as *K. K. S. A. R. A. Chettiar v. Maung Myat Tha (1)* and this lays down very clearly that there is nothing incompatible with the extension of the period, within which a debtor must apply for his discharge at the instance of and on cause shown by the petitioning creditor. With this decision we agree and we are also of opinion that there is no reason why a Court should not extend the time *suo motu*.

The facts of the particular case, in which this question has arisen, are given in the earlier part of the Referring Order and those facts show that the creditors applied for extension of time in very peculiar circumstances. Mr. Ralli has addressed us on behalf of the insolvent and has urged that it is only logical that the right to apply for an extension of time should be confined to the person who has the sole right to apply for discharge, namely, the insolvent himself. It is, in our opinion, no more illogical to allow the creditors to apply for an extension of time than it is to allow them as the Act expressly does, to apply for the original adjudication with all con-

(1) 100 Ind. Cas. 921; 6 Bur. L. J. 5; A. I. R. 1927 Rang. 136.

sequences which flow from that adjudication. There is, however, no question of the logical amplification or restriction of any rule. We have to consider the plain meaning of the words used in the two sections of the Act. Section 43 lays down, that the Court shall annul the order of adjudication if the debtor does not appear to apply for an order of discharge within the period specified by the Court. This is mandatory and the Court has no option in the matter. Counsel, however, would have us read the words "the period specified by the Court" as meaning "specified in the first instance" and not as subsequently extended, if action has been taken under s. 27 (2). This subsection runs as follows:—"The Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in such manner as it thinks fit." Mr. Ralli then qualified the position taken up by him to this extent that he reads the words: "the period specified by the Court" as meaning the period so specified in the first instance or extended on application made by the insolvent, but not as including "extended on application made by the creditors or by the Court on its own motion." Were there any ambiguity it would be for us to decide between the two rival interpretations, but so far from there being any ambiguity it appears to us that the words are absolutely clear. The Court has the power to extend on sufficient cause being shown, and that sufficient cause may be patent on the face of the record or may be established by any interested party. It is for the Court to decide whether the cause is sufficient and, if it extends the period, the later date to which it is extended becomes the last date of the period specified by the Court as described in s. 43 of the Act.

We answer the reference by saying that we are in agreement with the view taken by the Division Bench of High Court of Rangoon in the case reported as *K. K. S. A. R. A. Chettiar v. Maung Myat Tha* (1) and we hold that it is open to an Insolvency Court to extend the period on the application of the insolvent himself, or on the application of the creditors, or *suo motu*. It follows, that the appeal is dismissed with costs.

R. L.

*Appeal dismissed.***LAHORE HIGH COURT.**

CIVIL REVISION PETITION No. 406 OF 1927,
November 25, 1927.

Present:—Mr. Justice Broadway,
ABDUL AZIZ—DEFENDANT—PETITIONER
versus

PUNJAB NATIONAL BANK, LTD.,
LAHORE—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 115, O. IX,
r. 13—Order restoring suit dismissed in default—
Revision.*

An order restoring a suit dismissed in default is not an interlocutory order and is open to revision. [p. 396, col. 1.]

Wiru Ram v. Amar Chand (5), *Firm Bhajan Ram-Gil Raj Mal v. Narain Devi* (6) and *Piroj Shah v. Qarib Shah* (7), followed.

Petition for revision of an order of the Subordinate Judge, First Class, Lahore, dated the 30th March, 1927.

Messrs. Carden Noad and Obedullah, for the Petitioner.

Mr. Har Gopal, for the Respondent.

JUDGMENT.—The Punjab National Bank, Ltd., Lahore, instituted a suit for the recovery of money against one Abdul Aziz. The case was fixed for hearing on the 29th of June, 1926, when the plaintiff's Counsel failed to appear up to 2 p. m. and the suit was dismissed in default. On the same day, however, an application was filed by the Counsel for the plaintiff Bank asking for restoration of the suit and alleging that the said Counsel had been engaged in another Court and that his absence had not been intentional. This application was not supported by any affidavit.

On the 2nd of December, 1926, the plaintiff's Counsel again failed to appear at the hearing of the application for restoration which was accordingly dismissed in default. On the same date, soon after the dismissal in default of this application, the Counsel for the plaintiff Bank filed another application. In the heading he asked for, the restoration of the suit (*darkhast baramdgi muqadma wa darkhast baramdgi*) but did not specify what *darkhast* was to be restored. In the relief sought by the application no mention is made of any application whatever, but the prayer is that the suit should be restored. This application was again not supported by any affidavit. The 4th of February, 1927, was fixed for the hearing of this second application, and on that date Abdul Aziz filed certain objections but as the Presiding Officer of the Court was absent it was postponed to the 4th of

March, 1927, and again to the 12th of that month. On the 12th of March, 1927, the defendant Abdul Aziz's Counsel failed to appear as soon as the case was called on, whereupon the following order was passed: "The Counsel for the plaintiff is present, none is present on behalf of the second party. The application is of the same day: the case is restored; the second party to be summoned for the 30th March, 1927."

Mr. Obedullah who had reached the Court on the 12th of March, 1927, while the above order was being written by the Court filed a petition for review of that order which was dismissed on 30th of March, 1927, for the reason that there was no ground for review.

The defendant Abdul Aziz has now come up to this Court on the Revision Side and it has been urged that the action of the Court below was without jurisdiction, illegal and improper. Mr. Har Gopal on behalf of the plaintiff Bank raised certain objections. First, he urged that no revision was competent inasmuch as the order was an interlocutory one and reliance is placed on *Firm Lal Chand-Mangal Sen v. Firm Behari Lal-Mehr Chand* (1) and *Fateh Ullah v. Abdul Rahim* (2). Secondly, it was urged that even if the second application was barred by time the decision of the Court below was not open to attack on revision, and reliance is placed on *Amir Hassan Khan v. Sheo Baksh Singh* (3) and *Jhotu Lal Ghose v. Ganowri Sahu* (4).

Mr. Noad for the petitioner did not attempt to challenge the correctness of the decision in the authorities relied upon by Mr. Har Gopal. He urged that the order in question was not an interlocutory one and for his contention relied on *Wiru Ram v. Amar Chand* (5) a decision of Campbell, J., *Firm Bhajan Ram-Gil Raj Mal v. Narain Devi* (6) decided by Jai Lal, J., and finally on the decision by Campbell, J., in *Piroj Shah v. Qarib Shah* (7).

In my opinion the authorities relied upon by Mr. Noad support his contention and following them I hold that the order complained of is not an interlocutory one and, therefore, is open to revision.

Now the second application, i.e., the one made on the 2nd of December, 1926, by the plaintiff Bank in its terms clearly asked for the restoration of the case, and was, therefore, *prima facie* barred by limitation. The remarks of Campbell, J., in *Piroj Shah v. Qarib Shah* (7) are applicable and the case would clearly be one in which this Court should interfere. The order under consideration is a very brief one, and does not indicate that the Presiding Officer of the Court had brought his mind to bear seriously on the question he had to decide.

In these circumstances I accept this petition and return the case to the Court below with the direction that it will hear first the application dated the 2nd of December, 1926, and if it considers that the plaintiff Bank's contention is correct and that it includes a prayer for restoration of the first application dated the 29th June, 1926, the Court will then proceed to decide whether any justification or excuse had been made out for the absence of the Counsel on either or both of these dates. The petitioner would be entitled to the costs for this petition in this Court but as no fee certificate has been filed, no Counsel's fee is allowed.

R. L.

A. N. A.

Petition accepted.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 721 OF 1927.

December 16, 1927.

Present:—Mr. Justice Tek Chand.

RAMJI DAS, PROPRIETOR OF THE FIRM

SEWA RAM DAYAL—PLAINTIFF—

PETITIONER

versus

JAI RAM DAS, PROPRIETOR OF UNAO

MILLS—DEFENDANT—RESPONDENT.

Punjab Courts Act (VI of 1918), s. 44—Interlocutory order—Revision—Interference—Order reviewing previous order setting aside ex parte proceedings, nature of.

Orders passed in a pending case are not order

(1) 84 Ind. Cas. 259; 5 Lah. 288; A. I. R. 1924 Lah. 425; 6 Lah. L. J. 558; 1 Lah. Cas. 36 (F. B.).

(2) 91 Ind. Cas. 10; A. I. R. 1926 Lah. 191; 2 Lah. Cas. 115.

(3) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.).

(4) 46 Ind. Cas. 176; 3 P. L. J. 376.

(5) 94 Ind. Cas. 117; A. I. R. 1926 Lah. 344; 8 Lah. L. J. 170; 27 P. L. R. 710.

(6) 96 Ind. Cas. 830; A. I. R. 1926 Lah. 642.

(7) 95 Ind. Cas. 124; 7 Lah. 161; 8 Lah. L. J. 267; A. I. R. 1926 Lah. 379; 27 P. L. R. 321.

passed in a "case which has been decided by a subordinate Court" within the meaning of s. 44 of the Punjab Courts Act but interlocutory orders, and are not, therefore, open to revision.

Firm Lal Chand-Mangal Sen v. Firm Behari Lal-Mehr Chand (1), followed.

Piroj Shah v. Qarib Shah (2) and *Dittu Ram v. Nawab* (3), distinguished.

Petition for revision of an order of the Subordinate Judge, First Class, Lahore, dated the 16th November, 1927.

Mr. H. C. Kumar, for the Petitioner.

Mr. J. L. Kapur, for the Respondent.

JUDGMENT.—This is a petition for revision of an order passed by the trial Court on the 30th of November, 1927, whereby it reviewed its previous order of the 16th November, 1927, modifying the conditions on which it had set aside *ex parte* proceedings against the defendant-respondent.

This suit in which these orders were passed has not yet been decided. The relevant facts are that the defendant failed to appear on a particular date and the Court directed *ex parte* proceedings to be taken against him. Before the judgment was announced an application was made to set aside the *ex parte* proceedings and this was granted on certain conditions. On review, one of these conditions was modified and the Court directed the parties to produce their evidence. As these various orders have been passed in a pending case and are interlocutory they are not orders in a "case which has been decided by a subordinate Court" within the meaning of s. 44 of the Punjab Courts Act and a revision is not competent in view of the Full Bench decision in *Firm Lal Chand-Mangal Sen v. Firm Behari Lal-Mehr Chand* (1).

Mr. H. C. Kumar, for the petitioner, relies on *Piroj Shah v. Qarib Shah* (2) and *Dittu Ram v. Nawab* (3) in support of his contention that this Court has got the power to interfere with such orders on revision. I am, however, of opinion that these cases are clearly distinguishable as in each of them the suits had (at least for the time being) been decided by the passing of an *ex parte* decree. In the present case the suit is still pending and no decree has yet been passed. The orders are, therefore, of

a purely interlocutory nature and no revision lies. Accordingly I dismiss the petition for revision, but having regard to all the circumstances of the case I leave the parties to bear their own costs.

The Deputy Registrar will see that the record is returned to the lower Court tomorrow.

R. L.

A. N. A.

Application dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL

No. 1407 of 1927.

November 22, 1927.

Present:—Mr. Justice Tek Chand.

Musammât SAKINA BEGAM—APPELLANT
versus

RAJA MUHAMMAD WALI ULLAH
KHAN—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 7—Court's power to appoint as guardian person who has not applied—Practice—Court entering into correspondence on matter judicially before Court—Taking notice of statements in such correspondence, legality of.

It is not open to a Court acting *proprio motu* to appoint as guardian of the property of a minor a person who has not applied to be so appointed. [p. 399, col. 1.]

Badr Bakhsh v. Jangbaz Khan (1) and *Jaiwanti Kumri v. Gajadhar Upadhyaya* (5), followed.
Haji Hirji v. Kasim Hirji (6) and *Islāman v. Maqbulan* (7), dissented from.

It is objectionable for a Court to enter into correspondence with a person with regard to a matter pending judicially before it, and it is illegal to take notice of the statements made in such correspondence by such person who has not chosen to substantiate them either by himself going into the witness-box or by leading other evidence. [p. 399, col. 2.]

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Kangra at Dharamsala, dated the 7th March, 1927.

Mr. Muhammad Tufail, for the Appellant.

Mr. Niaz Muhammad, for the Respondent.

JUDGMENT.—This is an appeal by Musammât Sakina Begam against the order of the Senior Subordinate Judge of Kangra appointing the respondent Raja Muhammad Wali Ullah Khan as the guardian of the property of her son Farrakh Muhammad, minor, aged nine years. The proceedings which led to the appointment of the respondent as guardian are not described in the order under appeal. It is, therefore, necessary to give them in some detail in this judgment.

It appears that one Faiz Muhammad

(1) 84 Ind. Cas. 259; 5 Lah. 288; A. I. R. 1924 Lah. 425; 6 Lah. L. J. 558; 1 Lah. Cas. 36 (F. B.).

(2) 95 Ind. Cas. 124; 7 Lah. 161; 8 Lah. L. J. 267; A. I. R. 1926 Lah. 379; 27 P. L. R. 321.

(3) 92 Ind. Cas. 272; 7 Lah. L. J. 448; A. I. R. 1925 Lah. 639.

Khan of Rehlu, died about eight years ago, leaving him surviving his widow *Musammât Sakina Begam*, appellant, and a minor son *Farrakh Muhammad* who was then about one year old. His property consisted of two squares of land in the Lyallpur District and some immoveable property in the Kangra District, to which the minor succeeded. On the 12th of October, 1926, *Ali Muhammad*, who was a first cousin of *Faiz Muhammad Khan* deceased, applied to be appointed as the guardian of the property of the minor. It was alleged that the mother of the minor had not been managing the property satisfactorily. The mother opposed the application and contended that she had been managing the property in the best interests of the minor. An issue was framed as to whether it was necessary to appoint a guardian at all, and, if so, whether the applicant *Ali Muhammad*, was a fit person to be so appointed. *Ali Muhammad*, however, led no evidence to prove this issue but *Musammât Sakina Begam* produced two witnesses. On the 21st of December, 1926, the learned Senior Subordinate Judge instead of proceeding to adjudicate upon the application of *Ali Muhammad* sent a *robkar* to *Raja Muhammad Wali Ullah Khan*, respondent, Honorary Magistrate, Rehlu, who is an uncle of the deceased father of the minor, asking him to make suggestions for the protection of the property of the minor. No reply having been received from the *Raja* a reminder was sent to him. On the 21st of February, the *Raja* replied saying that the lands of the minor were not being properly managed, that it was necessary to appoint a guardian for the protection of his property and that he was prepared to assist in the management of the estate if a "paid guardian" was appointed. He suggested that one *Munir Ullah Khan* was a fit person to be appointed the "paid guardian" on Rs. 15 per mensem. This reply was laid before the Court on the 7th of March, 1927.

In the meantime the original applicant *Ali Muhammad* had died on the 4th of February, 1927, and no application had been made either by *Raja Muhammad Wali Ullah Khan* or by any other person to be substituted on the record in his place with a view to continue the proceedings started at his instance. On the 7th of March, neither *Raja Muhammad Wali Ullah Khan*

nor any agent on his behalf was present but the Court, on reading the reply received from him to the *robkar* sent by it, proceeded to appoint the *Raja* as guardian of the property of the minor. In the order it was stated that it was not necessary to take any security from the guardian, and that he could entertain a paid manager on a suitable salary.

Against this order the present appeal has been preferred by *Musammât Sakina Begam* and various objections have been taken on her behalf against the appointment of the respondent. The first point to be considered is whether, the application made by *Ali Muhammad* for appointment as guardian of the property of the minor had or had not abated on the date that the order under appeal was passed.

As already pointed out, *Ali Muhammad* had died on the 4th of February, 1927, and no application had been made to substitute any other person in his place. *Mr. Muhammad Tufail* for the appellant urges that the proceedings under the Guardians and Wards Act are personal to the applicant and on his death the "right to sue" does not survive and the Court has no power to proceed with that application any further, but that it is open to any other person to apply for his own appointment as guardian on a fresh application. *Mr. Niaz Muhammad* for the respondent contends, on the other hand, that the "right to sue" in such a case survives and that the proceedings can be continued by any person interested in the minor. The rulings on the point as to whether the "right to sue" in such proceedings survives or not are not uniform. In *Badr Bakhsh v. Jangbaz Khan* (1) and *Gangabai v. Khashabai* (2) it was held that the right to sue does not survive, but a contrary view was taken in a Single Bench judgment of the Chief Court in *Arjan Singh v. Gujri* (3) which has been cited with approval by the Madras High Court in *Samid Chetti v. Adaikalani Chetti* (4). I do not think it necessary for the purposes of this case to decide which of these rival views is correct, for, in my opinion, the procedure adopted by the

(1) 135 P. R. 1893.

(2) 23 B. 719; 1 Bom. L. R. 363; 12 Ind. Dec. (N. S.) 481.

(3) 42 Ind. Cas. 410; 116 P. L. R. 1917; 160 P. W. R. 1917.

(4) 84 Ind. Cas. 613; 47 M. 459; 46 M. L. J. 179; (1924) M. W. N. 222; 34 M. L. T. 15; A. I. R. 1924 Mad. 484.

lower Court is erroneous—according to either view. If the law was correctly laid down in *Arjan Singh v. Gujri* (3) and in the Madras case above cited and it be presumed that the “right to sue” survives, it would be necessary under O. XXII, rr. 1 and 3, Civil Procedure Code, for someone to apply to be made a representative of the deceased applicant and the proceedings could be continued only after such application had been granted. In this case no such application was admittedly made. Indeed, as pointed out already, Raja Muhammad Wali Ullah Khan, the respondent, was not even present in Court personally or by agent, and, of course, there was no representation on behalf of any of the heirs or legal representatives of the original applicant Ali Muhammad. In the absence of such substitution, there being no applicant before the Court, the proceedings had terminated and it had no jurisdiction to proceed further with the case. If, on the other hand, the contrary view be correct, that the “right to sue” was personal to the original applicant and did not survive after his death, the proceedings automatically abated on the 4th of February, 1927, and should have been consigned to the record room. In this view, also, it must be held that the proceedings had abated and the learned Senior Subordinate Judge had no jurisdiction to pass the order appealed against.

The appointment of the respondent is irregular for the additional reason that no application had been made on his behalf for his appointment as guardian. Under the leading authority of the Chief Court, *Badr Bakhsh v. Jangbaz Khan* (1) which has, so far as I am aware, not been doubted in any subsequent ruling of the Chief Court or of this Court, it was not open to the Senior Subordinate Judge acting *proprio motu* to appoint as guardian of the property of the minor a person who had not applied to be so appointed. The Calcutta High Court has also taken the same view in *Jaiwanti Kumri v. Gajadhar Upadhyaya* (5). I am not unmindful of the fact that a contrary view has been taken by the Judicial Commissioners of Sind and Oudh in *Haji Hirji v. Kasim Hirji* (6) and *Islamān v. Maqbulan* (7). But after giving

(5) 10 Ind. Cas. 334; 38 O. 783; 15 O. W. N. 676; 14 C. L. J. 226.

(6) 4 Ind. Cas. 603; 3 S. L. R. 115.

(7) 73 Ind. Cas. 255; 9 O. & A. L. R. 74; A. I. R. 1024 Oudh 126.

the matter my fullest consideration, and having regard to the clear wording of ss. 7 and 8 of the Guardians and Wards Act, I venture to think with all respect; that the sounder view is that taken in *Badr Bakhsh v. Jangbaz Khan* (1). I, therefore, hold that the appointment of the respondent was irregular for this reason also.

There is yet another ground on which the order of the lower Court cannot be sustained. The lower Court had of its own motion sent a *robkar* to the respondent, but he had not expressed his willingness to be appointed as guardian of the property of the minor and all that he had stated was that he would be prepared to assist the “paid” guardian (whatever that expression might mean) if one was appointed by the Court. In his reply the Raja had made allegations of mismanagement against the appellant and the Court seems to have accepted them as proved without any legal evidence on the record and without even calling upon the mother to meet these allegations, if she could. It seems to me that the entire procedure followed by the learned Subordinate Judge in this matter was misconceived. It is hardly necessary to point out that it is objectionable for a Court to enter into correspondence of this kind, with regard to a matter pending judicially before it, and it is illegal to take notice of the statements made in such correspondence by a person, who has not chosen to substantiate them either by himself going into the witness-box or by leading other evidence. In these circumstances there were no materials on the record to justify the conclusion that the mother was incapable of managing the property and the appointment of a guardian was necessary. It may be noted that similar allegations had been made by the original applicant Ali Muhammad in his application but he had failed to support them by any evidence and had closed the case on the 27th of December, 1926. Therefore, even if the Senior Subordinate Judge had jurisdiction to proceed with the matter after the death of Ali Muhammad and to consider the respondent as eligible for appointment as guardian without any application by him, it was necessary to make a proper enquiry in accordance with law on the issue which arose in the proceedings.

For the foregoing reasons I accept the appeal and set aside the order appointing

the respondent as guardian. As the respondent through Counsel has strenuously opposed this appeal, he must pay the appellant her costs in this Court.

I wish to make it clear that this order is not intended to indicate in any way that Raja Muhammad Wali Ullah Khan, respondent, is not a fit person to be appointed guardian of the property of the minor or to preclude him or any other person from applying to be appointed as such in proceedings instituted and conducted in accordance with law.

R. L.

A. N. A.

Appeal accepted.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL

No. 1134 OF 1927.

December 9, 1927.

Present:—Mr. Justice Zafar Ali.

MUNSHI RAM—AUCTION-PURCHASER—
APPELLANT.

versus

Sheikh GHULAM DASTGIR, OFFICIAL
RECEIVER, AND OTHERS—RESPONDENTS.

*Provincial Insolvency Act (V of 1920), ss. 4, 75—
Order dismissing claim of stranger to money ordered to
be paid to Official Receiver—Appeal—Creditors, whe-
ther necessary parties.*

An order of a District Judge dismissing a claim preferred by a stranger to money ordered to be paid to a Receiver in insolvency is a decision on a question of title within the meaning of s. 4 of the Provincial Insolvency Act and is appealable under s. 75 of that Act. The creditors of the insolvent are not necessary parties to an appeal from such an order.

East India Cigarette Manufacturing Co., Ltd. v. Ananda Mohan Basak (1), followed.

Miscellaneous first appeal from an order of the District Judge, Jullundur, dated the 4th March, 1927.

Lala Badri Das, R. B., for the Appellant.

Lala Sardha Ram, R. S., for Mr. Jag-
gan Nath Aggarwal, for the Respondents.

JUDGMENT.—One Amar Singh of Jullundur City authorised three gentlemen of that City to sell his property for the purpose of paying off his debts. These gentlemen who are described as trustees sold by auction a house of Amar Singh to Munshi Ram, appellant, for Rs. 5,200. A deed of sale was now to be executed by the trustees and registered. Munshi Ram deposited Rs. 5,200 with Lala Dwarka Das, Treasurer, to be paid to the trustees before the Sub-Registrar but no deed was executed

because the trustees refused to enter there-
in an indemnity clause.

Long after that Amar Singh was adjudged an insolvent and the Official Receiver applied to the District Judge for orders about the money that was in the hands of Lala Dwarka Das. The District Judge endorsed the following order on that application:—

"All moneys in hand should be made over to the Official Receiver. 25th February 1927."

On the 4th March, 1927, Munshi Ram presented a petition to the District Judge stating that the money was his, and praying that it may not be handed over to the Official Receiver. But the District Judge ordered Lala Dwarka Das, who was with the petitioner at that time, to pay the money to the Official Receiver. This order is in vernacular and runs thus:—

"Munshi Ram wants to get back the money. For the reasons recorded in the order in English the money be made over to the Official Receiver."

The order in English referred to above was presumably the order of the 25th February, 1927, which, however, contains no reasons whatsoever.

Now it is clear that it was highly unsatisfactory to dispose of in this summary manner, without any enquiry a matter involving a question of title to a sum of Rs. 5,200. Before making any order the District Judge should have decided whether the money belonged to Munshi Ram or to the insolvent.

Counsel for the Official Receiver objects that the order of the District Judge is not appealable and that even if it is, the appeal must fail because the creditors of the insolvent have not been made respondents. Both these contentions are untenable. The order of the District Judge disposes of a question of title and hence falls under s. 4 of the Provincial Insolvency Act of 1920 and is appealable under cl. (2) of s. 75 of that Act. The creditors are not necessary parties to this appeal as held in *East India Cigarette Manufacturing Co., Ltd. v. Ananda Mohan Basak (1)*.

I accept the appeal, set aside the order of the learned District Judge and direct that the application of the appellant be disposed of in accordance with law after a proper enquiry.

R. L. & A. N. A.

Appeal accepted.

(1) 58 Ind. Cas. 10; 24 C. W. N. 401.

MADRAS HIGH COURT.

CIVIL SUIT No. 740 of 1920.

August 18, 1924.

Present:—Justice Sir C. V. Kumaraswami
Sastri, Kt.GURUMOORTHY IYER, MINOR, BY HIS NEXT
FRIEND MEENAMBAL—PLAINTIFF
versusP. S. SUBRAMANIAM AND OTHERS—
DEFENDANTS.*Hindu Law—Debts of father—Liability of son—
Illegal and immoral debts—Burden of proof—Direct
connection between debt and immorality, proof of, whe-
ther necessary—Open reckless life—Duty of creditors
—Want of inquiry, effect of—Constructive notice—
Mortgage—Subrogation—Mortgagee directed to pay off
prior mortgage, right of, to subrogation.*

Although in the case of a joint Hindu family the sons are ordinarily liable for their father's debts even if the debts are contracted by the father for his own benefit without any legal necessity so long as the debts are not incurred for an unlawful or immoral purpose, yet where a youngman who has just attained majority and who has inherited valuable property which would yield an income more than sufficient to keep him in comfort having regard to the position of the family and its requirements, leads an openly reckless and immoral life and borrows large sums of moneys, which will not in the ordinary circumstances be necessary for any lawful purpose, and the lenders make no enquiries and are merely satisfied with the fact that there were antecedent debts or with the statement of the borrower that he wants money for family expenses, the lenders cannot as against the minor sons of such borrower get the protection which is usually given to *bona fide* lenders, unless they prove that they made reasonable enquiries. [p. 410, col. 2; p. 411, col. 1.]

It is not necessary in such a case that direct connection should be shown between the debt and the purpose for which it was borrowed. Constructive notice or the absence of any enquiry would be sufficient. [p. 410, col. 2.]

[Case-law discussed.]

It is not the law that, in order to absolve themselves from liability, the sons must prove not merely the purpose for which such loans were contracted but also that the lenders knew of the immoral purpose of the loan. It would be quite sufficient to prove that the borrower was at that time leading a licentious life beyond his means, indulging in drink, riot, prostitution and debauchery, and that at the same time he was without any business or occupation upon which the money might legitimately have been spent without showing on which particular act of immorality the money was spent. If it is proved clearly that at the time the borrower was notoriously wasting his substance on riotous living and spending large sums beyond his income and above his station in life in this way only, a loan contracted in the midst of such living and spent upon it would be a loan contracted for immoral purposes. [p. 412, col. 1.]

[Case-law considered.]

The question of subrogation is really one of intention and has to be gathered with reference to the terms of the various documents concerned though there is always a presumption that a person discharging a prior mortgage intends to keep it alive for his benefit. [p. 409, col. 1.]

Where a person raises money to pay off a prior

mortgage and the mortgagee pays as the agent of the mortgagor there can be no question of subrogation. [p. 409, col. 1.]

The mere fact that a mortgagee keeps money in his hands to pay off a prior encumbrance and does not run the risk he would otherwise incur if he pays money to the mortgagor to pay off the prior encumbrance and he does not do so, will not make the mortgagee an agent of the mortgagor. [p. 403, col. 2.]

Suit by the plaintiff for partition and for a declaration that certain debts incurred by his father were not binding upon him.

Messrs. V. C. Seshachariar, K. Krishnaswami Iyengar and R. Rajagopala Iyengar, for the Plaintiff.

Messrs. M. A. Tirunarayanachariar, T. L. Venkatarama Iyer, M. Subbaraya Iyer and S. Gurusami Chetti, for the Defendants.

JUDGMENT.—This is a suit filed by the minor plaintiff represented by his mother as his next friend for a partition against his father the 1st defendant.

Defendants Nos. 2, 3 and 4 are mortgagees from the 1st defendant.

The plaint sets out that the plaintiff and the 1st defendant constitute a joint undivided Hindu family, that Gurumurthi Iyya, the father of the 1st defendant and grandfather of the plaintiff was a Subordinate Judge and died in about 1903 leaving considerable properties, mostly immovable, of the value of Rs. 2,37,000, that the 1st defendant was only six years of age when his father died and was under the guardianship of his mother till about the year 1918, that even before he attained majority he fell into bad company and was leading a very dissolute and immoral life, that the 1st defendant attained majority in 1918, and has been borrowing monies very recklessly for illegal and immoral purposes and has incurred considerable debts to the extent of Rs. 1,00,000, that the joint family possesses considerable immovable properties, the income wherefrom is more than sufficient to meet the requirements of the joint family and would even leave a large surplus, if properly managed, that there was no necessity for the 1st defendant to borrow any money for family purposes, that the money-lenders were fully aware of the youth and inexperience and the immoral habits of the 1st defendant and were equally reckless in advancing money at high discount, that most of the transactions are unconscionable in their nature, that the debts are not binding on the plaintiff and the joint family estate, that the 1st defendant's conduct in recklessly borrowing and alienating the pro-

parties and not looking after the interests of the family has rendered it necessary in the interest of the minor plaintiff to place the estate in the hands of a Receiver and that the plaintiff's share should be delivered to him.

Defendants Nos. 2, 3 and 4 are made parties as they hold mortgages in respect of certain properties belonging to the joint family.

The plaint contains the usual prayers for an account of the assets and liabilities of the joint family, for a declaration that the debts incurred by the 1st defendant are not binding on the plaintiff or the joint family estate and for further reliefs.

The mother of the plaintiff was added as the 5th defendant and his minor sister as the 6th defendant on the ground that they are entitled to maintenance and that the 6th defendant is also entitled to her marriage expenses.

The 1st defendant filed no written statement.

The 2nd defendant filed a written statement pleading that he is not aware of the allegations in the plaint as to the 1st defendant leaving a very dissolute and immoral life or borrowing monies or alienating properties for illegal and immoral purposes, that he lent money to the 1st defendant for the purpose of discharging antecedent and other debts binding on the family, that the consideration for his mortgage went towards discharging prior mortgage debts due by the 1st defendant and the plaintiff to N. R. K. Thathachariar, High Court Vakil, Madras, S. Rathnavelu Chetti, Dubash, Messrs. Best & Co. and Madhavji Govindji and a simple debt to P. A. N. Annamalai Chetti and other sundry debts and for necessary purposes, that he paid the above creditors directly and obtained vouchers for the discharge of these debts, that he made due enquiries as to the necessity for the loan, that the 1st defendant executed a registered deed of mortgage on the 28th of November, 1919, for Rs. 58,000 agreeing to re-pay the same with interest at 12 per cent. per annum within the 31st of December, 1920, that the mortgage is binding on the minor and that the suit as framed for taking an account of the joint family properties with mesne profits and for a declaration that the debts incurred by the 1st defendant are not binding on the plaintiff is not maintainable.

The 3rd defendant filed a written state-

ment denying the allegations in the plaint as to the illegality and immorality of the debts contracted by the 1st defendant and pleading that he is a mortgagee with possession under a deed of mortgage deed, dated the 16th of July, 1919, of items Nos. 1 and 4 of the plaint to secure the re-payment of Rs. 6,500 advanced to the 1st defendant, that the 1st defendant subsequently received another sum of Rs. 1,000 and executed a further charge on the said properties on the 18th of September, 1919, that both the mortgages were executed for full and adequate consideration and for purposes binding on the plaintiff and not for any illegal or immoral purpose, that at any rate he was not aware that the monies were borrowed for such purposes, that Rs. 6,500 is due for principal and Rs. 772-14 for interest on the first mortgage and Rs. 1,000 for principal and Rs. 156-5-4 for interest on the second mortgage and that he has no objection to the partition asked for by the plaintiff provided provision is made for the payment of the money due to him.

The 4th defendant filed a written statement pleading that he is not aware of the allegations made in paras. 5 to 10 of the plaint and knows nothing of the alleged dissolute and immoral habits of the 1st defendant, that the 1st defendant applied to him for a loan for the purpose of discharging antecedent debts and to redeem family jewels and he lent the 1st defendant Rs. 10,000 for that purpose, that he is not a money-lender by profession, that he advanced the money after careful enquiry and *bona fide*, that the debt is binding on the plaintiff and that the plaintiff's suit is not maintainable.

The 5th defendant filed a written statement stating that she has been living apart from her husband, the 1st defendant, since February, 1921, for the reasons given by her in her written statement filed in C. S. No. 946 of 1921 which was filed by the 1st defendant for restitution of conjugal rights and which was withdrawn by the plaintiff therein that she is entitled to live separately and to claim separate maintenance and that an adequate provision of Rs. 50 a month should be made for her maintenance the same being created as a charge on the joint family properties.

The 6th defendant filed a written statement through her guardian *ad litem* claiming maintenance at Rs. 50 per mensem and Rs. 5,000 for her marriage expenses,

As there was no dispute raised as to the necessity for a partition between the plaintiff and the 1st defendant and as it was suggested that the property which would fall to the share of the 1st defendant would be sufficient to meet all the debts created by him irrespective of any question of necessity, the suit was referred to the Official Referee to suggest a scheme for partition and he submitted an interim report on the 26th of September, 1921 wherein he estimates the total value of the house properties at Rs. 90,000 and as regards the land in Perambore he states that there was evidence given before him at the enquiry showing that there was a *bona fide* offer for Rs. 1,25,000 and that in making the offer the person who was making the offer was not putting a fancy price on the property. He made a proposal that pending the final adjustment of the rights of the parties the house properties in Madras should be allotted to the 1st defendant as against his share in the family properties, that the properties should be sold free from the encumbrances created by the 1st defendant and the proceeds brought into Court and applied towards the discharge of the mortgage debts contracted by the 1st defendant and the balance towards the discharge of other debts and that the other matters outstanding between the parties including the determination of the value of the Perambore land (item No. 1 in the plaint) should be adjourned till the sales were effected. It appears that the Counsel for the defendant accepted the proposal but the Counsel for the plaintiff felt doubtful whether he would be justified in accepting the proposal on behalf of the minor plaintiff. The matter came on before me for consideration and I passed an order on the 27th of September, 1921, in which after setting out the report of the Official Referee I observed as follows:—

"In these circumstances I think the best thing will be to direct that the houses in Madras be sold by the Official Referee free from encumbrance at the earliest possible date and that the sale proceeds be brought into Court, the mortgagees and plaintiffs having the same rights over the monies as they now have on the properties. The question of the binding nature of the mortgages will be determined later on. The 1st defendant will bring the sale proclamation at once, and have

the conduct of the sale, and bear the necessary expenses in respect of the same. The Receiver will pay the necessary funds to the 1st defendant for bearing the Court expenses in connection with the sale."

An order was passed on the 26th April, 1921, directing the Official Referee to advertise and call for claims against the 1st defendant and to take an account of the liabilities due by the 1st defendant in respect of such claims and the Official Referee submitted his report on the 23rd of August, 1921. The concluding portion of his report sets out the names of the claimants and the amount allowed by him in respect of each claim. Objections were filed to this report and I confirmed the report with certain modifications in my order dated the 4th of October, 1921. One other claim—the claim of Kishanchand Chellaram was asked to be disposed of by the Official Referee and he submitted his report on that matter on the 2nd of May, 1922.

Sales were held in pursuance of my order referred to above of the Madras properties. As regards the debts due by the 1st defendant, irrespective of the question of their legality and illegality and their binding nature on the plaintiff, there would have been probably no necessity to enquire into the nature of those debts or their binding nature of the plaintiff but for the very heavy fall in prices which took place very shortly after the report of the Official Referee. The basis of his report as regards partition being thus swept away and as it is admitted by all parties that the present value of all the properties is much lower than the value put by the Official Referee, it is necessary to enquire into the binding nature of the debts.

So far as the factum of some of the simple debts incurred by the 1st defendant is not much disputed before me and the trial mainly related to the necessity for and the binding nature of those debts so far as the minor plaintiff was concerned.

Before dealing with the evidence adduced I think it is necessary to refer to certain facts as to which there is no dispute. The plaintiff's grandfather Mr. Gurumurthi Ayya was a Subordinate Judge and died on the 30th of July, 1903, leaving the 1st defendant his only son. In 1904 the 1st defendant was about seven years

old. The 1st defendant's mother obtained a Succession Certificate from the District Court of Tanjore on the 17th of October, 1903, and applied to this Court in 1904 to be appointed guardian of the person and property of the minor and her petition (O. P. No. 6 of 1904) has been filed as Ex. G in this suit. The value of the properties in 1904 after deducting the debts was said to be Rs. 24,130 5-4 and it was also stated that the minor would be entitled to certain bazaars in China Bazaar Road and to some houses situated in Malayaperumal Street and Anderson Street which were in the name of his mother. The value of the properties is as given in 1904 and there can be no doubt that having regard to the fact that properties went on increasing in value they would be worth a great deal more now. The Official Referee valued the properties at over two lakhs in 1921. An order was passed on the 15th of March, 1904, appointing the mother of the 1st defendant as guardian of his person and property allowing Rs. 75 a month for the expenses of maintenance and directing the guardian to file accounts. Accounts were filed from time to time. An order was obtained by the guardian permitting her to borrow Rs. 3,000 from the Mylapore Fund and this amount was borrowed and the debt has subsequently been discharged. Accounts were filed in Court from time to time and it is not suggested that the income was insufficient to meet the needs of the family or that it was necessary to borrow any more monies during the period of the 1st defendant's minority. The age of the 1st defendant as given in the petition, Ex. G, is not disputed by any of the parties and there can be no doubt as to its correctness. The 1st defendant became a major in 1918 and it is not disputed that at the time the value of the properties left by his father increased considerably and the properties were worth over a lakh and half and that the rents which the properties were yielding also increased. It is clear from the evidence which I shall refer to later on that the 1st defendant began to lead a vicious life even during his minority and that he borrowed moneys for immoral purposes before he was a major.

Meenambal Ammal, plaintiff's first witness, is the mother-in-law of the 1st defendant. She states that her daughter was married to

the 1st defendant in 1912 and she joined him in 1914, that in 1917 she came to know that the 1st defendant was drinking and leading an immoral life and was keeping a Eurasian woman in his house and that he was visiting Bangalore, the Nilgris and other places with that woman. She states that the property was then yielding Rs. 500 a month; that Rs. 150 was the income that his mother was getting from her own properties, that the only members of the 1st defendant's family who had to be maintained were himself, his wife, his mother and an infant son and a daughter, that the house in which the family was living was the property of the 1st defendant's mother and, therefore, no rent was being paid and that the expenses of the family would not be more than Rs. 80 a month. She states that in 1917 the 1st defendant went to Malabar and brought a woman from there, and that she was living with the 1st defendant for about a year, that the Eurasian lady Mrs. C. came to live with the 1st defendant in his house and she was kept upstairs from the year 1918 or 1919 and that the lady left the 1st defendant only after the institution of the suit in 1921. Plaintiff's 2nd witness Swarnammal who is the wife of the 1st defendant states that she joined her husband in 1914, that the monthly income of the 1st defendant at that time was Rs. 600, that she first came to know of the 1st defendant's bad ways in 1917 when he borrowed monies and went to Octacamunda and Malabar and brought a woman from Malabar with him and that subsequently Mrs. C. was living with the 1st defendant in his house, meals being brought to her from Harrison and Co. Plaintiff's 3rd witness Subba Rao who is a Medical Practitioner states that he has known the 1st defendant from 1916, that he knew the 1st defendant in the company with Mrs. C. in 1st defendant's house and that he treated the 1st defendant for gonorrhoea. He also states that he saw bottles of whisky in 1st defendant's house. Vadivelu Mudaliar, plaintiff's 4th witness, states that he has known the 1st defendant since he was a student, that the 1st defendant went to Malabar and brought a Malayalee woman with him and kept her in Royapettah, that he was borrowing monies and squandering the same, that after sometime he got a Eurasian lady and kept her in his own house and that he was borrowing monies to go to Pondicherry,

the Nilgris, Bombay and other places with the lady. Raymond Victoria, plaintiff's 5th witness, states that he was formally employed as an accountant in Morrison and Co. and has known the 1st defendant from about 1918, that Mr. C. was employed for sometime in Morrison and Co. that in 1918 the 1st defendant became intimate with Mrs. C. when she was living in Dents Gardens, that the 1st defendant afterwards brought her and kept her in the upstairs of his own house and that she ultimately left the 1st defendant in the latter part of 1921 after the present suit was filed and a Receiver was appointed. He also states that Mr. C. threatened proceedings and that he was paid Rs. 3,000. He produces certain letters written by Mr. C. to the 1st defendant which I shall refer to later on. He states that the 1st defendant borrowed monies on the pledge of his wife's jewels which he redeemed subsequently. He gives details of the sordid attempts which the 1st defendant made to keep Mr. C. ignorant of his intimacy with Mrs. C. and the ultimate buying off of Mr. C. by payment of money. He also states that the 1st defendant purchased a motor-car for Mrs. C. for Rs. 1,400 and that he used to go out of Madras to various places the Nilgris, Pondicherry with Mrs. C. and borrow monies for that purpose. He states that the 1st defendant was addicted to drink and produces letters written to the 1st defendant complaining that he could not get even a drop of whisky. He also states that Rs. 3,000 was paid to a relation of the Malayalee lady who threatened trouble. He also produces bills from various firms which were given to him by the 1st defendant. He refers to various mortgages and other debts. I shall deal with his evidence in detail in regard to those items later on.

Exhibit A is a letter dated the 25th of September, 1919, from Mr. C. to the 1st defendant wherein Mr. C. states that the conduct of the 1st defendant has been most despicable and that the 1st defendant has been the cause of ruination of his domestic happiness. He also states that he has a good mind to take criminal proceedings against the 1st defendant. Exhibit A-2 is a letter dated the 20th of December, 1919, written by the 1st defendant to Mr. Victoria from Bangalore in which he says "What about Mr. C. He has not come. Please give us the real truth as to the affairs of Mr. C. if starting. Because

you wrote that he was coming I had to send all of them away for two days. Enquire every day and in case he is starting please wire. Do not fail." The 1st defendant evidently refers to Mrs. C. and her children in this letter and wants to know of Mr. C's movements. Exhibit A-3 is a letter, dated the 20th September, 1920, written by the 1st defendant to Victoria in which he says: "To-day Mrs. C. took a run down to Madras about the Ally Brother's affairs and I believe he was not there. In the end he had to go to Vadiveloo Mudaliar and get Rs. 10 and buy me a bottle of W. (meaning whisky), and a few little things for Re. 1-8-0 and come back again to the destination. One other thing that worries me is that when Mrs. C. was coming to the bungalow one Brahmin chap followed her at a distance and waited a little while and went away again." Exhibit A-4 is a letter dated the 13th of September, 1920, in which the 1st defendant asks Victoria to tell the manager of Y. M. C. A. Restaurant not to worry Mr. C. and his people, for the boarding fees and that he the 1st defendant would pay the same on Wednesday morning. Exhibit A-5 is a letter dated the 5th of November, 1920, written by the 1st defendant from Pondicherry to Victoria in which he says: "As for food we have got rice and other things in stock but only thing is for mutton and wisky. There is no whisky for to night and moreover I cannot go and ask Mr..... for the simple reason that unless I return his Rs. 25 cannot borrow from him." One of the Ex. A-10 series is a bill of 1920, showing dress materials purchased for Mrs. C. of the value of Rs. 144 of which Rs. 100 was paid on the 10th of June, 1920, and the balance still remains to be paid. Another bill dated the 8th of March, 1921, relates to a Piano hired for Mrs. C. Exhibit A-12 is a letter dated the 9th of January, 1921, written by the 1st defendant to Victoria wherein the 1st defendant refers to Mrs. C. having taken Rs. 75 from him and having gone from Bombay and to Mrs. C. taking a divorce from her husband. He also refers to Mrs. C. going to Madras and from there to Bombay and to her writing to her husband for money.

These letters and the evidence adduced on behalf of the plaintiff make it clear that the 1st defendant was leading a shameless and immoral life even before

he attained his majority that he was addicted to drink, that he was so utterly destitute of any sentiments of honour or respect for the members of his family, that he actually brought Mrs. C. and made her live upstairs in his own house while his mother and his wife were living downstairs and that he had to buy off Mr. C. by payment of money to him. Mrs. C. left the 1st defendant only after the present suit was filed and after he had run through a very large portion of his fortune and was in a desperate state for a few rupees. First defendant was admittedly carrying on no business. The family was not large, consisting only of himself, his wife who was young girl, his mother and two children. The plaintiff was born in 1917, and his sister later. He had to pay no house rent as he was living in the house belonging to his mother. There was, therefore, absolutely no necessity for the 1st defendant to borrow any monies and the evidence which I shall refer to later on shows that with the exception of the amounts due to persons from whom he brought provisions and cloth for himself and the members of his family, all the other monies which he borrowed went to meet the expenses which were occasioned by his profligate life. I have no hesitation in coming to the conclusion that the way of his living was so notorious that anybody who had made the slightest enquiry would have known that not only was there no necessity for the 1st defendant to borrow any money but that the monies borrowed by him were borrowed to meet the expenses incurred during the few years of his shameful life.

I shall now deal with the mortgages created by the 1st defendant. On the 19th of November, 1919, about one and a half year after he attained majority he executed a mortgage for Rs. 58,000 in favour of the 2nd defendant, Lakshmanan Chetty. The mortgage deed has been marked as Ex. 6. It purports to be executed by the 1st defendant for himself and on behalf of his minor son the plaintiff and the consideration of Rs. 58,000 is recited as follows:

1. Rs. 16,000 reserved with the mortgagee for the payment and discharge of the equitable mortgage of Rs. 15,000 carrying interest at 9 per cent. per annum created by the 1st defendant in favour of N. R. K. Thathachari by executing a promissory

note and depositing the deeds on the 4th of April, 1919.

2. Rs. 16,000 reserved with the mortgagee for the purpose of discharging the principal sum of Rs. 15,000 and interest due on the mortgage executed by the 1st defendant in favour of S. Rathnavelu Chetty for Rs. 25,000, dated the 12th of June, 1918.

3. Rs. 10,000 reserved with the mortgagee for the purpose of discharging the debt due on a registered mortgage executed by the 1st defendant in favour of Madhavji Govindji for Rs. 9,250 carrying interest at 9 per cent. per annum.

4. Rs. 7,000 reserved with the mortgagee for the discharge of a promissory note, dated the 7th of June, 1919 executed by the 1st defendant in favour of P. M. P. A. N. Annamalai Chetty for Rs. 7,000 carrying interest at 12 per cent per annum; and

5. Rs. 6,000 and Rs. 3,000 paid to the mortgagors in cash. The mortgage deed stipulated that interest at 12 per cent. per annum was payable every three months and that the principal amount was payable on or before the 1st of December 1920.

The Vakil for the 2nd defendant admits that out of the above consideration, a sum of Rs. 6,000 was not paid to the 1st defendant and that another sum of Rs. 1,040 which was retained by the mortgagee for the discharge of a mortgage dated the 18th of September, 1919, in favour of one Udai Kavar was also not paid.

As regards the sum of Rs. 16,000 alleged to be due to Mr. N. R. K. Thathachari, the evidence of Mr. Thathachari who is a Vakil of this Court, is that he lent Rs. 15,000 on Ex. I dated the 4th of May, 1919, to discharge the debt due to one Govindaraja Iyengar and that he paid the amount directly to Govindaraja Iyengar.

[His Lordship referred to the evidence and continued:]

The whole transaction of Thathachari and Govindaraja Iyengar appears to me to be very suspicious.

The mortgage executed in favour of Mr. Rathnavelu Chetty is dated the 12th of June, 1918. In the letter Ex. 3-B dated the 26th of July, 1918, the 1st defendant writes to Mr. Rathnavelu Chetty not to pay Rs. 10,000 out of the mortgage amount to Govindaraja Iyengar as he had made other arrangements to pay him and to give him (1st defendant) credit for Rs. 10,000 on the

mortgage document. As I said before, Govindaraja Iyengar has not been called and there is nothing to show for what purpose he lent the money to the 1st defendant. Mr. Thathachari makes no enquiries when he says he paid the amount of Rs. 15,000 to Govindaraja Iyengar and the agent of the 2nd defendant Rangasami Iyengar states that he was satisfied with the promissory note that Mr. Thathachari handed to him and that he made no further enquiries.

As regards the sum of Rs. 15,709 said to have been paid to Mr. Rathnavelu Chetty the mortgage, Ex. 2, is dated the 12th June, 1918, and is executed by the 1st defendant very shortly after he attained majority. The consideration for the mortgage *viz.*, Rs. 25,000 is said to be the discharge of a debt of Rs. 10,500 borrowed for discharging the equitable mortgage dated the 31st of May, 1918, in favour of V. E. V. R. Lakshmanan Chetty; the payment of Rs. 1,500 borrowed on the 4th of June, 1918, from Ekambara Iyer on a mortgage, the payment of Rs. 8,000 being the principal sum due to Govindaraja Iyengar and his wife Singarammal on a mortgage and Rs. 1,000 due to them on a promissory note Rs. 9,000 being the sum retained by the mortgagee for payment of the principal and interest due to Govindaraja Iyengar and his wife as above stated and Rs. 3,000 received in cash for family expenses and for commission business carried on by the 1st defendant. It is not even suggested by any witness called that any commission agency or other business was carried on by the 1st defendant and this recital is obviously false. The mortgage-deed Ex. II bears an endorsement dated the 30th November, 1919, which runs as follows:—"Consideration of Rs. 15,709 received by cheque of V. E. V. R. Lakshmanan Chetty on behalf of Hon. Mr. S. R. M. M. C. T. Muthiah Chettiar as per letter of date of P. S. Subramaniam the executant herein. This document cancelled and returned to the agent of the said Hon. S. R. M. M. C. T. Muthiah Chettiar together with all its enclosures.

The promissory notes and documents in favour of Madhavados Govindaji have been marked as Ex. 4 series. Exhibit 4-A is a promissory note dated the 12th of December, 1918, for Rs. 5,000. The amount purports to have been borrowed for dis-

charging decrees and other debts. Exhibit 4-B is a promissory note dated the 2nd January, 1919, for Rs. 2,000 said to be borrowed for paying the price of a motor-car and for meeting Court and other expenses. Exhibit 4-C is a promissory note dated the 16th of September, 1919, for Rs. 125. The purpose for which the money was borrowed is not stated in the promissory note. Exhibit 4-D is a mortgage deed dated the 4th of February, 1919, executed by the 1st defendant for himself and on behalf of his minor son the plaintiff in favour of Madhavados Govindaji for Rs. 9,250. The deed recites the amount due on the above promissory notes and a further sum of Rs. 2,000 advanced. The document bears an endorsement dated the 2nd of December, 1919, which runs as follows:—"Consideration received and the document cancelled and returned." This transaction was on the security of the title-deeds of certain properties belonging to the 1st defendant. Exhibit 5 series are vouchers in respect of debts which the 1st defendant had to discharge. As regards one of these vouchers which relates to money required for paying the price of a motor car the evidence adduced on the plaintiff's side is that the money was borrowed for purchasing a car for Mrs. C. and it is likely that Madhavados Govindjee would have been aware of this fact if he made enquiries. It appears from the evidence of the second defendant's agent that a sum of Rs. 10,309 was paid to Madhavados Govindajee. So far as Madhavados Govindajee's claim is concerned there can be little doubt that the 1st defendant did borrow money from him though probably as is usual with *sowcars* a portion of the alleged commission and advance interest were deducted, I have little doubt that the debts contracted by the 1st defendant were for his immoral purposes neither Madhavados Govindajee nor any person connected with him having been called. As regards the sum of Rs. 7,000 reserved with the mortgagee for discharging a promissory note dated the 7th of June, 1919, executed by the 1st defendant in favour of P. M. P. A. N. Annamalai Chettiar for Rs. 7,000 I am of opinion that there was no debt in favour of Annamalai Chettiar and that this sum was put in for the purpose of swelling the consideration. The 2nd defendant's agent states that Rs. 7,000 was paid to Annamalai Chettiar.

and his debt was discharged. He admits in cross-examination that he has no personal knowledge of the payment to Annamalai Chettiar but that Lakshmanan Chetti (2nd defendant) told him (the witness) that he paid the amount to Annamalai Chettiar. It appears from the evidence of the agent that the 1st defendant complained before the Registrar that the full consideration was not paid. So far as Annamalai Chettiar's alleged debt is concerned the only document filed is the promissory note, Ex. X, dated the 7th of June, 1919. It bears the endorsement "cancelled" and is signed by the 1st defendant but bears no date. The 1st defendant who was examined before the Official Referee stated that the consideration for the mortgage was only Rs. 50,960. He now wants to support the 2nd defendant's agent and says that Rs. 58,000 was received by him but I do not think it is possible to place any reliance on the 1st defendant. His condition is such that he would say anything if he gets a few rupees to satisfy his craving for drink and women. During the course of the trial I had considerable doubts as to the genuineness of Annamalai Chetti's claim and I thought it is probable that this was a bogus transaction entered into to swell the consideration. It is not unusual for money-lenders to recite fictitious debts and support them by promissory notes. I wanted the accounts of Annamalai Chetti and Lakshmanan Chetti to be produced which would show the payment. While other payments are made by cheques there is nothing to support this payment except the statement of Lakshmanan Chetti and no accounts were produced to support this payment.

[His Lordship discussed the evidence and continued:]

This evidence leaves little doubt in my mind that Muthayya Chettiar had a great deal to do with this transaction. In the inception it is clear from the endorsement on the mortgage bond Ex. II that it was Muthayya Chettiar who was really acting in the matter and that Lakshmanan Chetti was only his agent. Subsequently for some reason or other the document was taken in Lakshmanan Chetti's name. It is not necessary for me to find that Lakshmanan Chetti is a *benamidar* as it has now been settled by their Lordships of the Privy Council that even a *benamidar* can sue in his own name and that the fact of the transaction

being *benami* is no defence to the claim. It is, however, important when testing the nature of this transaction and the *bona fides* of the parties.

As regards the mortgage in favour of the 3rd defendant Udaya Kavar, Mr. Thirunarayanachari, Counsel for the 3rd defendant, states that he would be satisfied with a decree against the share of the 1st defendant in the mortgaged properties as the share of the 1st defendant would be ample to cover the amount due to him. It is, therefore, unnecessary to discuss the evidence as regards the binding nature of that debt. Were it necessary to do so I would hold that it is not binding on the plaintiff and that the evidence as to consideration is of a very doubtful nature. There is no dispute as to the amount which would be due on the mortgage so far as the first defendant is concerned.

As regards the mortgage in favour of Chockalinga Chetti, he is now dead and his estate is now vested in the Official Trustee. The mortgage in favour of Chockalinga Chetti is dated the 2nd August, 1920, and is marked as Ex. XII. It states that a sum of Rs. 10,000 was borrowed for the purpose of discharging certain unsecured debts, for redeeming certain jewels belonging to the family and for other purposes necessary and beneficial to the family. The rate of interest fixed is 18 per cent. per annum.

* * * * *

I have little doubt that the 1st defendant received only Rs. 3,500 and that the usual trick played in such cases was followed—the cheque being given and the money taken back. I find that this mortgage is supported by consideration only to the extent of Rs. 3,500. I am of opinion that this sum was borrowed to meet the immoral necessities of the 1st defendant.

[His Lordship then dealt with the claims of some minor creditors whose claims were contested and continued:]

As regards Batchmain Sahib, he claims Rs. 263-12-0 being the premium paid by him to the 1st defendant in respect of the lease of some property. This is found against by the Official Referee as under the lease the arrangement is that the premium has to be worked off by deductions from the monthly rent. This disposes of the claim made before the Official Referee. Except the claims I have specifically held to be binding on the 1st defendant and

claims in respect of creditors referred to in the Official Referee's report not disputed before me I hold the other claims not binding on the plaintiff and his share in the family properties. The question as to subrogation has been raised by the 2nd defendant who claims priority in so far as he has discharged the debt due under Ex. II the mortgage in favour of Rathnavelu Chetti. So far as the claim of Udai Kavar is concerned, I have already stated that Mr. Tirunarayanachari, Counsel for the 3rd defendant, stated that he would be satisfied with a decree against the half share of the 1st defendant. The two mortgages in favour of the 3rd defendant are dated the 16th of July, 1919; (Ex. VIII) and the 18th of September, 1919, (Ex. IX). The mortgage in favour of Rathnavelu Chetti is dated the 12th of June, 1918, (Ex. II). The mortgage in favour of Lakshmanan Chetti is dated the 29th November, 1919, (Ex. VI). It is argued that as the mortgage Ex. VI in favour of Lakshmanan Chetti was created, *inter alia*, to discharge the debt due to Rathnavelu Chetti under Ex. II, Lakshmanan Chetti should be subrogated to the rights of Rathnavelu Chetti and that he should thus have priority over the mortgages in favour of Udai Kavar (Exs. VIII and IX) to the extent to which Rathnavelu Chetti's mortgage was discharged.

The question of subrogation is really one of intention and has to be gathered with reference to the terms of the various documents though of course there is always the presumption that a person discharging a prior mortgage intends to keep it alive for his benefit. Where a person raises money to pay off a prior mortgage and the mortgagee pays as the agent of the mortgagor there can be no question of subrogation. In *Malireddi Ayyareddi v. Adusumilli Gopalakrishnayya* (1). Their Lordships of the Privy Council at page 167* observe as follows:—

"It is now settled law that where in India there are several mortgages on a property, the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and

(1) 79 Ind. Cas. 592; 46 M. L. J. 164; 22 A. L. J. 45; A. I. R. 1924 P. C. 36; 19 L. W. 215; 26 Bom. L. R. 204; 31 M. L. T. 1; 2 Pat. L. R. 99; 10 O. & A. L. R. 269 (1924) M. W. N. 290; 39 C. L. J. 204; 47 M. 19; 28 O. W. N. 1025; 51 I. A. 140; L. R. 5 A. (P. C.) 49; 1 O. W. N. 27 (P. C.).

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stand in the same position as his vendor or to put in another way, he may keep the encumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt, but in this case there was no such personal covenant. It is further to be presumed, and indeed the Statute so enacts (Transfer of Property Act, s. 101), that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit."

In Ex. VI, the mortgagor, has added a clause at the end which runs as follows:—

"As regards items Nos. 2 to 5 in Sch. B, a sum of Rs. 1,040 out of charging a further charge with possession in those properties, of one Udai Kavar executed on the 1st September, 1919. After the discharge, there is only one mortgage left with Udai Kavar dated 16th July 1919, and there are no other encumbrances."

It is argued by Counsel for the 3rd defendant that where a mortgagee undertakes to discharge a previous mortgage out of the moneys which he lends to the mortgagor and thus puts himself under a personal liability to pay and where the mortgagee expressly states that of all the previous mortgages there is only one mortgage left undischarged, the fair inference is that the parties intended, that all the other mortgages should be treated as discharged and not kept alive for the benefit of the mortgagee. I do not think it can be said from the tenor of the mortgage-deed in favour of the 2nd defendant that he intended to give up any right he had to use the mortgage in favour of Ratna Chetty as a shield against subsequent encumbrances. The mere fact that a mortgagee keeps money in his hands to pay off a prior encumbrance and does not run the risk he would otherwise incur if he pays money to the mortgagor to pay off the prior encumbrance and he does not do so will not make the mortgagee an agent of the mortgagor. The recital in Ex. VI that only one mortgage is outstanding simply means that the other mortgages have been paid off. It does not mean that the claim to subrogation, should it arise, is intended to be negated. I think the 2nd defendant is entitled to subrogation to the extent to

which he discharged Ex. II Rathnavelu Chetty's mortgage. It is, however, clear that Udai Kavar will be entitled to marshal the properties under s. 81 of the Transfer of Property Act. As I have already shown, there can absolutely be no doubt that the 1st defendant even before he attained majority began to lead a reckless and immoral life and began to borrow monies recklessly and that there was absolutely no necessity for any loans being raised for his own ordinary personal family expenses. The 1st defendant was carrying on no business and the recital in some of the documents that he was carrying on business or that moneys were required for family expenses is false. An ordinary enquiry set on foot by a person who wanted to lend money to the 1st defendant would have disclosed not only that there was no necessity for the 1st defendant to borrow any money but that he was leading a grossly immoral life. He had a Eurasian woman living in his own house which is situate in one of the busy and central parts of Mylapore, and there can be little doubt that the 1st defendant's mode of life must have been notorious. The evidence which I have alluded to shows that though the 1st defendant attained majority only on the 16th of May, 1918, he borrowed from Govindaraja Iyer, Rs. 8,000 on the 1st of October, 1917, a year before he attained majority, and another sum of Rs. 1,000 on the 5th of April, 1918, immediately before he attained age. On the 12th of June, 1918, i. e., a month after he attained age, he executed a mortgage in favour of Rathnavelu Chetti for Rs. 25,000 I have already referred to the recitals in that mortgage. On the 4th of May, 1919, almost within a year of his attaining majority, he creates an equitable mortgage in favour of Mr. Thathachari for Rs. 16,000. In December, 1918, within six months of his attaining majority he again borrows Rs. 5,000 from Madhawaji Govindji on an equitable mortgage. On the 16th of July, 1919, he borrows from Udai Kavar Rs. 6,500 alleged to be for the purchase of jewels none of which were for his wife or any member of his family and on 18th of September, 1919, Rs. 1,000. On the 29th November, 1919, about 1½ years after attaining age he executed a mortgage for Rs. 58,000 in favour of Lakshmanan Chetti. The various other

simple debts which I have referred to were all contracted between 1918 and 1919. So that within two years of his attaining majority the 1st defendant borrowed over a *lakh* of rupees. I have already given my reasons for holding that almost all the debts contracted by the 1st defendant were for no necessity, but for the purpose of meeting the expenses necessary for his illegal and immoral habits. It is clear from the evidence that the lenders made no enquiries and were merely satisfied with the fact that there were antecedent debts or with statement of the 1st defendant that he wanted money for family expenses. That *bona fide* enquiries are necessary is clear. See *Saravana Tevan v. Muttayi Ammal* (2) *Savumian v. Narayanan Chettiar* (3). The question is whether in the circumstances I have referred to and on the facts I have found these debts are binding on the plaintiff. The law is clear that in the case of a joint family the sons are liable for their father's debts even if the debts are contracted by the father for his own benefit without any legal necessity so long as the debts are not incurred for an unlawful or immoral purpose. The difficulty often arises out of a limitation imposed by some decided cases which finds no place in the Smirities or ancient commentators that the lender must have notice of the purpose for which the loan was made. Some cases go to the length of holding that direct connection should be shown between the debt and the necessary purpose for which it was borrowed. I think that constructive notice or the absence of any enquiry would be sufficient in cases like the present. Where a father carries on some business or trade, or where there is reasonable ground for thinking that the loans were required for purposes which though not necessary would still not be immoral or illegal the son seeking to evade liability has to show that the creditor knew that the money borrowed was going to be used for immoral purposes. The position however is different where a young man who has just attained majority and who has inherited valuable property which would yield an income more than sufficient to keep him in comfort having regard to the position of the family and its requirements, leads an

(2) 6 M. H. C. R. 371.

(3) 23 Ind. Cas. 248; 15 M. L. T. 372.

openly reckless and immoral life and borrows large sums of moneys, which will not in the ordinary circumstances be necessary for any lawful purpose. In the case of expectant heirs and young men who had just attained majority borrowing money from money-lenders, Courts have thrown the burden of proving the factum of the loans upon the money-lenders. I need only refer to *Moti Gulabchand v. Mahomed Mehdi Tharia Topan* (4), *Sundarammal v. Subramania Chettiar* (5), *Sami Sah v. Parthasarathy Chetty* (6) and *Official Assignee of Madras v. Sambanda Mudaliar* (7). In such cases I think that a lender to a young man in the circumstances above mentioned who is the father of minor children who cannot protect themselves, cannot get the protection which is usually given to *bona fide* lenders, unless he proves that he made reasonable enquiries. In the present case I am of opinion that the 1st defendant who is a young man, and who had recently attained majority, got into the hands of unscrupulous money-lenders who took advantage of his youth and vicious habits, lent him moneys, got documents for larger sums than those he actually received and put in fictitious recitals and they have not made out even a shadow of a claim for protection as *bona fide* lenders without notice, or that they have any reasonable belief that the moneys which the 1st defendant borrowed were borrowed for lawful purposes.

Numerous authorities were cited on both sides, and it is not easy to reconcile all the views taken. I think the law as to fixing creditors with notice of the illegality or immorality is correctly laid down in the cases which I shall refer to.

In *Sunlara Goundan v. Arumuga Goundan* (8) Sir Abdur Rahim and Moore, JJ., observed as follows:—

"It would no doubt be difficult in many cases to prove that a particular debt was incurred for some specific immoral or illegal purpose and it may be sufficient if the evidence is such that the Court would be in a position to infer that the debt in-

curred by the father must have been incurred for immoral purposes."

That seems to be the principle underlying the decision in *Bhagbut Pershad Singh v. Girja Koer*, (9) In *Bhagat Mal Sahu v. Abdul Karim* (10) the learned Judge observed:—

"We think that while you need not have direct proof that the money was raised to be spent on any particular person, one must be reasonably satisfied that the father was a man of vicious, extravagant and lustful habits and that he raised the money for the purpose of applying it for immoral purpose. In some way, by reasonable legal proof, it must be shown that there is a connection with the debt and the immoral purpose."

In *Maharaj Singh v. Balwant Singh* (11) Sir John Stanley, C. J., and Justice Sir William Burkitt observe as follows:—

"The evidence irresistably leads us to the conclusion that there was no necessity for those debts or any of them other than that which the gratification of his vicious habits created. He had more than ample income for the maintenance in luxury of himself and his family. There is not even a suggestion of the existence of any family necessity for the loans. Under all the circumstances we think the appellant has made out his case. The facility with which Hindu fathers can obtain loans from money-lenders on the security of ancestral property has proved disastrous to many respectable and well-to-do families in these Provinces. . . . It is common experience that money lenders readily advance loans on any class of landed security taking considerable risks, but charging high if not exorbitant rates of interest. It is no easy matter for sons to satisfy the heavy onus which lies upon them in impeaching loans obtained for immoral purposes, but it would, we think, be the death-blow to the rule of Hindu Law which gives immunity to sons when defending their title to ancestral property from liability to their father's immoral debts, if it were the law that in order to absolve themselves from liability the sons must prove, not merely the purpose for which such loans were

(4) 20 B. 367; 10 Ind. Dec. (N. S.) 807.

(5) 30 Ind. Cas. 971; 29 M. L. J. 236.

(6) 31 Ind. Cas. 739.

(7) 60 Ind. Cas. 205; 43 M. 739; 39 M. L. J. 345; 28 M. L. T. 258.

(8) 59 Ind. Cas. 390; 12 L. W. 159.

(9) 15 C. 717; 15 I. A. 99; 12 Ind. Jur. 289; 5 Sar. P. C. J. 186; 7 Ind. Dec. (N. S.) 1062 (P. C.)

(10) 34 Ind. Cas. 23; 20 C. W. N. 797; 1 P. L. J. 56; 2 P. L. W. 430.

(11) 28 A. 508; 3 A. L. J. 274; A. W. N. (1906) 117.

contracted, but also that the lenders knew of the immoral purpose of the loan."

In *Babu Singh v. Behari Lal* (12) Banerjee and Richards, J.J., observed that the passage above referred to was *obiter* but with great respect I think it correctly sets out the law. This case went on appeal to the Privy Council but the decision of the High Court was confirmed on another point. In *Ram Nath v. Bulagi Ram* (13) the learned Judges observed as follows:—

"But it would, in our opinion, equally be sufficient to prove that the borrower was at the time living a licentious life, beyond his means, indulging in drink, riot, prostitution and debauchery, and that at the same time he was without any business or occupation upon which the money might legitimately have been spent, without showing on which particular act of immorality the money was spent. In fact, if it is proved clearly that at the time the borrower was notoriously wasting his substance on riotous living, and spending large sums beyond his income and above his station in life in this way only, a loan contracted in the midst of such living and spent upon it would be a loan contracted for immoral purposes. Indeed, it can hardly ever, if ever, be possible and must always be extremely difficult to prove specific expenditure on one specific act of immorality."

I am, therefore, of opinion that the mortgages referred to in my judgment are not binding on the plaintiff but are only enforceable against the half share of the 1st defendant. The mortgagees who have taken out the moneys will, therefore, bring into Court the one half share of the plaintiff. I have already given my views as to the simple debts and decree. As regards the properties which have not yet been sold and which are subject to mortgages the mortgage claims will be enforceable against the one half share of the 1st defendant and those properties will be sold and the half share of the plaintiff will be paid into Court.

As regards the debts which I have found to be binding on the minor plaintiff they will, in the first instance, be paid out of any surplus, if any, that may remain to the credit of the 1st defendant after the payment of the mortgage debts and any balance will be paid out of the minor's

share in Court. As regards creditors whose claims have been held not to be binding, they will be paid out of any surplus standing to the credit of the 1st defendant after the mortgagees are satisfied. As regards the maintenance to be awarded to the plaintiff's mother and sister, I think that the matter can best be disposed of after it is ascertained what is the net amount that will remain to the credit of the plaintiff. As regards the costs of the suit the costs of the plaintiff will be paid out of the estate and the defendants will bear their own costs.

Having regard to the difficulty of the case, I allow fees for two Vakils.

V. N. V.

A. N. A.

Decree accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 449 OF 1925.

December 7, 1926.

Present :—Mr. Justice Devadoss.

SINTHAMANI CHETTI alias

ANNAMALAI CHETTI and OTHERS

—DEFENDANTS NOS. 3 AND 4 AND LEGAL

REPRESENTATIVE OF DEFENDANT No. 5—

APPELLANTS

versus

ARUNACHALAM CHETTIAR AND OTHERS

—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 55—Contract Act (IX of 1872), s. 60—Agreement for sale of leasehold interest—Purchaser put in possession—Suit for specific performance by purchaser—Pendency of unsuccessful appeals against decree—Payment by vendor of rents and charges on property—Suit by vendor for reimbursement after termination of litigation—Cause of action when arises—Suspension during pendency of appeals—Limitation.

A mere contract of sale of immovable property does not confer any right to the property on the prospective vendee. His right is only to have a conveyance effected in his favour [p. 414, col. 1.]

The liability of a person who agrees to purchase a leasehold interest in immovable property to pay rent and charges in respect thereof ordinarily arises only on the date of the actual sale-deed. [ibid.]

But where the purchaser was put in possession under the agreement of transfer, and, during the pendency of a suit by such purchaser for specific performance of the agreement of transfer, against the vendor, the vendor paid the rents and charges on the land, and after the suit for specific performance was decreed and the sale-deed was executed by him, the vendor sued for recovery of the amounts from the purchaser:

Held, (1) that inasmuch as the possession of the defendant was not that of a trespasser but that of a transferee whose title had only to be perfected by

(12) 30 A. 156; 5 A. L. J. 175; A. W. N. (1908) 61.

(13) 17 Ind. Cas. 735; 69 P. L. R. 1913; 50 P. R. 1913; 15 P. W. R. 1913.

the execution of a proper deed, the defendant was bound to pay the rent and charges on the property while he was in possession thereof; [p. 415, col. 1.]

(2) that under s. 69, Contract Act, plaintiff who paid the amounts was entitled to recover the same from the defendant; [*ibid.*]

(3) that Art. 61 of the Limitation Act, applied and the cause of action arose on the date of the several payments and not on the date of the execution of the actual deed; [p. 415, col. 1; p. 416, col. 2.]

(4) that during the pendency of the unsuccessful appeals of the plaintiff to the District Court and the High Court, the cause of action was not suspended. [p. 415, col. 2.]

Second appeal against the decree of the District Court, Ramnad at Madura, in A. S. No. 61 of 1920, preferred against that of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in O. S. No. 24 of 1918 (O. S. No. 144 of 1917 on the file of the Court of the Subordinate Judge, Ramnad at Madura).

Mr. S. Varadachariar, for the Appellants.

Mr. K. Rajah Iyer, for the Respondents.

JUDGMENT.—This case has been very fully and ably argued on both sides. The plaintiff took a sub-lease of some property from the lessees of the Sivaganga *semindari* and contracted to transfer it to the 2nd defendant's father. As he refused to carry out the contract O. S. No. 195 of 1911 was filed for specific performance of the contract. It was decreed by the District Munsif, and on appeal the District Court confirmed the District Munsif's decree and the plaintiff, who was the defendant in that suit, preferred S. A. No. 248 of 1916 which was dismissed by a Bench of the High Court. Thereupon the plaintiff executed Ex. B in accordance with the decree of the High Court in second appeal. He now sues the defendants for recovery of rents and charges paid by him during the pendency of the suit for specific performance. The Subordinate Judge dismissed the plaintiff's suit and the District Judge of Ramnad has given him a decree for Rs. 2,644-5-7. Defendants Nos. 3 and 4 and the legal representatives of the 5th defendant have preferred this second appeal. Two contentions are raised by Mr. Varadachariar for the appellants.

1. The liability of the defendants to pay rent and charges in respect of the property which is the subject of the sub-lease arose only on the date of Ex. B and they are not liable to pay rent and charges which accrued due before that date and the plaintiff has no cause of action against the defendants in respect of them.

2. The cause of action, if any, is barred by limitation as the suit was filed more than three years after the date of the payments made by the plaintiff.

A few facts are necessary to understand the contention. The sub-lease in favour of the plaintiff was on 27th April, 1908. The contract to transfer the sub-lease in favour of the 2nd defendant's father was on 10th September, 1908. The suit for specific performance O. S. No. 195 of 1911 was filed on 2nd May, 1911, and the District Munsif's decree was passed on 31st March, 1914. The decree of the High Court in S. A. No. 248 of 1916 was on 8th March, 1917. Exhibit B, the transfer deed by the plaintiff in favour of the defendants according to the decree of the High Court, was executed on 19th June, 1917. The present suit was filed on 11th November, 1917. The payments by the plaintiff in respect of the leasehold property were between 1909 and 1915. It is admitted that if the three years' rule were held applicable to the present suit all but Rs. 200 and odd would be barred by limitation.

Taking the first point, "The seller is bound to pay all public charges and rent accrued due in respect of the property up to the date of the sale and the liability of the vendee to pay them arises only on the date of the sale" (*vide* s. 25, cls. (1) (g) and (5) (d) of the Transfer of Property Act). "In the absence of a contract to the contrary the liability of a vendee of property or the transferee of a lease to pay rents and charges arises only on the date of sale or transfer of the lease." There is no distinction between the sale of immoveable property and the transfer of a lease in this respect. This contention is sought to be met by the argument that the defendant's title related back to the date of the contract for transfer of the sub-lease. It is difficult to follow the argument of Mr. Rajah Iyer that the title of the defendants should be held to relate back to the date of the contract to transfer the sub-lease. The title passes in the case of a sale on the date of the execution of the sale-deed and in the case of a lease on the date of the execution of the transfer-deed. Though a sale-deed is registered sometime after its execution it takes effect from the date of the execution and not from the date of registration. This is specifically provided for in the Registration Act. The title of the defendants cannot on any principle of

law be held to relate back to the date of the contract for the transfer of the sub-lease and the terms of Ex. B do not warrant such a contention. Under Ex. B the right of the plaintiff, as it was on the date of the sub-lease, was transferred to the defendants. The defendants have only acquired the right of the plaintiff under the sub-lease as it was on the day, the sub-lease was executed and not as it was on the date of the contract of sale or at any other time. This does not mean that the defendants' title to the lease should be taken to relate back to the date of the contract of sale. The sub-lease and the contract to transfer it were on different dates, and if the contention of the respondent is tenable the question would arise whether the title of the defendants related back to the date of the sub-lease or the date of the contract to transfer it. The only answer to this contention is that the title of the defendants commenced only from the date of Ex. B.

It is contended that the defendants had an equitable right to the sub-lease by reason of the contract to transfer it to them and, therefore, they were liable to pay the rent and charges. A mere contract of sale of immoveable property does not confer any right to the property on the prospective vendee. His right is only to have a conveyance effected in his favour. The defendants, therefore, cannot be said to have acquired any right to the sub-lease on the date of the contract for its transfer.

In *Theathalan v. The Eralpod Rajah* (1) it was held that a privity of estate arises only when the whole of the lessee's interest is assigned over and not where a subsidiary interest is carved out of the lessee's interest. It is only on the execution of the transfer-deed Ex. B that the defendants could be said to have acquired a title to the sub-lease. In law, therefore, the liability of the defendants to pay rent and charges in respect of the property sub-leased arose only on the date of Ex. B and that too for the rent and charges accruing due on or after the date of Ex. B.

Let us see whether there was any contract under which the defendants were liable to pay the rent and charges before they became owners of the sub-lease. The judgment in Second Appeal No. 248 of 1916 does not create a contract between the parties. The observation of the learned

Judges that "the plaintiffs are no doubt bound as soon as the ownership passes to them to pay all public charges and rent, etc., from the date of such passing (s. 55, cl. (5) (d) of Act IV of 1882). But as the document of conveyance has not yet been executed and delivered to the plaintiffs they cannot be compelled to pay the public charges and rent paid already by the defendant as a condition precedent to the execution of the conveyance by the defendant who must be left to recover the same after plaintiffs' title becomes perfected when only plaintiffs' obligation to pay such charges accrues," was only in answer to the contention of the defendant in that suit that the plaintiffs therein should be made to pay the rent and charges which he had paid as a condition precedent to the execution of the transfer-deed. This observation of the learned Judges cannot be taken to have either created a contract between the parties or to have decided on the liability of the defendants herein to pay rent and charges already paid by the plaintiff herein.

Though ordinarily in the case of vendees of property and the transferees of leases the liability to pay rents and charges arises only on the date of sale or transfer, yet in this case under a contract to transfer the lease the 2nd defendant's father agreed to take over the lease on payment of Rs. 100 to the plaintiff as profit and got possession of the property on the date of the contract and he and the defendants remained in possession all along. The possession of the defendants was not that of trespassers but that of transferees whose title had to be perfected by the execution of a proper deed and the suit for specific performance was instituted only for getting that deed executed and when the deed was executed it did not alter the character of the possession of the defendant but made it only secure; to put the matter slightly differently could the plaintiff have successfully sued to eject the defendants from possession of the property, and if he did bring a suit for possession would not the defendants have pleaded the contract to transfer the sub-lease and set up the plea of part performance of the contract inasmuch as possession had been given and Rs. 100 was paid to the plaintiff as profit. I think they would have had a good defence if an action for ejectment had been brought by the plaintiff.

(1) 40 Ind. Cas. 841; 40 M. 1111; 32 M. L. J. 442; 21 M. L. T. 401.

iff and, therefore, their position was that of transferees of the sub-lease. Such being the case they were bound to pay rent and charges on the property in their possession.

It is fairly conceded by Mr. Varadarachariar that the payments by the plaintiff were not voluntary payments and that he as sub-lessee was bound by the terms of the sub-lease in his favour to pay rent and charges even though he agreed to transfer his right to another, and his liability continued till the Sivaganga lessees consented to the transfer of the sub-lease and to release him from his liability. The question of voluntary payment, therefore, does not arise in this case. Section 69 of the Contract Act applies to this case. The question is when did the plaintiff's cause of action against the defendants arise? Did it arise on the date of the payments by the plaintiff or on the date of the execution of Ex. B. Mr. Rajah Iyer very naturally relies upon the observation of the learned Judges in the judgment in the Second Appeal No. 248 of 1916 which is as follows:—

"Who must be left to recover the same after the plaintiff's title becomes perfected when only the plaintiff's obligation to re pay such charges accrues."

The observation that the liability of the defendants to pay rent and charges paid by the plaintiff during the pendency of the suit would arise only on the defendants' title being perfected by the execution of a transfer-deed is only *obiter*. At best it is only an expression of opinion and cannot be treated as a decision on the point as to the liability of the defendants to pay rent and charges paid before the date of the decree. This point has to be decided in this case and with all respect to the learned Judges I am unable to hold that the cause of action for the plaintiff's claim arose only on the date of Ex. B. As the execution of the transfer-deed was required by law only in order to give a legal title to the defendants who were already in possession of the leasehold property and enjoyed the income in the capacity of transferees, the cause of action arose on the dates of the several payments made by the plaintiff. This brings us to the second point which is one of limitation.

Mr. Rajah Iyer urges that if Art. 61 were really applicable to the case

there was no one whom he could sue, for the defendants had not acquired a title to the sub-lease and, therefore, his cause of action did not arise till there was some one who could be sued. Article 61 gives three years, for money payable to the plaintiff for money paid for the defendant and time begins to run from the day when the money is paid. The defendants, being in possession of the property and suing only for perfecting their title, were in equity bound to pay the rent and charges and the plaintiff who paid them could have brought a suit against them after the decision of the District Munsif in their favour. The District Munsif passed a decree in O. S. No. 195 of 1911 on 31st March, 1914. On that day the defendants had by reason of the decree become entitled to the sub-lease. There was nothing to prevent the plaintiff from suing them after 31st March 1914. The cause action which arose on 31st March, 1914, could not be said to have been suspended till the decision of the second appeal in No. 248 of 1916. The principle of the decision in *Hukam Chand Boid v. Pirithchand Lal* (2) applies to the present case. In that case the question was, when did the cause of action arise for recovery of money paid upon an existing consideration which afterwards failed under Art. 97 of the Limitation Act. Sir Lawrence Jenkins, in delivering the judgment of the Privy Council observes at page 678*: "Both Courts have held that the failure of consideration was at the date of the 1st Court's decree. Their Lordships feel no doubt that as between these two decrees this is the correct view, for whatever may be the theory under other systems of law, under the Indian Law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal." The plaintiff who could have brought a suit the day after the District Munsif gave a decree in defendants' favour is not entitled to plead that the title of the defendants was decreed only when the High Court disposed of the second appeal.

Mr. Rajah Iyer for the respondent has relied upon a number of cases but it is unnecessary to consider all of them. His

(2) 50 Ind. Cas. 444; 46 C. 670; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 26 M. L. T. 131; 19 L. W. 416; 46 I. A. 52 (P. O.).

*Page of 46 C.—[24.]

main contention is that he could not have sued before the date of the decree in second appeal and he relies upon *Dwijendra Narain Roy v. Jogesh Chandra Dey* (3) as supporting his contention. In that case the plaintiff along with the 3rd defendant instituted a suit against the 1st defendant to enforce the registration of certain documents under the provisions of s. 77 of the Indian Registration Act. The defendant contended that the deeds had been materially altered after he executed them. Finally the suit was decreed. The plaintiff instituted a suit for recovery of possession of mesne profits on the strength of his title. The Subordinate Judge decreed the plaintiff's suit. Mr. Justice Mukerjee and Mr. Justice Suhrawardy held that the plaintiff's suit was not barred. They observed at page 55*: "The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief. *Whalley v. Whalley* (4). The Statute does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result (*Angell on Limitations*, s. 42)." In that case the plaintiff without getting a registered document could not maintain a claim to the property and he could not, therefore, sue for mesne profits. But here the defendants had obtained a decree for specific performance and they were in possession of the property under the contract to transfer the sub-lease and they were bound to pay the rent and charges on the property. The plaintiff who, no doubt, was under a liability to see that the rent and charges were paid and who paid in consequence of his liability could have brought a suit the day after the decree of the District Munsif was pronounced in favour of the defendants for the execution of a proper transfer-deed.

In *Matangini Debya v. Prasannamoyi Debya* (5) a *putnidar* purchased his co-*putnidar's* share in a sale for arrears of

rent, the sale was set aside as the *putnidar* was not competent to bid having regard to the provisions of s. 9 of the Putni Regulation VIII of 1819. The plaintiff, who after the purchase was the owner of the *putni*, paid the arrears of rent and instituted a suit for contribution in respect of the payment made by him. Maclean, C. J., held that the cause of action arose when the sale was set aside and that "the payment must be regarded as made on his own account and not for the co-*putnidars*. In this view the Statute would not begin to run until after the 12th June, 1899. The plaintiff would have no cause of action against the defendants until the 12th June, 1899. To revert, for a moment, to Art. 61, it cannot be said that there was any money paid for the defendants until the sale had been set aside. Up to that time, the money must be taken as paid by the plaintiff on his own account." This case is distinguishable on the facts of the present case. *Bijoy Chand Mahatab v. Nilmoni Lahiri* (6) does not help the respondent. In that case the learned Judges followed *Hukum Chand Boid v. Pirthichand Lal* (2).

It is next contended that Art. 120 of the Limitation Act applies to this case. This is a residuary Article and when there is no other Article applicable to the case then only the Court should see whether Art. 120 would be applicable. In this case Art. 61 is clearly applicable and, therefore, Art. 120 cannot be held to apply to the facts of the present case. In this view it is unnecessary to consider at length the cases in *Viswanadha Vija Kumara Bangaroo v. Orr* (7) and *Sundara Aiyar v. Ananthapadbhanaba Aiyar* (8). In both the cases the cause of action was held to arise on the date when the defendant had the benefit of the plaintiff's payment or acts. Here the defendant had the benefit of the payments on the dates on which they were made. If the plaintiff had not made those payments the defendants should have paid them and if they defaulted to pay them, due charges, the sub-lease would have been forfeited and the defendants would have lost possession of the property.

(3) 79 Ind. Cas. 520; 39 C. L. J. 40; A. I. R. 1924 Cal. 800.

(4) (1816) 1 Mer. 436; 3 Bligh 1; 35 E. R. 734.

(5) 3 C. L. J. 93.

*Page of 39 C. L. J. — [Ed.]

(6) 85 Ind. Cas. 1007; A. I. R. 1925 Cal. 1216.

(7) 45 Ind. Cas. 786.

(8) 70 Ind. Cas. 405; 43 M. L. J. 271; 16 L. W. 231; 31 M. L. T. 164; (1922) M. W. N. 678; A. I. R. 1923 Mad. 61.

Venkatadri Appa Rao Bahadur v. Parthasarathi Appa Rao (9) does not help the respondent. There the Privy Council held that in the case of a legacy time began to run only from the time when the executor had funds with which he could pay the legacy.

After a careful and anxious consideration of the case I hold that Art. 61 applies to this case and the cause of action arose on the dates of the several payments. It is admitted that a sum of Rs. 248-10-9 was paid within three years before suit and, therefore, I modify the decree of the District Judge by reducing the amount to Rs. 248-10-9 with 12 per cent. interest from the date of payment to the date of the District Court's decree and at 6 per cent. interest thereafter. Considering all the circumstances of this case I direct that both the parties should bear their costs throughout.

V. N. V.

Decree modified.

(9) 87 Ind. Cas. 324; 48 M. 312; 23 A. L. J. 261; 48 M. L. J. 637; L. R. 6 A. (P. C.) 82; A. I. R. 1925 P. C. 105; 27 Bom. L. R. 823; 3 Pat. L. R. 208; (1925) M. W. N. 411; 29 C. W. N. 989; 52 I. A. 214 (P. C.).

Mr. G. Ramakrishna Iyer, for the Appellants.

Mr. P. Somasundaram, for the Respondents.

JUDGMENT.—There are no grounds for interfering in second appeal with the findings of fact of the lower Appellate Court. The only point for consideration is as to the admissibility of the oral agreement providing for re-payment of the mortgage-debt from the usufruct of the land. The contention that this amounted to a lease is clearly untenable, nor did it constitute an usufructuary mortgage, but only a means of discharging the debt by putting the simple mortgages in possession of the property: [see *Ram Bakhsh v. Durjan* (1)] and *Kamla Sahai v. Babu Nandan Mian* (2). As such even an oral agreement may be proved.

We dismiss the second appeal with costs.

V. N. V.

Appeal dismissed.

(1) 9 A. 302; A. W. N. (1897) 65; 5 Ind. Dec. (N. S.) 698.

(2) 2 Ind. Cas. 13; 11 C. L. J. 39.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1366 OF 1921.

August 8, 1927.

Present:—Mr. Justice Cargenven and Mr. Justice Ananthakrishna Ayyar.
BALAM NOOKAMMA AND ANOTHER—
DEFENDANTS NOS. 1 AND 5—APPELLANTS
versus

SADIREDI AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Evidence Act (I of 1872), s. 92—*Transfer of Property Act* (IV of 1882), ss. 55, 107—*Simple mortgage*—*Subsequent oral agreement by mortgagor to re-pay mortgage-debt from usufruct of land, admissibility of.*

An oral agreement by the mortgagor, subsequent to the execution of a simple mortgage, providing for payment of the mortgage-debt from the usufruct of the land is only a means of discharging the debt by putting the simple mortgages in possession and does not amount either to a lease or a usufructuary mortgage, and is consequently admissible in evidence.

Ram Bakhsh v. Durjan (1) and *Kamla Sahai v. Babu Nandan Mian* (2), followed.

Second appeal against a decree of the District Court, Vizagapatam, in A. S. No. 359 of 1923, preferred against that of the Court of the District Munsif, Yellamachili, in O. S. No. 282 of 1922.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 101 OF 1926.

August 1, 1927.

Present:—Sir William Watkins Phillips, Kt., Officiating Chief Justice, and
Mr. Justice Ananthakrishna Ayyar.

C. MUNUSWAMI MUDALI—DEFENDANT
No. 4—APPELLANT

versus

JAWARMAL SOWCAR—PLAINTIFF—
—RESPONDENT.

Mortgage—*Subrogation*—*Sale by mortgagor to discharge mortgage*—*Failure of purchaser to pay off mortgage-debt*—*Subsequent mortgage*—*Discharge of prior mortgage*—*Subsequent mortgagee's right of subrogation.*

A sold certain properties to B directing B to discharge a mortgage created by A. B did not discharge the mortgage. A subsequently executed a puisne mortgage to C empowering him to redeem the prior mortgage. C paid off the prior mortgage. In a suit by C to enforce the mortgage:

Held, that C was not a mere volunteer and was entitled to subrogation in respect of the prior mortgage.

Govinda Padayachi v. Lokanatha Aiyar (1), distinguished.

Appeal from the judgment of Mr. Justice Srinivasa Ayyangar, dated the 18th of

August, 1826, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 514 of 1925.

Mr. K. Mohanranga Pillai, for the Appellants.

Messrs. V. Masilamani Chetty and S. Gurusami Chetty, for the Respondent.

JUDGMENT.—This suit is based on an equitable mortgage alleged to have been effected by the 1st defendant in plaintiff's favour supported by a promissory note executed by the 1st defendant, her brother, 2nd defendant, and his wife, the 3rd defendant. As regards the personal remedy against the 1st defendant, the plaintiff withdrew his case, and he also withdrew his case against the 3rd defendant who has no interest whatever in the mortgage property and apparently received no consideration in the transaction. The learned Judge has found first of all that the 1st defendant did not take part in the transaction with the plaintiff. Secondly, he has found that the 1st defendant had previously sold the property to her brother's father in-law, 4th defendant, but he has not dismissed the plaintiff's case because he finds that the plaintiff discharged a mortgage executed by her prior to the sale to the 4th defendant and is entitled to subrogation. The 1st defendant's signature on the promissory note is admitted as also her signature on Exs. D and D-1, two promissory notes in favour of her brother. In her written statement she did not deny execution of the suit promissory note but simply denied any knowledge of the transaction. It is an extraordinary story that she puts forward, namely, that on three different occasions, or even more, according to her evidence, she puts her signature on a stamp affixed to a blank sheet of paper. She is a young woman but it is clear from the manner in which she gave evidence that she is not devoid of intelligence, and it is incredible that she should have on these several occasions put her signature across a stamp on blank paper without making further enquiries especially when she admits that she realised that such a signature is likely to be one on a bond or other document. The learned Judge was inclined to believe that the 1st defendant's case was not true but he has found it true, because he found that she had executed a sale-deed in favour of the 4th defendant prior to the execution of this promissory note and was unlikely to execute a mortgage thereafter. In this appeal it will be unnecessary to decide

whether or not that sale to the 4th defendant was a genuine transaction or was merely nominal, because we are of opinion that the 1st defendant did enter into the mortgage transaction with the plaintiff. That being so, we must agree with the learned Judge that plaintiff was also entitled to subrogation to the earlier mortgage. The 1st defendant, at any rate, had not been paid the full consideration for the sale-deed, for the 4th defendant had not paid Rs. 3,000 to the prior mortgagee, Rajagopal, which he had undertaken to do. It is also very doubtful whether he had paid the thousand rupees in cash to the 1st defendant. She was, therefore, still liable personally to Rajagopal for the debt under the mortgage and the property was also liable; consequently it cannot be said that she had no interest in the property. In this view, inasmuch as she entered into a transaction with the plaintiff empowering him to pay off a prior mortgage, and obtain title-deeds deposited with the mortgagee, it cannot be said that the plaintiff was a mere volunteer. He had made a distinct agreement with the debtor to pay off the mortgage and consequently he would be entitled to subrogation, as there is no ground for holding that he is a mere volunteer. The case mainly relied upon by the appellant *Govinda Padayachi v. Lokanatha Aiyar* (1) is very different to the present one. In that case, the party who paid off the mortgage was perfectly well aware that the previous owner of the property had parted with all rights before entering into the agreement with him. He, therefore, was paying off the mortgage purely as a volunteer and had derived no interest whatsoever in the property by the transaction with a person who he knew had no interest herself.

The plaintiff has not appealed with regard to the portion of his claim disallowed and consequently we need not go into the question off whether the sale to the 4th defendant was nominal or not. As plaintiff has paid off the prior mortgage he is entitled to subrogation and consequently the appeal fails and is dismissed with costs.

V. N. V.

A. N. A.

Appeal dismissed.

(1) 62 Ind. Cas. 291; 40 M. L. J. 114; (1921) M. W. N. 87; 29 M. L. T. 156.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 93 OF 1926.

August 2, 1927.

Present:—Sir William Watkins Phillips,
Kt, Officiating Chief Justice, and
Mr. Justice Ananthakrishna Ayyar.

NAGARATHNAMMAL AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

CHINNU SAH AND OTHERS—DEFENDANTS

—RESPONDENTS.

Hindu Law—Inheritance—Illegitimate sons, right of, to succeed when collaterals exist—Illegitimate daughters, right of, to maintenance.

Under the Hindu Law illegitimate sons are not entitled to a share in the family property, when there are collaterals in the family.

Krishnayyan v. Muthusami (4), Ramalinga Muppan v. Pavadaigoundan (3) and Gopalasami Chetti v. Arunachelam Chetti (1), followed.

Illegitimate daughters are not entitled to maintenance from their father's family.

Vellaiyappa Chetty v. Natarajan (5), followed.

Appeal from the judgment of Mr. Justice Srinivasa Aiyangar, dated the 26th of July, 1926, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in O. S. No. 319 of 1925

Messrs. K. Narasimha Iyer and E. Doraiswami Iyer, for the Appellants.

Messrs. K. S. Krishnaswami Iyengar and K. G. Ramaswami Ayyangar, for the Respondents.

JUDGMENT.—The plaintiffs have brought this suit to recover a share in the family property of themselves and the defendants. Plaintiffs Nos. 2 and 3 are the illegitimate sons of the deceased brother of the 3rd defendant; defendants Nos. 1 and 2 are sons of the deceased and the 4th defendant is the son of the 3rd defendant. The learned trial Judge has held that, sitting as a Single Judge, he is bound by the decision in *Gopalasami Chetti v. Arunachelam Chetti (1)* and has held that the illegitimate sons, plaintiffs Nos. 2 and 3, are not entitled to any share in the family property of their deceased father as there are collaterals in existence. This point was expressly determined in *Gopalasami Chetti v. Arunachelam Chetti (1)* but it is now sought to be argued that that decision is wrong. Reliance is placed chiefly on a decision of the Privy Council reported as *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing (2)*. This case in *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing (2)*

(1) 27 M. 32.

(2) 18 O. 151; 17 I. A. 128; 5 Sar. P. C. J. 596; 9 Ind. Dec. (N. S.) 101 (P. C.).

was considered in *Ramalinga Muppan v. Pavadaigoundan (3)* and it was there held that it did not affect the law as laid down in this Presidency. Similarly in *Gopalasami Chetti v. Arunachelam Chetti (1)* the case in *Ramalinga Muppan v. Pavadaigoundan (3)* more particularly that portion of it referring to the Privy Council decision, was considered, and it was held that an illegitimate son was not entitled to a share in the family property when there were collaterals in the family. The learned Vakil for the appellants has been unable to refer us to any case in which the correctness of *Gopalaswami Chetti v. Arunachelam Chetti (1)* has been impeached, and that case only carries a little further the decisions of this Court beginning with *Krishnayyan v. Muthuswami (4)*. That current of decisions has continued for the last 40 years and there appears to be no case in which the principle has been questioned. With all respects we entirely agree with the decision in *Gopalasami Chetti v. Arunachelam Chetti (1)* and, as nothing has been urged before us to show that it is in any way wrong, we are prepared to follow it. The appeal accordingly fails.

A memorandum of objections has been filed by the respondents objecting to the grant of maintenance to plaintiffs Nos. 4 and 5, the illegitimate daughters of Chinnasami Sah. The question of whether they are entitled to any maintenance has not been discussed in the trial Court, but the learned Judge has remarked:

"As regards them (namely plaintiffs Nos. 4 and 5) it is not admitted by the defendants that they would be entitled to maintenance, but still, in order to avoid any further litigation or question, the defendants' Counsel is willing that I should fix a reasonable rate of maintenance for them also."

It is, therefore, now contended for the appellants that the decree for maintenance in their favour is a consent decree and cannot be altered, but we are assured by the respondents' Counsel that this agreement was, as stated in the judgment, "in order to avoid any further litigation" and that it was understood that the

(3) 25 M. 519; 11 M. L. J. 399.

(4) 7 M. 407; 8 Ind. Jur. 427; 2 Ind. Dec. (N. S.), 867.

agreement was subject to the plaintiffs not appealing against the decree for maintenance. This is consistent with the language of the judgment, and we must accept Counsel's submission that this is the correct interpretation of the learned Judge's order. It has been held very recently in this Court in *Vellaiyappa Chetty v. Natarajan* (5) that illegitimate daughters are not entitled to maintenance from their father's family. The provision, therefore, for their maintenance and for their marriage expenses must be omitted. In this respect the decree must be modified.

The appeal is dismissed with costs. No order as to costs in the memorandum of objections.

V. N. V.

Appeal dismissed.

A. N. A.

(5) 100 Ind. Cas. 655; 50 M. 310; 52 M. L. J. 229; 25 L. W. 493; A. I. R. 1927 Mad. 286.

MADRAS HIGH COURT.

TESTAMENTARY ORIGINAL SIDE JURISDICTION

No. 13 of 1927.

January 16, 1928.

Present:—Mr. Justice Venkatasubba Rao.

M. K. SOWBHAGYAMMAL AND ANOTHER

—PLAINTIFFS

versus

KOMALANGI AMMAL BY GUARDIAN

KANDASAMI CHETTY AND ANOTHER

—DEFENDANTS.

Will—Probate—Grant of Probate, effect of—Caveat—Sufficient interest to support caveat, what amounts to—Testator dealing with objector's property, whether sufficient.

The function of a Court of Probate is to decide whether the Will propounded is the last Will of the testator and whether the right to represent the estate may be conferred upon an applicant for Probate. The Court of Probate does not profess to decide the disputed title to every item of property mentioned in the Will or the disposing power of the testator or the existence of any disposable property. [p. 422, col. 2.]

In dealing with the question whether a caveator has the necessary interest the test is, does the grant displace any right to which the caveator would otherwise be entitled? If so, he has such an interest, if not, he has not. [*ibid.*]

On an application for grant of Probate of a Will, a person who alleges that the testator has by the Will purported to dispose of such person's property as if it belonged to the testator himself does not possess sufficient interest to support a caveat and oppose the grant of Probate. [p. 423, col. 1.]

Behary Lall Sandyal v. Juggo Mohun Gossain (1), *Abhiram Dass v. Gopal Dass* (2), *Sri Gobind Prasad v. Laljhari Kuer* (3), *Bal Gangadhar Tilak v. Sakwarbai* (4), *Ochavaram Nanabhai v. Dolatram Jamietram* (5), *Birj Nath De v. Chandra Mohan Banerji* (6) and *Rahamtullah Sahib v. Rama Rau* (8), followed.

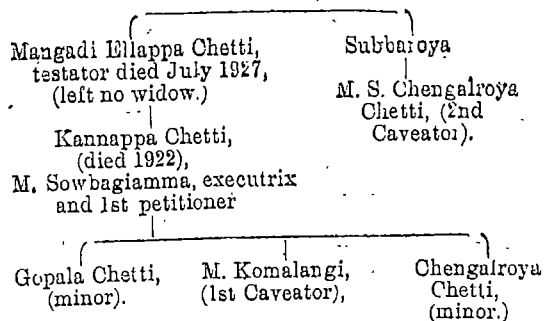
Application by the plaintiffs for Probate of the Will of Mangadi Ellappa Chetti.

Mr. Radhakrishnaiya, for the Petitioners.

Mr. Venkataramana Rao, for the Caveator.

JUDGMENT.—The question that has been raised, I regard to be a settled point—settled alike by weighty decisions and unbroken practice of the Court. But of late, I have found a tendency at the Bar to raise this point, as if it is a debatable one and requires serious notice. I am delivering this considered judgment, to once for all state definitely what my view is and I am tempted to follow this course in this case on account of the lengthy argument addressed to me.

One Mangadi Ellappa Chetti died leaving assets valued by the petitioners at about 10 lakhs. He is said to have left a Will and this is an application for Probate of that Will. The following pedigree serves to explain the facts of the case.



The Will is propounded by Sowbagiamma shown in the pedigree and her brother Thangavelu Chetti, these two persons being the executors named in the Will. Caveats have been filed as shown in the pedigree by Komalangi and Chengalroya. The caveat of the latter may be summarily dismissed as he has not complied with the rules of the Court and has not cared to appear at the hearing. The former is a minor and is represented in these proceedings by her father. The petitioners take a preliminary objection, namely, that Komalangi does not possess such an interest as to support a caveat. The question I have to decide is, does she possess a sufficient interest and can she be heard as a caveator?

The interest alleged on her behalf is, that the testator purported to dispose of by the Will, her *stridhanam* jewels, as if they belonged to himself. I am asked to go into the question of the ownership of these jewels and declare by my judgment, that the deceased was not the owner and that his Will in regard to them is inoperative. Two things I regard to be clearly settled by authority, firstly, that the interest alleged is not an interest as would support a caveat, secondly, that a Probate Court does not decide questions of title in regard to the property disposed of by the Will.

The question may be thus shortly stated. The testator has disposed of property belonging to the objector. By reason of this fact, does the latter get an interest to oppose the grant of Probate? One of the earliest cases and one often cited, is *Behary Lall Sandyal v. Juggo Mohun Gossain* (1). In that case, the grant of Probate was opposed on the ground that the testatrix, who was a Hindu widow, had only a life-interest and that her husband's property passed by survivorship to the latter's brother, the caveator. The District Judge refused the application for Probate, holding that the widow had no power to dispose of the properties mentioned in the Will. Garth, C. J., and McDonald, J., held "that upon an application for Probate of a Will, as long as it is made *bona fide*, it is not the province of the Court to go into questions of title with reference to the property of which the Will purports to dispose."

The learned Judges add that the grant of Probate does not confer upon the executor any title to property, which the testatrix had no right to dispose of, but that it only perfects the representative title of the executor to the property which belonged to the testatrix and over which she had a disposing power.

This case has been repeatedly followed in Calcutta; but I shall content myself with referring to two more decisions of that Court. In *Abhiram Das v. Gopal Das* (2) the caveator objected that the testator never owned the property with which the Will dealt as the same belonged to a *mutt*, to which the testator and the caveator belonged. The learned

Judges, reversing the order of the lower Court, held that a person disputing the right of a testator to deal with property as his own, cannot be properly regarded as having an interest in the estate of the deceased. The second case is *Sri Gobind Prasad v. Laljhari Kuer* (3). Letters of Administration had been granted to a Hindu lady and the application was for revoking those letters inasmuch as the property was joint family property which passed to the petitioner by survivorship. On the ground that the interest to be shown in an application for revocation, is the same as the interest to be possessed by a person opposing the grant, the Court came to the conclusion that the applicant did not have sufficient interest and his application was accordingly rejected.

Now turning to Bombay, the law is very clearly stated in *Bal Gangadhar Tilak v. Sakwarbai* (4). That was also a case of revocation of a grant already made, but the learned Judges point out that in this respect the same considerations apply to a revocation of a grant as to a grant itself. The law is thus stated:

"We regard the grant of Probate as decisive only of the genuineness of the Will propounded, and the right of the executors thereby appointed to represent the estate of the testator. It in no respect decides any question as to the disposing power of the testator or as to the existence of any disposable property." It will be sufficient to refer to one other case of the Bombay High Court, *Ochava-ram Nanabhai v. Dolatram Jamietram* (5). In that case, the grant was opposed on the ground that the property dealt with by the testator was joint family property which could not be disposed of by his Will. The trial Judge Russel, J. dismissed the caveat, holding that the defendant had no interest and adding, that were he to decide differently he should do so contrary to a long series of cases. The case was taken in appeal and this view was confirmed. Jenkins, C. J., observes that this was the view that was uniformly taken in Bombay, Calcutta and Allahabad. On enquiry from the Testamentary Registrar, the learned Judges found that this was the invariable practice

(1) 4 C. 1; 2 C. L. R. 422; 1 Shome L. R. 185; 2 Ind. Dec. (N. S.) 1.

(2) 17 C. 48; 8 Ind. Dec. (N. S.) 571.

(3) 2 Ind. Cas. 402; 14 C. W. N. 118.

(4) 26 B. 792; 4 Bom. L. R. 637.

(5) 28 B. 644; 6 Bom. L. R. 966.

on the Original Side of the Calcutta High Court. I regard this as a very valuable case and I may cite an important observation from that judgment.

"The grant in no way hurts or prejudices the caveator, for it is general in its terms, specifying no item of property and prejudging nothing to the detriment of the appellant."

As regards the Allahabad High Court, I may refer to *Birj Nath De v. Chandar Mohan Banerji* (6). In that case again, it was objected that the widow had no disposing power over the property or some of it dealt with by the Will. Edge, C. J., and Blair, J., observe that it is not the practice of the Courts in India to try questions of title and finally decide them on applications for grant of Probate or Letters of Administration. This was the view taken in spite of the fact, that at the Bar, reliance was placed upon *Tharp v. McDonald* (7) to which the learned Judges also refer in their judgment.

Coming to our own High Court, *Rahamtullah Sahib v. Rama Rao* (8) (decided by Muthusami Ayyar and Best, JJ.) contains some useful observations. The question arose, whether a creditor of the testator can be said to have an interest in the latter's estate. The answer was in the negative. Discussing the nature of the interest which a caveator must possess, the learned Judges say:

"There must be a possibility of having an interest in the result of setting aside the Will."

A creditor of the testator, they observe, has no right to contest the Will, for the reason that it is indifferent to him whether he shall receive his debt from an executor or an administrator, (I may add) or an heir. In my own experience, I am not aware of a single case, during the last 25 years, when any Judge, sitting on the Original Side, of this Court allowed a question of this kind to be raised in a testamentary proceeding. This is confirmed not only by Mr. Radhakrishnaia who appears for the petitioners but by Mr. Venkataramana Rao himself who represents the caveator.

The view I am taking is thus supported by authority and uniform practice of the

Court; furthermore, it is based on reason and sound common sense. The function of the Court of Probate is to decide whether the Will propounded is the last Will of the testator and whether the right to represent the estate may be conferred upon the applicant. The Court of Probate does not profess to decide the disputed title to every item of property mentioned in the Will. If a testator disposes of, say, 15 items of property and 10 different claimants appear before the Court, each claiming one of them as his own, is the Court to postpone its decision on the validity of the Will and on the representative character of the applicant, until it decides the disputed ownership of the various items. By delaying the grant, serious injury may be caused to the estate, there being none during this interval to represent it. Then, again, innumerable persons, each with his grievance, may come to oppose the grant, from one who claims a property worth some lakhs, down to one who sets up title to a property worth a paltry sum. It is certainly not to be expected that the application is to be decided in the presence of each one of these claimants. If, then, the scope of testamentary proceedings is correctly understood, no difficulty can arise. Can the executor to whom Probate is granted, on the strength of that Probate, recover property which is not the testator's? Does the Probate confer on the executor right to property to which he is otherwise not entitled? If it is remembered that these questions ought to be answered in the negative, it does not in the least matter, what the properties are, which the testator professes to treat as his own and to dispose of by his Will. The remarks I have made apply equally to applications for Letters of Administration. In dealing with the question—Has the caveator the necessary interest?—the test is, does the grant displace any right to which the caveator would otherwise be entitled? If so, he has such an interest, if not, he has not. An heir on intestacy has an interest in impeaching the Will; for, but for the Will, he would succeed to the property. A legatee under a previous Will has a similar interest; for, he is interested in establishing the validity of that Will and impeaching the validity of the later Will which deprives him of the benefit. A reversionary heir under the Hindu Law has such an

(6) 19 A. 458; A. W. N. (1897) 106; 9 Ind. Dec. (N. S.) 295.

(7) (1878) 3 P. D. 76; 38 L. T. 867; 27 W. R. 770.

(8) 17 M. 373; 6 Ind. Dec. (N. S.) 259.

interest; for, normally, a widow has only a limited estate and the reversioner is interested in impeaching a Will, which professes to enlarge that interest, or, again, which purports to confer upon her a right to make an adoption. [See *Brindaban Chunder Shaha v. Sureshwar Saha* (9).] But in every case it must be shown that the caveator, but for the Will, would be entitled to a right, of which that Will deprives him.

I have said there has been of late a tendency at the Bar, to treat the rule I have stated as open to question, and support is sought in certain observations of a Bench of this Court in a recent case, *Jammi Hanumantha Rao v. Aratha Latchamma* (10) but I am sure I shall not be wrong if I assert (and I do so with some confidence) that the learned Judges could not have intended by their *dicta* to cast a doubt on a long settled practice sanctioned in a series of judgments of great authority.

In this case, I have come to the conclusion that the caveator is not possessed of an interest entitling him to oppose the grant and I dismiss his caveat with costs which I fix at Rs. 300.

It came to my notice that citation did not issue to the minor grandsons of the testator, Gopala and Chengalroya. They are certainly persons interested in the estate and I, therefore, directed citation to issue to them. As their mother happens to be one of the petitioners, a Court guardian has been appointed and the latter has filed a written statement. I shall now proceed to hear the application on its merits.

Mr. Venkataramana Rao now says that his client, the caveator, has another kind of interest. According to him, if there is a bare possibility of a person having an interest, that person is entitled to file a caveat. It is needless in this case to enquire whether this proposition is sound or not; the caveator is the wife of Gopala Chetti, the minor grandson of the testator, and whatever interest she may or may not have, she cannot be permitted to oppose the grant, when we find that, as a matter of fact, her husband and her brother-in-law, who alone would be entitled to succeed on intestacy, are before the Court and are

taking necessary steps. The contention is overruled and I direct the plaintiffs to examine their witnesses.

V. N. V.

A. N. A.

Order accordingly.

MADRAS HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION

Suit No. 42 of 1927.

October 4, 1927.

Present:—Mr. Justice Venkatasubba Rao.
A. KRISHNASWAMI AYYAR—PLAINTIFF

versus

THATHA RAGHAVIAH CHETTY AND

ANOTHER—DEFENDANTS.

Madras High Court (Original Side) Rules, r. 5 (a)—Third party procedure—Suit on mortgage—Mortgagor defendant claiming indemnity against another defendant—Procedure, applicability of—Trustee and cestui que trust—Cestui que trust, right of, to indemnity against trustee—Third party application, principles relating to.

The third party procedure is applicable only to claims to indemnity and not to claims to damages. [p. 424, col. 2.]

Birmingham & District Land Co. v. L. & N. W. Ry. (1), followed.

The right to indemnity may arise in several ways, by contract express or implied, or where the position of the parties is such that either in law or in equity there is an obligation on the one party to indemnify the other, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify or where a right to indemnity is given by Statute. [*ibid.*]

A right to indemnity exists on the part of a trustee against his *cestui que trust* and likewise on the part of the *cestui que trust*, against his trustee. [p. 425, cols. 1 & 2.]

Eastern Shipping Co. v. Quah Beng Kee (3), followed.

An application for the issue of a third party notice should be made promptly and as a rule before the defence is delivered, so that the notice may be served within the time limited for delivering the defence, but in special cases the delay may be excused. [p. 426, col. 1.]

If the third party proceedings will prejudice, embarrass or delay the plaintiff, or where the whole dispute between the defendant and the third party cannot be disposed of in the action itself, the Court may refuse to give directions, but the mere fact that the case presents some difficulty is not a reason for refusing directions. [p. 427, col. 1.]

On such an application, the question to be asked is, whether on the facts alleged, a right to indemnity exists. If the right is made out, the applicant has a *prima facie* claim and the Court should not inquire closely into the merits of that claim. [p. 427, col. 2.]

Application under O.V.A. of the Original Side Rules by the 1st defendant that a

(9) 3 Ind. Cas. 178; 10 C. L. J. 263.

(10) 98 Ind. Cas. 259; 49 M. 980; 24 L. W. 502; (1926) M. W. N. 785; 51 M. L. J. 563; A. I. R. 1926 Mad. 1193.

decrees may be passed in his favour against the 2nd defendant.

Mr. M. Subbaraya Ayyar, for the Plaintiff.

Messrs. V. Radhakrishnayya, R. Tirumalai Thathachariar, P. Venkataramana Rao and A. Suryanarayanaiah, for the Defendants.

JUDGMENT.—This application is made under O. V-A of the Original Side Rules. These provisions relate to what is known as "third party procedure" and were framed only recently and I understand that this is the first application made in this Court under this order.

The plaintiff's action is one to enforce a mortgage created by the first defendant and the latter claims indemnity as against the second defendant. The facts which according to the first defendant give rise to his claim are these: The second defendant is the elder brother of the first and they had a sister by name Sitamma. She wanted to help the first defendant who was in difficulties and with that object entrusted the second defendant with a sum of Rs. 50,000 directing him to redeem the suit house which was the ancestral house of the first defendant and thus free it from the suit mortgage to which it was subject and hand it over to the first defendant. The latter who is the applicant asks that the question raised should be determined in this action under these rules and that a decree should be passed in his favour against the second defendant.

On the facts alleged by the applicant there can be no doubt that the transaction amounts to a trust. This word is thus defined in s. 3 of the Indian Trusts Act:

"A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner."

Sitamma is the author of the trust, the second defendant is the trustee, the first defendant is the beneficiary, the sum of Rs. 50,000 is the trust money and the beneficial interest of the first defendant is his right against the second defendant as owner of the trust property. It seems to me that all the ingredients necessary to constitute a trust are present in this case but the more important question to decide is, is the claim of the first defendant against the second a claim to damages or a claim to

indemnity? It is well settled that the third party procedure is applicable only to claims to indemnity and not to claims to damages. See *Birmingham & District Land Co. v. L. & N. W. Ry.* (1). Is then a *cestui que trust* entitled to indemnity as against his trustee? The English cases establish that a right to indemnity may arise in several ways.

(a) First, it may be created by express contract, that is, if it is given in terms by the contract itself between the two parties.

(b) Secondly, it may arise by implied contract, that is, if the true inference to be drawn from the facts is, that the parties intended such indemnity even if they did not express themselves to that effect. As an instance, if A requests B to do a thing for him and B by reason of doing that act is subject to some liability, then, from A's request to do the act, the law implies a contract by him to indemnify B for the loss.

Now in the case of contracts, right to indemnity must be carefully distinguished from right to damages. A right to indemnity is given by the original contract, whereas a right to damages arises in consequence of the breach of that contract. These two rights are confounded and one reason for the confusion is, that when a contract is broken, indemnity is often found to coincide with the measure of damages. In those cases, whether the right is called right to indemnity or right to damages, practically the same result follows, and it is forgotten that these two words express two fundamentally different legal ideas.

(c) The position of the parties is such that either in law or in equity there is an obligation on the one party to indemnify the other.

(d) If there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify.

[Cases (c) and (d) are generally treated as falling under 'implied contract'.]

(e) A right to indemnity may be given by Statute. These are some of the cases—the enumeration may not be exhaustive—where a right to indemnity arises.

We are now concerned with cl. (c), that is, where the Court comes to the conclusion from the position of the parties that either in law or in equity there is an obligation cast upon the one party to indemnify the

(1) (1887) 34 Ch. D. 261; 56 L. J. Ch. 956; 55 L. T. 699; 35 W. R. 173.

other. To this class belongs the case of trustee and *cestui que trust*. From the position the parties occupy, a trustee has a right to be indemnified by the *cestui que trust* against liabilities which he has incurred. "It is settled," say their Lordships of the Privy Council in *Hardoon v. Belilios* (2) "that, speaking generally, absolute beneficial owners of property must in equity bear the burdens incidental to its ownership and not throw such burdens on their trustees." The reason is stated in these words: "The plainest principles of justice require that the *cestui que trust* who gets all the benefit of the property should bear its burden unless he can show some good reason why his trustee should bear them himself. The obligation is equitable and not legal." Page 123*.

The right to indemnity thus exists on the part of a trustee as against his *cestui que trust*. Does the converse right exist? that is to say, has a *cestui que trust* a right to indemnity as against his trustee? That is the question I have to decide.

That such a right exists has been decided by the Judicial Committee of the Privy Council in *Eastern Shipping Co. v. Quah Beng Kee* (3). After enumerating the cases where a right to indemnity exists which have been very fully dealt with in *Birmingham & District Land Co. v. L. & N. W. Ry.* (1) and which have been referred to by me above, their Lordships observe thus:

"The question of indemnity commonly arises in the case in which a trustee claims to be indemnified by his *cestui que trust*. This class of cases was particularly discussed by Lord Lindley in *Hardoon v. Belilios* (2). The present case is the converse."

The facts of that case were these: The owners of a wharf granted a Shipping Company a right to berth their ships at that wharf subject to certain liability for damage caused. The defendant, the Managing Director of that Company, gave instructions without the Company's authority that a ship which he himself had chartered for his own benefit should berth at the wharf. Owing to the unskilful way in which the ship was unloaded the wharf collapsed. The owners of the wharf sued the Shipping Company for damages and the latter served a third party notice upon the Managing Director

(2) (1901) A. C. 118 at p. 124; 70 L. J. P. C. 9; 49 W. R. 209; 83 L. T. 573; 17 T. L. R. 126.

(3) (1924) A. C. 177; 93 L. J. P. C. 72; 130 L. T. 462; 40 T. L. R. 109.

*Page of (1901) A. C.—[Ed.]

and claimed that he should indemnify them against any damages for which they should be held liable. The question that arose was whether the Shipping Company had against their Director a right of indemnity. Their Lordships thus proceed:

"Beng Kee (the Managing Director) has been found to stand in fiduciary relation to the Eastern Shipping Company, and the latter claim indemnity from him in respect of liability imposed upon them by his abuse of powers in the exercise of which he owed them a duty and was responsible as a trustee of those powers. He was not a trustee in the full sense of that word. No property was vested in him. But he was a trustee of his powers in the sense that they were vested in him in such manner that he stood in a fiduciary relation to the Company in respect of his exercise of those powers."

The passage which I find most helpful is the following:

"The nearest simile that was put in argument was that of a trustee in the fullest sense of the word who abuses his powers; say, the trustee of real estate with power to mortgage who mortgages for his own benefit and in breach of his duty as trustee and puts the mortgage money into his own pocket. In such a case an action would lie in the Chancery Division for a declaration that the defendant was guilty of breach of trust and was liable to indemnify the *cestui que trust* against the mortgage, and for an order that he do redeem the mortgaged property and indemnify the *cestui que trust* against the mortgage debt."

The facts of the present case seem to closely resemble the facts of the case put. The trustee in the latter case wrongfully mortgages the beneficiary's property and applies the money to his own use. In the present case the trustee wrongfully appropriates the trust money and fails to utilise it in redeeming the beneficiary's property. If in one case the *cestui que trust* has a right to be indemnified, it seems to me that in the other case he has equally that right—I, therefore, decide this point in favour of the applicant.

I have now dealt with the main question raised, but there are some subsidiary points which have been argued and I shall now proceed to deal with them.

It is contended for the second defendant that the application has been made too late and that the delay is fatal to it.

Under the English rules, it may be taken as settled that the application cannot be made until after the defendant has entered an appearance in the action. It should further be made promptly and as a rule before the defence is delivered, so that the notice may be served within the time limited for delivering the defence. (See The Yearly Practice of the Supreme Court for 1927, Vol. I, page 236). Rule 1 of O. V-A of the Original Side Rules, in effect reproduces this provision in regard to the service of the notice. The second defendant contends that this provision has been infringed. For dealing with this point, it may be useful to glance at the rules. They provide that where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the suit, he may by leave of the Court or Judge issue a notice (called the third party notice) to that effect sealed with the seal of the Court. Such notice shall generally be served within the time limited for delivering the defence. This is the procedure to be adopted when the party against whom relief is claimed by the defendant is not a party to the suit. But where the defendant claims relief against any other defendant already on the record, the rule applicable is r. 8 of O. V-A. In this case the same procedure is to be adopted as if the last mentioned defendant were a third party with the exception that no leave of the Court is required for service of the notice. *Towse v. Loveridge* (4). Bearing these rules in mind, let us see what has happened in the present case. The plaint was filed on the 20th January, 1927, the first defendant filed his written statement on the 26th February, 1927, and the second defendant filed his statement on the 19th April, 1927, on which date the present rules came into force. The application for the issue of the third party notice could, of course, not be made before the 19th of April, as such procedure was unknown on the Original Side before that date. The time for filing the written statement of the first defendant had expired on the 26th of February. Under the rules, strictly, the third party notice ought to have been served before that date. But in this case, that course was impossible, as this procedure did not then obtain on the Original

Side. The Court closed for the long vacation on the 7th of May and re-opened on the 18th of July. The case was posted before me for the settlement of issues on the 19th. On that day, on behalf of the first defendant it was said that he intended to claim under the third party procedure, indemnity from the second, on the allegations already made in the first defendant's written statement. The latter had no defence to the plaintiff's action and I passed a decree on the 19th in favour of the plaintiff against the first defendant. The second defendant's Vakil then raised the contention that the question between the defendants *inter se* could not be gone into in this action and that this must be tried as a preliminary point. I accordingly made an order on the same date adjourning the case a fortnight for deciding this question. Generally, no doubt, the third party notice must be served within the time I have mentioned, but r. 1 shows that in special cases the delay may be excused, for according to that rule the notice shall be served within the time mentioned "unless otherwise ordered by the Master or Registrar." This is a very fit case for an order being made excusing the delay. Within a few days of the rules coming into force, the Court was closed and the application was made on the next day after the re-opening. Both the English rules and our rules give a discretion to the Judge to extend the time and in this case I am prepared to exercise the discretion in favour of the applicant. Such delay, as there has been, is excusable as the rules were new and it took some time for the parties to become aware of them.

To make my statement of facts complete, I must advert to one circumstance. The suit as originally filed was against the first defendant alone. He applied on the 21st February, 1927, that the present second defendant should be brought on the record as a party and the Registrar made an order on the 22nd directing the second defendant to be impleaded and he was accordingly brought on the record. It will be seen that at that time there were no rules relating to the third party procedure. The first defendant's application was supported by an affidavit in which he set forth his claim to indemnity as against the second defendant. But on those allegations he suggested that the decree

(4) (1884) 25 Ch. D. 76; 53 L. J. Ch. 499; 49 L. T. 466; 32 W. R. 151.

in favour of the plaintiff should be passed both against himself and the second defendant. It was in this manner that the second defendant came on the record. These facts are entirely irrelevant for determining the questions that have been raised but I have set them out in order to remove any confusion that may arise on account of the somewhat peculiar facts of this case.

It is next urged by the second defendant that in the exercise of my discretion I must dismiss him from being a third party to the action. It is undoubtedly true that the Judge has a discretion whether he will give directions or not; per Lord Esher in *Baxter v. France* (5). The very object of the third party procedure is to prevent multiplicity of actions. Some good reason must, therefore, be shown for the course which I am asked to adopt. If the third party proceedings will prejudice, embarrass or delay the plaintiff, the Court may refuse to give directions. As neither of the defendants had any objection to a decree being passed in favour of the plaintiff on the suit mortgage, such a decree was already passed and the ground, therefore, that the plaintiff will be prejudiced or embarrassed does not exist. The Court may refuse to adopt this procedure for another reason, namely that the whole dispute between the defendant and the third party cannot be disposed of in the action itself. For instance, if the claim of the defendant against the third party is in part a claim to indemnity within the meaning of the third party procedure and in part to damages, this procedure will not cover the latter claim and it would remain, therefore, to be tried between the defendant and the third party in another action. In such a case the Court holds that the third party procedure is inapplicable [*Baxter v. France* (5) already cited.] Then the question remains, is the mere fact that the case presents some difficulty, a reason for refusing directions, as has been urged for the second defendant? The decision of the Privy Council in *Eastern Shipping Co. v. Quah Beng Kee* (3) (to which I have already referred) shows clearly that the Court will not refuse to apply the procedure merely because the case raises a question of some difficulty. The trial Judge there held that the right

claimed against the third party was only a right to damages and not to indemnity and that, therefore, the procedure was not applicable. The Appellate Court affirmed this judgment. The Privy Council taking a different view held that the right was a right to indemnity and applied the third party procedure. Can there be a clearer case than this to show that the mere fact that some doubtful question arises is not a reason to refuse to apply these rules? [*Baxter v. France* (5) does not decide differently.] In that case the Court refused to apply the procedure for various reasons, one reason being that the question raised was complicated and difficult. The discretion having been exercised by the Court of first instance, the Court of Appeal refused to interfere. Apart from this consideration, I do not find that the question raised in the present case is so difficult or complicated that I must decline to adopt the procedure. In my opinion, the point is, as I have shown, covered by clear authority.

It is next urged that the first defendant has not made out a *prima facie* case and that on that ground his application fails. The question is, what is meant by a *prima facie* case. In *Carshore v. North Eastern Ry.* (6) Cotton, L. J., observes:

"If it could be shown that their claim, if substantiated, was not one for indemnity, but for something else, it would have been different; but this is a claim for indemnity within the meaning of the rule."

Fry, L. J., makes an observation to the same effect. The question to be asked is, on the facts alleged, does a right to indemnity exist? If this right is made out, the applicant has a *prima facie* claim and the Court will not enquire closely into the merits of that claim. Bacon, V. C., thus puts it tersely in the following passage:

"There is no doubt that the defendants were clearly right in taking out this summons; and to go into the nature of the indemnity would be a most idle and absurd thing for me to do. The rule is sufficient; the rule is plain; it is a case where an indemnity has been given." [*Edison Electric Light Co. v. Holland* (7).]

(6) (1885) 29 Ch. D. 344; 54 L. J. Ch. 760; 52 L. T. 232; 33 W. R. 420.

(7) (1887) 33 Ch. D. 497; 56 L. J. Ch. 124; 55 L. T. 587; 35 W. R. 178.

(5) (1895) 1 Q. B. 591 at p. 593; 64 L. J. Q. B. 337; 14 R. 285; 72 L. T. 183; 43 W. R. 341.

The Court might come to a different conclusion if the claim is entirely frivolous. [*Carshore v. North Eastern Ry.* (6).]

In the result, I am of the opinion that no valid ground has been shown for my refusing to give directions.

There remains one further question to be dealt with. For the second defendant it is urged that there have been some irregularities in the procedure adopted and that, therefore, the application should be dismissed. I think this argument is scarcely tenable. When indemnity is claimed against a defendant who is already a party to the suit, I have pointed out that no leave of the Court is necessary to serve the notice. In this case, on the 19th of April, the first defendant gave notice to the second defendant in Court that he intended to apply under the rules relating to the third party procedure. As a matter of fact, such an application was then and there made in Court and in the presence of the second defendant, but the Bar not having become familiar with these rules, a written notice was not then served on him although this defect was later remedied. Is the absence of the written notice fatal to the application? I hold, in the circumstances, that it is not.

If the defendant desires the third party proceedings to continue, he must take out a summons for directions as to the further proceedings. On the hearing of this summons, the third party or the defendant already on the record as the case may be, may object that the case is not one in which the third party procedure is applicable. The second irregularity complained of occurred in the taking out of the summons for directions. On the day the case was taken up for hearing the second defendant's objections, there was not before me a formal summons for directions. But it is obvious that every one came to the Court for arguing this very question, for, according to the order of the 19th July, that was the question that was to be argued and decided. The second defendant was not prejudiced for he not only knew that this question was reserved by that order, but he actually came to Court to argue that very question. To cure the defect, a formal Judge's summons has since been filed and, in the circumstances, I must disallow the objection.

The second defendant shall file his written statement on or before the 18th. Post the case for issues on the 19th.

V. N. V.

A. M. A.

Order accordingly.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 202 AND 203 OF 1927.

(CRIMINAL REVISION PETITIONS NOS. 181 AND 182 OF 1927).

October 10, 1927.

Present:—Mr. Justice Devadoss.

THE PRESIDENT DISTRICT BOARD,
ANANTAPUR—PETITIONER

versus

ISMAIL SAHIB AND ANOTHER—RESPONDENTS.

*Madras Local Boards Act (XIV of 1920), s. 166—
Motor vehicle—Plying car for hire along public road
without license—Offence—Liability of owner and
driver.*

Where a motor vehicle is plied for hire in a public road without a license in contravention of the provisions of s. 166 of the Madras Local Boards Act, the owner of the car as well as the driver are liable to be convicted. [p. 429, col. 1.]

The responsibility of a driver who plies a car knowingly without a license is not taken away by the mere fact that the master is also liable. [*ibid.*]

Sivarama Mudaliar v. Muthunnaingar (2), followed.

In re Velayudha Mudali (1), distinguished.

Petitions under ss. 435 and 439 of the Code of Criminal Procedure, 1898, and s. 107 of the Government of India Act, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Gooty, in C. A. No. 40 of 1926 (C. C. No. 142 of 1926 on the file of the Court of the Stationary Sub-Magistrate, Gooty) and petition to revise the judgment in the said C. C. No. 142 of 1926.

Messrs. K. P. Ramakrishna Aiyar and C. R. Lakshmikantha Mudaliar, for the Petitioner.

Mr. V. Balarama Aiyar, for the Respondent.

ORDER.—In these petitions the District Board of Anantapur is the petitioner. These arise out of a prosecution instituted by the District Board against the driver and the owner of a bus for infringing the notification issued by the President District Board on 11th June, 1926. The Second Class

Magistrate who tried the case acquitted the owner of the bus and convicted the driver under ss. 166 and 207 of the Local Boards Act.

The Appellate Court set aside the conviction of the driver. The District Board has preferred these revision petitions against the order of the Appellate Magistrate and also against the order of the Second Class Magistrate. The contention for the driver is that it is the owner of the bus that is liable if at all under ss. 166 and 207 and not the driver who is only a servant. Reliance is placed on *In re Velayudha Mudali* (1). That case has no application to the present. In order to see whether the driver of a vehicle comes within the provisions of the section we have to look at the section itself. The first portion of s. 166 is in these terms:—

"No person shall, on any public road in a District, ply any motor vehicle for hire, or use any such vehicle for carrying passengers or goods at separate fares or rates on such road, except on a license obtained from the President of the District Board."

This covers the case of a person who plies any motor vehicle for hire or uses any vehicle for conveying passengers. It cannot be said that the driver of a car does not ply the car for hire when, as a matter of fact, he collects the fares from passengers. Though the owner may be liable for allowing the car to be taken along the road prohibited by the District Board yet the responsibility of the driver who takes a car knowing that there is such a prohibition is not taken away by the mere fact that the master also is liable. The contention that the servant is merely obeying the orders of his master is no ground for relieving him of his liability when clearly the section covers the case of a person plying for hire whether it is his own car or not. There is no warrant for saying that the driver who drives a vehicle knowing perfectly well that he should not go along a particular road does not contravene the provisions of s. 166. I am clearly of opinion that the case of the driver is covered by s. 166. I, therefore, set aside the Appellate Magistrate's order and direct him to restore the case to file and dispose of it according to law. In considering the sentence to be awarded to the driver he may,

of course, take into consideration the fact that the master also is liable. But this is a matter entirely within the discretion of the Magistrate and it is unnecessary for me to say anything more about it.

As regards the owner of the vehicle he is clearly guilty under s. 163. This point is covered by a distinct ruling of my brother Wallace reported as *Sivarama Mudaliar v. Muthunnaiengar* (2) and it is unnecessary for me to repeat the observations of the learned Judge. I set aside the acquittal order of the owner of the vehicle and direct the Second Class Magistrate to take the case on his file and dispose of it according to law.

V. N. V.

Acquittal set aside.

A. N. A.

(2) 102 Ind. Cas 502; 26 L. W. 13; 52 M. L. J. 561; 33 M. L. T. 320; A. I. R. 1927 Mad. 612; 28 Cr. L. J. 566; 8 A. I. Cr. R. 215; 50 M. 913; (1927) M. W. N. 925.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 254 of 1925.

April 19, 1927.

Present:—Mr. Justice Ramesam and
Mr. Justice Odgers.

SANKUNNI PANNIKAR—PLAINTIFF—
APPELLANT

versus

RAMA PANNIKAR AND OTHERS—

DEFENDANTS—RESPONDENTS.

Malabar Law—Extinct tavazhi—Inheritance.

Under Malabar Law a *tavazhi* which has separated last and which is also the nearest in point of propinquity to the last member of an extinct *tavazhi* is entitled to succeed to that *tavazhi* in preference to a *tavazhi* whose only claim is its original connection with the same *tarwad*. [p. 430, col 2.]

Letters Patent Appeal against the judgment of Mr. Justice Phillips, in S. A. No. 1494 of 1922, dated the 9th April, 1925, preferred to the High Court against the decree of the Court of the Subordinate Judge, South Malabar at Calicut, in A. S. Nos. 294 and 295 of 1919, preferred against that of the Court of the District Munsif, Manjeri, in O. S. No. 172 of 1916.

FACTS.—The plaintiff alleged that his *kunnath tarwad* was divided into four *tavazhis*, his own *tavazhi*, the *tavazhis* of the defendants Nos. 4 and 5 and one *chathakot tavazhi*, that *chathakot tavazhi* became extinct on the death of its last member, that the plaintiff's *tavazhi* with the *tavazhi*

(1) 62 Ind. Cas. 183; 43 M. 438; 11 L. W. 413; 39 M. L. J. 65; 27 M. L. T. 211; 22 Cr. L. J. 487.

of defendants Nos. 4 and 5 was, therefore, entitled to its property. The 4th defendant contended that the *chathakot tavazhi* was not a separate *tavazhi* as alleged by the plaintiff but was a branch of his Parappathodi *tavazhi*. The Appellate Court held that the *kunnath tavazhi* was split into four *tavazhis* one of which was *chathakot*, which was divided off from the defendant's Parappathodi *tavazhi* at a time subsequent to the separation of that *tavazhi* from the main *kunnath tavazhi*.

A second appeal was preferred against that decree and his Lordship Mr. Justice Phillips accepted the above finding of fact. On the question of law, his Lordship held as follows:—

"Accepting this evidence we have to consider whether the decree is right. The question of inheritance to the property of an extinct *tavazhi* or *tarwad* has never been definitely decided in this Court, but there have been several pronouncements, mostly *obiter*, on the question. We have the dictum of Sundara Iyer, J., in *Krishnan Nair v. Damodaram Nair* (1) which is quoted in the Appellate Court's judgment to the effect that in the case of extinction of a *marumakkathayam tarwad*, the last member's nearest heirs are entitled to succeed to the property. This is not opposed to the dictums of Holloway, J., in *Korapen Nayar v. Chenen Nayar* (2) which says 'on the extinction of a particular house, it goes over to the other houses traditionally connected, but long severed in point of rights of property.' That does not definitely state that it shall be only the nearest heir, but it is not opposed to such a contention. Again it has been held in Travancore [*Lakshmi Narayani v. Eachotty Mathani* (3)] that the property of the last surviving member of a *tarwad* would lapse jointly to the *tarwads* having community of pollution, that is to the *koottukars* or *dayadies*, the nearer, however, excluding the more remote and the nearness being determined not by the degree of propinquity alone, but also by the fact that they remained united in interest with the *tarwad* longer than the others who divided off at an earlier period.

"Another dictum quoted is that of Madhavan Nair, J., in *Gopala Nair v. Raghavan*

Nair (4). He does not agree with the dictum of Sundara Iyer, J., but he agrees with a portion of the decision of the Travancore Court. His opinion, which I take to be his personal opinion, is that the property goes to the branch which has last separated from the extinct *tarwad*. Whichever view is taken in the present case, the lower Appellate Court's decree is correct. If 4th defendant's *tavazhi* is the last separated *tavazhi*, it is entitled. If the question of propinquity is considered the 4th defendant's *tavazhi* is again the heir; similarly also if it is held that Lakshmi Ammal's heir would succeed.

In any view, therefore, the decree is right and it is unnecessary to decide which of these conflicting views both in this Court and Travancore is correct.

The second appeal is dismissed with costs."

Against this decree, a Letters Patent Appeal was filed.

Messrs. T. R. Ramachandra Iyer and Kuttikrishna Menon, for the Appellant.

Mr. C. V. Anantakrishna Iyer, for the Respondent.

JUDGMENT.—The 4th defendant in his written statement pleaded that *chathakot* was a branch of Parappathodi and also pleaded that *chathakot* was never divided from Parappathodi. The first issue dealt with this plea of the 4th defendant and the second part of the issue raised the point whether *chathakot* was a portion of Parappathodi. It is true that in the issue it meant undivided portion as shown by the contract to the former part of the issue. Still it raised the question whether, divided or undivided, it was really an off-shoot of Parappathodi.

The Subordinate Judge found in para. 3 that all the four *tarwads* including *chathakot* are separate but he gave no date for the separation of *chathakot*. The earliest of the documents he refers to is dated 1894 Ex. JJ. In the next para. 4 he took up the question whether *chathakot* is nearer than the others and finds that it is an off-shoot of Parappathodi. We do not think there is any surprise to the plaintiff in recording such a finding.

We agree with Phillips, J., in accepting the finding *chathakot* is nearer the Parappathodi and also *chathakot* separated last. On any view of the law, the 4th defendant's

(4) 86 Ind. Cas. 620; 21 L. W. 215; A. I. R. 1925 Mad. 460.

(1) 17 Ind. Cas. 769; 38 M. 48; 13 M. L. T. 166; 24 M. L. J. 240.

(2) 6 M. H. C. R. 411.

(3) 17 Travancore L. R. 69.

tarwad has preferential right and the suit is rightly dismissed.

The Letters Patent Appeal fails and is dismissed with costs of the 1st respondent.

V. N. V.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 829 OF 1925.
March 23, 1927.

Present:—Mr. Justice Ramesam.
PARAMANANDACHARI—PLAINTIFF—
PETITIONER
versus

M. VEERAPPAN—DEFENDANT—
RESPONDENT.

Succession Act (XXXIX of 1925), s. 381—Succession Certificate Act (VII of 1889), s. 16—Succession Certificate, conclusiveness of—Certificate in name of wrong person, whether invalid.

Under the 1st part of s. 16 of the Succession Certificate Act of 1889 (corresponding to s. 381 of the Succession Act of 1925), a Succession Certificate is conclusive against the debtor.

Kuchu Iyer v. Vengu Ammal (1), followed.

The fact that a Succession Certificate is issued in the name of a person different from that of the person ultimately found to be the real heir does not render the certificate invalid.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Chittoor, in S. C. S. No. 499 of 1924.

FACTS.—The plaintiff, alleging that he was the husband of one Aliamma, deceased, sued on a promissory note executed by the defendant in favour of Aliamma. Defendant admitted execution but denied that the plaintiff was the husband of the deceased Aliamma or that he was her heir and contended that the suit was not maintainable without a Succession Certificate. The plaintiff thereupon obtained and filed a Succession Certificate in respect of the debt.

The learned District Munsif held that Aliamma, the payee under the promissory note was only the concubine of the plaintiff and not his wife and that the obtaining of the Succession Certificate, by itself, did not entitle the plaintiff to a decree since admittedly the payee had a daughter who was the proper heir to sue on the note and accordingly the suit was dismissed. The plaintiff applied for revision.

Mr. Gopal Menon, for the Petitioner.

Mr. K. V. Srinivasan, for the Respondent.

JUDGMENT.—Under the 1st part of s. 16 of the Succession Certificate Act (now s. 381 of the Succession Act of 1925) the certificate (Ex. B) is conclusive against the debtor [*vide, Kuchu Iyer v. Vengu Ammal (1)*].

The learned Vakil for the respondent refers to s. 386 of the Succession Act of 1925 (s. 22 of Act VII of 1889) which shows that he need not pay if the certificate is invalid. But I do not see why the certificate is invalid.

Even if another person (such as the daughter) turn out to be the heir of the deceased, it does not follow that the certificate is invalid. Section 374 has no bearing in the case.

The petition is allowed and the plaintiff is given a decree with costs throughout.

V. N. V.

Petition allowed.

A. N. A.

(1) 93 Ind. Cas. 360; 50 M. L. J. 432; (1928) M. W. N. 118; A. I. R. 1926 Mad. 407; 23 L. W. 728.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 671 OF 1926.
May 3, 1927.

Present:—Mr. Justice Ramesam.
UPPUTURI PUNNAYYA AND ANOTHER
—PETITIONERS
versus

POLAVARAPU LINGAYYA—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (4), O. XXXII, r. 4—Suit by adult and minor sons to set aside alienation by father—Compromise between adult son and defendant, whether binding on minor son—Splitting of compromise, legality of—Co-plaintiffs—Withdrawal of suit by one without consent of others, validity of.

During the course of a suit by two brothers one an adult, and the other a minor represented by the adult as next friend, to set aside an alienation by their father, the defendant set up a compromise between the adult plaintiff and himself under which it was agreed between them that the suit should be dismissed on the defendant paying Rs. 100 to the plaintiff.

Held, (1) that the compromise was not binding on the minor plaintiff;

(2) that no portion of the joint estate was bound by it inasmuch as the compromise could not be split up into two different compromises.

Venkata Row v. Tuljaram Row (1), followed.

Under O. XXIII, r. 1, cl. (4), Civil Procedure Code, one plaintiff cannot withdraw from a suit without the consent of his co-plaintiff especially in a case where such other plaintiff is a minor represented by the adult plaintiff as next friend.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Bapatla, dated the 30th November, 1925, and made in C. M. A. No. 27 of 1925, preferred against that of the Court of the Additional District Munsif at Ongole, dated the 27th July, 1925, and made in C. M. P. No. 396 of 1925, in O. S. No. 257 of 1924 (O. S. No. 517 of 1925, Principal District Munsif's Court, Ongole).

FACTS.—The plaintiffs (2nd plaintiff being a minor represented by 1st plaintiff as next friend) sued to set aside an alienation by their father and for possession. During the trial of the suit, the defendant contended that the parties had entered into a compromise of the suit by which on payment of Rs. 100, the 1st plaintiff was to get the suit dismissed and that the said sum of Rs. 100 was paid. The plaintiff denied the compromise but the District Munsif found in favour of the compromise and dismissed the suit. On appeal the District Judge also found that the compromise was true but held that it was binding only on the 1st plaintiff.

Against this order a Civil Revision Petition was filed.

Mr. T. V. Venkatrama Iyer, for the Petitioner.

Mr. Raghava Rao, for the Respondent.

JUDGMENT.—In revision petition, I am bound by the finding of the Subordinate Judge that the compromise was, as a fact, entered into by the 1st plaintiff. I may add that I am of opinion that the post cards, Exs. B and C, are genuine and, therefore, agree with his findings.

The *razinama* is that the suit should be withdrawn. This *razinama* is certainly not binding on the 2nd plaintiff. The question is whether the 1st plaintiff should be held to be bound by it. Mr. Raghava Rao at first contended that the 1st plaintiff is bound by it so far as his share is concerned. But this amounts to splitting up the compromise into two separate compromises and the facts do not justify it. The deci-

sion in *Venkata Row v. Tuljaram Row* (1) shows that no portion of the joint estate is bound by the compromise. Mr. Raghava Rao then contended that 2nd plaintiff may press his claim for the whole of the suit property and he would confine his contention to the 1st plaintiff only and not his share of the property. But this seems to be a distinction by which nothing is gained. If the whole suit is to be tried, I do not see any object in saying that the 1st plaintiff (though not his share) is bound. Moreover, there is O. XXIII, r. 1, cl. (4) which shows that one plaintiff cannot withdraw from a suit without the consent of the others. If the 1st plaintiff wished to withdraw, he could not do so as the 2nd plaintiff is a minor, and the next friend is the 1st plaintiff himself. In all the circumstances, I think the best course is to give no effect to the compromise and allow the whole suit to proceed. But the 1st plaintiff will have to refund Rs. 100 to the defendant. To this extent the Civil Revision Petition is allowed.

If the plaintiffs succeed and in the final decree they get mesne profits, the 1st plaintiff's half share of the profits will be diminished by Rs. 100 and if it be less than Rs. 100 there will be a direction in the decree directing the 1st plaintiff to refund the balance to the defendant. If the plaintiffs do not succeed, the final decree will contain a direction directing the 1st plaintiff to refund the sum of Rs. 100 to the defendant. In this Court each party will bear his own costs.

V. N. V.

A. N. A.

Order modified.

(1) 74 Ind. Cas. 765; 45 M. 298; 20 A. L. J. 833; 26 C. W. N. 546; 30 M. L. T. 272; 4 U. P. L. R. (P. C.) 33; A. I. R. 1922 P. C. 69; (1922) M. W. N. 392; 43 M. L. J. 298; 24 Bom. L. R. 1191; 35 C. L. J. 319; 49 I. A. 91 (P. C.).

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL INSOLVENCY No. 25 OF 1927.

September 16, 1927.

Present:—Mr. Rupchand Bilaram, A. J. C.
In re GOPALDAS VERSIMAL—DEBTOR.

Ex parte FIRM OF HARICHAND
KISHENOHAND.

Presidency Towns Insolvency Act (III of 1909), s. 29 (iv)—Composition not objected to by creditors—Court, whether bound to sanction.

A Court is not bound to accept a composition proposed by an insolvent and accepted by a majority in number and three-fourths in value of creditors who have proved their claim, simply because none of the creditors opposes its approval by the Court. Before accepting a proposed composition or scheme a Court should satisfy itself that such composition or scheme fulfils certain conditions, *inter alia*, that it is both reasonable and for the benefit of the general body of the creditors. If it is deficient in either of those qualities, it fails. [p. 433, col. 2.]

Ex parte Reed, In re Reed (1) and *Ex parte Bischoffsheim, In re Aylmer* (2), relied upon.

A composition or scheme is neither reasonable nor for the benefit of the general body of the creditors unless it affords some advantage to the creditors which they would not have if the insolvency proceedings were allowed to continue. [*ibid.*]

In re Walter Wood (3), *In re Browne & Wingrove, Ex parte the Debtors* (4) and *In re E. A. B.* (5), relied upon.

Mr. Kimatrai Bhojraj, for the Insolvents.

Messrs. Srikishendas H. Lulla and Dipchand Chandumal, for the Petitioning Creditors.

ORDER.—In this case the Composition Scheme proposed by the debtor has been accepted by a majority in number and three-fourths in value of the creditors who have proved their claims and has the support of the Official Assignee. In answer to the notices issued by the Court under s. 29, cl. (i) of the Act none of the creditors have appeared to oppose its approval by the Court. It has been strenuously argued that under these circumstances, the Court is bound to accept it.

This argument, however, completely loses sight of the Statute. A composition, stands on a different footing than a compromise to which all persons concerned are parties. The Statute intentionally and on set purpose imposes an obligation on the Court of approving a composition or scheme to which the creditors or a great majority of them have agreed. As pointed by Lord Esher, M. R., in *Ex parte Reed, In re Reed* (1), creditors of an insolvent were generally careless, and as a rule wrote off their debts as bad and agreed to terms which

(1) (1886) 17 Q. B. D. 241; 55 L. J. Q. B. 214; 34 W. R. 493; 3 Morrell 90.

might give some possibility of getting something out of the wreck, and that the Legislature had, therefore, thought it proper to vest the controlling power in the hands of the Court for the purpose of protecting the creditors against their own recklessness; for the purpose of preventing a majority of creditors for dealing recklessly not only with their own property but with that of the minority, and of enforcing so far as the Legislature could, a more careful and moral conduct on the part of the debtors. The Legislature has, therefore, made it incumbent on the Court that before accepting the proposed composition or scheme it should satisfy itself that such composition or scheme fulfils certain conditions *inter alia* that it is both reasonable and for the benefit of the general body of creditors. If it is deficient in either of those qualities it fails; per Fry, L. J., in *Ex parte Bischoffsheim, In re Aylmer* (2). In that event the Court is bound to withhold its consent, for cl. (iv) of s. 29 of the Act which is a verbatim reproduction of similar provisions in the English Statute declares that the Court "shall" and not "may" refuse to approve the proposal. It is also well settled that a composition or scheme is neither reasonable nor for the benefit of the general body of creditors unless it affords some advantage to the creditors which they would not have if the insolvency proceedings were allowed to continue. *In re Walter Wood* (3), *In re Browne & Wingrove, Ex parte the Debtors* (4) and *In re E. A. B.* (5). On the very face of it the proposed composition in issue in the present case confers no greater benefits on the creditors whatsoever and is, therefore, one which cannot be accepted. The only property so far disclosed by the debtors is certain piecegoods valued by him at Rs. 10,000 and valued by the Official Assignee at much less than Rs. 7000 and certain outstandings not exceeding Rs. 250 in value altogether. The debtor offers to pay nothing more. According to the proposed terms the property is to be handed over by the Official Assignee to five private trustees who are empowered to realise the profits and to distribute it amongst the

(2) (1837) 19 Q. B. D. 33 at p. 37; 56 L. J. Q. B. 460; 56 L. T. 801; 35 W. R. 532; 4 Morrell 152.

(3) (1868) 4 T. L. R. 277.

(4) (1890) W. N. 131.

(5) (1902) 85 L. T. 773; (1902) 1 K. B. 457; 71 L. J. K. B. 356; 50 W. R. 229; 9 Manson 105.

scheduled creditors. The debtor is not required to do anything more than to help the trustees in selling the piecegoods and recovering the outstandings which he is even otherwise bound to do. He wants the order of adjudication to be annulled forthwith so that he may be able to carry on his trade again as a free man.

I am not at all impressed with the only argument advanced in support of this proposal that the private trustees would obtain better prices for piecegoods by private retail sale than the Official Assignee by a public auction. In my opinion this procedure is as much likely to result in loss as in profit on account of the extra expenditure involved in such retail sale by way of shop rent, etc., and on account of fluctuation in prices which is unfortunately not uncommon in Karachi. Even otherwise it is open to the proposed trustees who are some of the biggest creditors to act as the agents of the Official Assignee free of charge, in selling the goods in the same manner as they would under the composition. The composition not only affords no greater benefits to the creditors but is, in my opinion, one which is positively disadvantageous to them. It deprives them of at least the possibility of participating in the property, if any, which the debtor might have failed to disclose or which the debtor might acquire before he is able to obtain his discharge in the ordinary course.

As the condition precedent required by cl. (iv) to the acceptance by me of the proposed composition is wanting, no question of any discretionary powers under cl. (vii) of that section arises, and I have no other option but to refuse to approve the same, and I order accordingly.

P. B. A.

Application rejected.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL JURISDICTION MISCELLANEOUS
No. 83 of 1927.

May 5, 1927.

Present:—Mr. Rupchand Bilaram, A. J. C.
Messrs. SHIVALDAS HOTCHAND—

APPLICANTS

versus

JAPAN COTTON TRADING COMPANY

—OPPOSANTS.

Arbitration Act (IX of 1899), s. 19—Submission

tion—Provision for reference to two arbitrators—No provision for appointing arbitrator on behalf of defaulting party, effect of—Suit by such defaulter, whether can be stayed—Discretion of Court—Ready and willing to go to arbitration, meaning of.

Where a submission clause in a contract provides for a reference to two arbitrators, one to be appointed by each party, but makes no provision for the appointment of an arbitrator on behalf of the defaulting party in the event of his refusal to appoint his arbitrator, the Court has a discretion under s. 19 of the Arbitration Act to stay a suit brought by such party, as, otherwise, it would be permitting a party to take advantage of his own wrong. [p. 435, col. 1.]

Manchester Ship Canal Co. Ltd. v. S. Pearson & Son Ltd. (1), relied upon.

In re Smith & Service and Nelson & Sons (2), distinguished.

All that an applicant for stay of a suit under s. 19 of the Arbitration Act is required to show is that he was ready and willing to go to arbitration at the time of the commencement of the proceedings. He is not required to give an intimation to the plaintiff before he institutes his suit, that he would enforce the submission clause. [p. 435, col. 2.]

Mr. Srikishendas H. Lulla, for the Applicants.

Mr. Assudomal Rewachand, for the Opponents.

ORDER.—This is an application under s. 19 of the Indian Arbitration Act for stay of an ordinary commercial suit instituted by the opponents against the applicants in the Court of Small Causes, Karachi.

The main ground on which this application is opposed is that the submission clause, as contained in the contract, provides for a reference to two arbitrators, one to be appointed by each party, but it contains no provision for the appointment of an arbitrator on behalf of the opponents in the event of their refusal to appoint one.

It is urged that in the absence of such a provision, and further in the absence of any provision in the Arbitration Act empowering the Court to appoint an arbitrator on failure or refusal of one of the parties to a submission to do so, s. 19 of the Indian Arbitration Act has no application.

A somewhat similar plea was raised in the case of *Manchester Ship Canal Co. Ltd. v. S. Pearson & Son Ltd.* (1) and was disallowed by the Court of Appeal. In that case the agreement to refer disputes to arbitration provided for a reference to three arbitrators, one to be appointed by each of the parties and the third by the two so appointed. One of the parties refused to appoint an arbitrator and brought an action against the other party to the sub-

(1) (1900) 2 Q. B. 606; 69 L. J. Q. B. 852; 48 W. R. 689; 83 L. T. 45.

mission, which was sought to be stayed. Reliance was placed on the case of *In re Smith & Service and Nelson & Sons* (2) as an authority for the proposition that in such a case there should be no stay. Their Lordships distinguished the case of *In re Smith & Service and Nelson & Sons* (2) on the ground that in that case no suit had been filed and, therefore, there was no occasion for the application of s. 4 of the English Act corresponding to s. 19 of the Indian Act. It was held that the provisions of s. 4 were wide enough to enable the Court to order a stay of the suit notwithstanding that it had no power to appoint an arbitrator on behalf of the plaintiff who had refused to do so.

All that s. 4 of the English Act and s. 19 of the Indian Act contemplate is that a party to a submission who is sued should apply to the Court for stay at the earliest opportunity, that is to say, immediately "after appearance and before filing a written statement or taking any other steps in the proceedings," and that such party should have been ready and willing at the time when the proceedings were commenced and should continue thereafter to be ready and willing to do all things necessary to the proper conduct of the arbitration. To hold that a party to the submission may refuse to appoint an arbitrator and thereby frustrate the arbitration, would be nothing short of permitting a party to take advantage of his own wrong. And this could never have been the intention of the Legislature. There is no hardship whatsoever on the opponents if the suit is stayed. It is open to them to appoint an arbitrator on their behalf if they so wish. If they decline to do so, and are thereby prevented from recovering the amount alleged to be due to them they have only to thank themselves for it. Even before the Indian Arbitration Act came into operation, a suit of this nature was barred by the proviso to s. 21 of the Specific Relief Act. The Indian Arbitration Act no doubt confers discretionary powers on the Court to stay suits instituted in breach of an agreement to refer but this is not one of those cases in which these powers could be exercised in favour of the opponents who are themselves the wrong doers. This objection, therefore, fails.

(2) (1890) 23 Q. B. D. 545.

The only other objection urged on behalf of the opponents is, that though the applicants were threatened with legal proceedings, they never called the attention of the opponents to the arbitration clause and never suggested that they were willing to refer the disputes to arbitration. There is no substance in this plea either. In *Anglo Persian Oil Co. v. Panchapakesa Ayyar* (3) where the lower Court had refused to stay a suit, *inter alia*, on a somewhat similar ground, the High Court held that it was not sufficient to justify the refusal of an order for stay of the suit. The words of s. 19 are clear. As pointed out above, they require the applicant to be ready and willing to go to arbitration at the time of the commencement of the proceedings and not before. There is also nothing in the section to require the applicant to give intimation in that behalf to the other party before the institution of the suit.

I, therefore, allow the application with costs and order that Suit No. 1227 of 1927 filed by the opponents in the Court of Small Causes, Karachi, be stayed.

P. B. A.

Application allowed.

(3) 78 Ind. Cas. 1011; 45 M. L. J. 653; (1923) M. W. N. 772; 18 L. W. 752; A. I. R. 1924 Mad. 336; 47 M. 161; 33 M. L. T. 103.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 111 OF 1926.
September 26, 1927.

Present:—Mr. Percival, J. C., and
Mr. Rupchand Bilaram, A. J. C.

FIRM OF UTTAMOHAND-BRIJLAL—
APPLICANTS
versus

FIRM OF BALMOKAND S. L.—OPPOSANTS.

Arbitration Act (IX of 1899); ss. 8, 9—Submission providing for reference to two arbitrators—Sole arbitrator appointed on default by one party—Refusal or neglect of arbitrator to act—Procedure to be followed—S. 8, applicability of—Contract Act (IX of 1872), s. 28, Excep. I—Time-barred claim, when can form subject-matter of reference to arbitration.

Clauses (a) and (b) of s. 8 of the Arbitration Act do not apply to a submission which provides for the appointment of two arbitrators, one by each party, but apply only to a submission which provides for the appointment of a single arbitrator from its very inception; the former case is governed by s. 9 of the Act. [p. 437, col. 2.]

Gopalji Kuverji v. Morarji Jeram Naranji (1), relied upon,

On a refusal or neglect of the sole arbitrator appointed by one of the parties to a submission under s. 9, cl. (b) of the Act, the machinery provided in the section may be invoked over again and the whole procedure gone through from the beginning to the end. [p. 437, col. 1.]

When a suit brought within the period of limitation is stayed and the plaintiff compelled to resort to arbitration, the question of limitation cannot arise. [p. 437, col. 1; p. 438, col. 2.]

Per Bilaram, A. J. C.—In the case of an ordinary submission clause contained in a commercial contract which provides for a reference to arbitration of disputes arising out of the contract and does not purport to bar the right of a party to enforce his claim in Court before he has obtained an award in respect thereof, there can be no valid reference to arbitration, if at the time of the reference, the claim which is the subject-matter of dispute is time-barred, although different considerations arise in respect of an agreement falling within the four corners of Exception 1 to s. 28 of the Contract Act. [p. 437, col. 2; p. 438, col. 1.]

Quære.—Whether Limitation Act applies to arbitration. [p. 438, col. 2.]

In the matter of the Arbitration Act (4) and Hirji Mulji v. Cheong Yue Steamship Co. (5), relied upon.

Scott v. Avery (2), Cayzer, Irvine & Co. Ltd. v. Board of Trade (3) and In re Astley & Tyldesley, Coal Co. and the Tyldesley Coal Co. (6), referred to.

Application to revise an order of Mr. Tyabji, A. J. C., dated the 13th August, 1926, in J. Misc. No. 210 of 1925, reported as 100 Ind. Cas. 890.

Mr. Kundanmal Dayaram, for the Applicants.

Mr. E. V. Castellino, for the Opponents.

JUDGMENT.

Percival, J. C.—This is a revision application against the order of Mr. Tyabji, Additional Judicial Commissioner, directing that the award in the case should be filed.

The facts of the case briefly, so far as they only refer to this application, are that there were three appointments made of an arbitrator. The first respondents (now opponents) first appointed Mr. Statham arbitrator and they gave notice accordingly under s. 9 (b) of the Arbitration Act to the other side, that is, to the second respondents. The second respondents failed to appoint their arbitrator, and Mr. Statham became sole arbitrator, but afterwards refused to act. The same procedure was adopted in respect of Mr. Penn Simkins, and he also refused to act as arbitrator. Finally the same course was a second time adopted in the case of Mr. Statham. On this occasion Mr. Statham acted as a sole arbitrator, and made the award which is now under consideration.

The record also shows that the first respondents filed a suit within three years of the date of the claim, which suit was admittedly in time. After the suit had proceeded for two years the second respondents relied on the arbitration clause and had the suit stayed; and the suit was still pending when the order was passed by Mr. Tyabji.

The two points raised in this application are, firstly, that the procedure adopted for the appointment of the arbitrator was not correct, and that the arbitration was, therefore, invalid; and, secondly, that the reference to the arbitration was made too late, and that the claim is, therefore, time barred.

On the first point, the question depends on ss. 8 and 9 of the Indian Arbitration Act. It is argued on behalf of the present applicant that s. 8 (b) applies in this case, because, when a sole arbitrator has once been appointed under s. 9, then you have to turn back to s. 8 to see what procedure is to be adopted in case the sole arbitrator refuses to act. I am, however, unable to accede to this argument, because, in s. 8 of the Act, it is provided that, if the arbitrator neglects or refuses to act, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in appointing an arbitrator umpire, or third arbitrator. I think that this makes it clear that s. 8 (1) (b) cannot refer to such a case as is dealt with in s. 9, where the submission provides for reference to two arbitrators, one to be appointed by each party. This view of the law, it appears, was approved in *Gopalji Kuverji v. Morarji Jeram Naranji* (1) where it was stated that s. 9 applies only to joint appointment by consent.

We come back, therefore, to the position that the procedure to be adopted is that laid down in s. 9. In respect of s. 9, it is argued by the learned Pleader for the applicant that that section does not state what is to be done in case the person who becomes a sole arbitrator refuses to act. I think, however, that, when cls. (a) and (b) of s. 9 are read together, it may fairly be inferred that the party who appointed the arbitrator, who became a sole arbitrator, may appoint a fresh arbitrator, after

(1) 50 Ind. Cas. 411; 43 B. 809 at p. 830; 21 Bom. L. R. 308.

giving fresh notice to the other side. That is to say the procedure provided by s. 9 is to be repeated, and that is exactly what was done in this case.

For these reasons, the objection based on ss. 8 and 9 of the Indian Arbitration Act does not appear to be valid.

Turning to the objection on the ground of limitation it is argued that the claim is time-barred because reference to arbitration was made (it is contended) three years after the claim became due. It appears to me, however, that it is not necessary to go into the question whether the reference to arbitration was made after the requisite time or not. All that we have to consider here is whether the suit was filed within the requisite period of limitation. Here there is no doubt that the suit was so filed, and it was the second respondent who relied on the arbitration clause and had the suit stayed.

I do not propose to go into other points connected with the question of limitation. It appears to be that the claim cannot be held to be time-barred because the suit was filed within a requisite period of limitation.

The application is, accordingly, dismissed with costs.

Bilaram, A. J. C.—I concur. The submission clause in the contract in dispute provides for the appointment of two arbitrators one by each party and contains no machinery for compelling one of the parties to the submission to make an appointment on behalf of the other.

It, therefore, falls clearly within the purview of s. 9 of the Indian Arbitration Act which supplements the requisite machinery for enforcement of an agreement to submit disputes to arbitration of that nature. I can find nothing in s. 9 to suggest that the same machinery may not be invoked over again and the whole procedure gone through from the beginning to the end if on account of any unforeseen circumstance the nominee of one of the parties who is appointed as the sole arbitrator under the provisions of cl. (b) of that section refuses or neglects to act. The repetition of the procedure laid down by the section, on a refusal or neglect of the sole arbitrator so appointed, affords a fresh opportunity to the party who has made default in the first instance to re-consider his position and to appoint if he so wishes

his own nominee when he is called upon to do so again.

Now, if cls. (a) and (b) of s. 8 of the Indian Arbitration Act are carefully analysed they clearly show that neither of them applies to a submission which provides for the appointment of two arbitrators one by each party. Clause (a) clearly contemplates a submission to a single arbitrator from its very inception and does not apply to a submission which provides for more than one arbitrator acting in the matter at any time. Clause (b) which follows cl. (a) deals with appointment of a substitute and *prima facie* refers to the substitute of a sole arbitrator appointed under a submission of the nature contemplated by cl. (a) that is to say, a sole arbitrator appointed in pursuance of a submission which does not contemplate the appointment of more than one arbitrator in any event. The words "the parties do not supply the vacancy" in that clause as also the words "concur in the appointment of an arbitrator" used in the latter part of that section indicate beyond doubt that the submission is one which requires the parties themselves to concur in the appointment of a sole arbitrator.

Our attention has not been drawn to any decided case in which a different view has been taken. On the contrary the case reported as *Gopalji Kuverji v. Moraji Jeram Naranji* (1) supports the view that cls. (a) and (b) of s. 8 refer to submissions which provide for the appointment of a single arbitrator. The first ground, therefore, fails.

In dealing with the second objection the learned Additional Judicial Commissioner has proceeded on the broad ground that the Limitation Act does not apply to settlement of disputes by arbitration and, therefore, it is open in every case to a party to enforce the submission clause, notwithstanding the fact, that the claim in dispute is statute-barred on the date on which he claims to refer the dispute to arbitration. With all respect I am unable to accept this broad proposition of law. Where the agreement between the parties falls within the four corners of Exception I to s. 28 of the Indian Contract Act which Exception is based upon the ruling in *Scott v. Avery* (2) no question of limitation can ever arise, for, in that case the claimant has no cause of action

(1) (1856) 5 H. L. C. 811; 25 L. J. Ex. 303; 2 Jur. (N. S.) 815; 4 W. R. 716; 10 E. R. 1121; 101 R. R. 932

for instituting a suit so long as his damages have not been ascertained by recourse to arbitration. In such a case no question of limitation arises and the observation of the learned Additional Judicial Commissioner would indubitably apply. As an authority for that proposition reference may be made to the case of *Cayzer, Irvine & Co., Ltd v. Board of Trade* (3).

But different considerations apply to an ordinary submission clause contained in a commercial contract which provides for a reference to arbitration of disputes arising out of the contract and does not purport to bar the right of a party to enforce his claim in Court before he has obtained an award in respect thereof. In that case a cause of action immediately arises to the aggrieved party; and if he wishes to enforce his claim he should be vigilant. He may take early steps either to enforce his claim by arbitration or by a regular suit. If he sleeps over his right for over the statutory period prescribed for the institution of his suit he is liable to be defeated by the plea that as his claim is barred by limitation and as no suit is maintainable in respect thereof there is no subsisting dispute under or arising out of the contract which may be enforced by arbitration. This was the view taken by me in *In the matter of the Arbitration Act* (4).

As observed by Lord Sumner in *Hirji Mulji v. Cheong Yue Steamship Co.* (5) the jurisdiction of an arbitrator depends on the question whether or not there was any submission, and that again on the question whether, at the time when it purported to be submitted to him, there was a dispute subsisting between the parties under the contract. I think it goes without saying that if there is no dispute subsisting between the parties under the contract there can be no reference to arbitration in pursuance of the submission clause contained in such contract. Where a party is called upon to nominate his arbitrator after the expiry of the period of limitation and raises the plea that he is not prepared to go to arbitration as the claim is time-barred, it is difficult to see how such a plea can

be said to arise out of the contract which may be adjudicated upon by the arbitrator. His refusal to do so would, therefore, give no right to the opposite party to nominate an arbitrator on behalf of his opponent or to nominate his arbitrator as the sole arbitrator to settle such disputes. From this point of view no question arises as to the applicability of the Limitation Act to arbitrations. And there is no occasion, therefore, to consider whether the case of *In re Astley & Tyldesley Coal Co., and The Tyldesley Coal Co.* (6) which held that an arbitrator was bound to give effect to the plea of the Statute of Limitation if it was raised before him as a defence, was rightly decided or not. That point has been left undetermined in the more recent case of *Hirji Mulji v. Cheong Yue Steamship Co.* (5) referred to above, and may be dealt with when a proper case for its consideration arises. So far as the facts of this case are concerned the second objection is easily disposed of on a much narrower ground. The opponents' claim was not barred by the Statute. As a matter of fact, they had already instituted the suit. It was stayed under s. 19 of the Indian Arbitration Act and could easily be revived again by leave of the Court in the event of the arbitration proving infructuous. It was also not open to the applicant to approbate and reprobate. It was he who had asked for arbitration. Furthermore the application which was in writing contained a clear acknowledgment of the liability of the applicant to pay such amount as was found due by the arbitrators and revived the period of limitation. The second plea was, therefore, without any foundation whatsoever and was one which should never have been raised.

The application will, therefore, stand dismissed with costs.

P. B. A.

Application dismissed.

(6) (1899) 68 L. J. Q. B. 252; 80 L. T. 116; 15 T. L. R. 154.

(3) (1927) 1 K. B. 269.

(4) 95 Ind. Cas. 750; 19 S. L. R. 24; A. I. R., 1926 Sind 209.

(5) (1926) A. C. 497 at p. 502; 95 L. J. P. C. 121; 134 L. T. 737; 31 Com. Cas. 199; 17 Asp. M. C. 8; 42 T. L. R. 359; 24 Ll. L. Rep. 210.

SIND JUDICIAL COMMISSIONER'S COURT.

[ORIGINAL CIVIL INSOLVENCIES NOS. 3 AND 24 OF 1922, 48 OF 1923 AND 32 OF 1921.]

April 27, 1927.

Present:—Mr. Rupchand Bilaram, A. J. C.
In re SUNDERJI BHIMJI AND OTHERS—
INSOLVENTS.

Provincial Insolvency Act (V of 1920), ss. 33 (3), 64
—Notice of final dividend—Creditors whose claims are not entered in schedule, whether entitled to notice.

Under s. 64 of the Provincial Insolvency Act, the Official Receiver is bound to give notice of a final dividend not only to those creditors who have notified their claims and whose names are entered in the schedule by him but to all such creditors whose claims have been notified to the Official Receiver either by the creditors themselves or by the insolvent. The notice is not confined to debts referred to in s. 62, cl. (4), sub-cl. (b) and (c) but extends to debts referred to in sub-cl. (a) of that section; and if the Official Receiver has any assets in his hands he is bound to adjudicate on all such claims as are preferred to him in response to the notice of final dividend so issued by him. [p. 440, col. 1.]

Sivasubramani. Pillai v. Theethiappa Pillai (2), relied upon.

Hiranand Mulchand v. Official Receiver (1), dis-sented from.

Instructions sought by the Official Receiver from the Court.

Mr. Suganlal Hussanand, for the Insolvent.

Mr. Nadirshah Naoraji, for the Creditor.

ORDER.—In several insolvencies the former Official Receiver has failed to comply with the provisions of the Provincial Insolvency Act. He has, *inter alia*, declared dividends without retaining in his hands sufficient assets to meet debts provable under the Act and appearing from the Insolvent's statement or otherwise, but not proved (s. 62) and has failed to declare final dividends and has also failed to give notices in that behalf (s. 64). The insolvents have been discharged, but certain amounts are standing to the credit of the insolvents, either as the balance due after payment of the dividends declared to the scheduled creditors or being the amount realized after the declaration of such dividends. The present Official Receiver has applied for instructions and advice as to the manner in which such amounts should now be disposed of. He has referred me to certain *obiter dicta* of Kennedy, A. J. C., in *Hiranand Mulchand v. Official Receiver* (1) where it was held that a notice under s. 64 of the Provincial Insolvency Act for the declaration

of a final dividend should be issued only to such creditors as have notified their claims.

If this decision is correct then all creditors whose names were disclosed by the insolvent in his petition but who had themselves failed to notify their claims to the Official Receiver would not be entitled to notice or to prove their claims after discharge so as to enable them to participate in the money now in the hands of the Official Receiver, and that such money could only be distributed among the scheduled creditors or else credited to Government.

If, on the other hand, it is still open to the Official Receiver to issue notices for declaration of a final dividend not only to the creditors who have notified their claims but to all those whose names have been notified to the Official Receiver by the insolvent himself, the amount in his hands should in the first instance be applied to all such creditors who now prove their claim for payment to them of a dividend equal to that received by the scheduled creditors and for payment *pro rata* of the balance, if any, to all the creditors who have and who may now prove their claims.

On notices issued by me to the creditors who had not proved their claims, to show cause why they should not be excluded from sharing in the money in the hands of the Official Receiver, Mr. Nadir Shah has appeared in Insolvency No. 3 of 1922 on behalf of some of the creditors and has urged that the order passed by the learned Additional Judicial Commissioner is not justified by the words of s. 64.

With all respect I am unable to find in s. 64 of the Act anything to require the creditors themselves to notify to the Official Receiver their claims, so as to entitle them to a notice under that section. The relevant words of the section are the following:—

"He shall give notice in manner prescribed to the persons whose claims to be creditors have been notified but not proved etc." The interpretation put upon these words by the learned Additional Judicial Commissioner may to a certain extent find *prima facie* support from s. 33, cl. (3) which reads as follows:—

"Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act, etc."

In *Sivasubra Mania Pillai v. Theethiappa Pillai* (2) the effect of s. 34 (4) of the Provincial Insolvency Act of 1907 which corresponds to s. 23, cl. (3) of the present Act was held to be controlled by the provisions of s. 39 (4) of that Act corresponding to s. 64 of the present Act and to be directory only, and that non-compliance by the creditor in applying before the discharge of the insolvent for his name being included in the schedule under s. 33 (3) was not considered sufficient to deprive such creditor of his right or limit his right to prove on a notice issued under s. 64 of the Act.

I agree with the view taken by the Madras High Court. This view is in consonance with the general policy of the Insolvency Law. In my opinion the Official Receiver is bound to give notice under s. 64 of the Act not only to those creditors who have notified their claims but to all such creditors whose claims have been notified to the Official Receiver either by the creditors themselves or by the insolvent, that is to say the notice is not to be confined to debts referred to in s. 62, cl. (1), sub-cl. (b) and (c), etc., but extends to debts referred to in sub-cl. (a) of that section.

I hold that the Official Receiver is bound to issue notices for a final dividend to all creditors of the insolvent specified in s. 62, cl. (1) sub-cl. (a), (b) and (c) and notwithstanding the discharge of the debtor he is bound to adjudicate on all such claims as are preferred to him in response to such notices.

I direct him to act in accordance with the above instructions in all the matters which are now pending before him.

P. B. A.

Directions accordingly.

(2) 75 Ind. Cas. 572; 45 M. L. J. 166; 18 L. W. 636; (1923) M. W. N. 895; A. I. R. 1924 Mad. 163; 47 M. 120.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 387 OF 1927,
October 31, 1927.

Present:—Mr. Aston, A. J. C.

FIRM OF RAHIMBUX-KADERBUX—
PLAINTIFFS

versus

FIRM OF TOPANDAS-HARBHAGWANDAS—
DEFENDANTS.

Contract—Repudiation before time of performance not accepted by other party—Contract kept alive—Anticipatory breach—Contract on 'Office Dhara' or usual terms in Karachi—Miti khari, importance of—Mention of wrong steamer therein, whether mere irregularity or vitiates contract—Pleading—Change of case at final hearing—Amendment, necessity of.

A repudiation of a contract before the time for performance arrives which is not accepted by the other party, the contract being kept alive, cannot be treated as an anticipatory breach of the contract. [p. 441, col. 1.]

Berners v. Fleming (1), relied upon.

In a contract on "Office Dhara" or "usual terms" in Karachi the making of *miti khari* by the seller is an essential act towards the completion of the contract, and the mention in the *miti khari* notice of a steamer which has not in fact brought goods of the shipment contracted for is not a mere irregularity but constitutes a breach of the contract on the part of the seller. [p. 441, cols. 1 & 2.]

South Indian Export Co., Ltd. v. Condiiah Chetty (3), distinguished.

A party cannot be allowed to change his case at the last moment, without even having made an application to amend his plaint. [p. 441, col. 1.]

Ramchand Gurdasmal v. Gobindram Gurdasmal (2), relied upon.

Mr. Pamanmal Valabdas, for the Plaintiffs.

Mr. Srikishendas H. Lulla, for the Defendants.

JUDGMENT.—This suit has been remanded for determination of the questions whether there was any breach of the contract on the part of the defendant in respect of the December shipment, and if so, what damages are recoverable.

The facts in the case relating to the alleged repudiation are very similar to those in Suit No. 1018 of 1918. The repudiation relied on in this suit is the same as in that suit. The evidence is the same as in that suit and for the reasons mentioned in my judgment in that suit, I am of opinion that there was no breach on the part of the defendant.

There is, however, an additional ground, in my opinion, why the plaintiff cannot rely on the so-called repudiation as

breach of the contract for the repudiation was not accepted and it was not set out in the plaint as the basis of the breach of contract. The plaintiff kept the contract alive, made *miti khari* and sued on the basis of the breach after *miti khari*. He made no mention of the incident repudiation and cannot now change his case at the last moment without even having made an application to amend his plaint: see *Berners v. Fleming* (1) and *Ramchand Gurdasmal v. Gobindram Gurdasmal* (2).

In one particular, however, the circumstances of the present case differ from those in Suit No. 1018 of 1918. The evidence shows that the ss. *Kangean* arrived in Karachi with the December shipment on the 25th February. It follows that *miti khari* notice of the 28th February, 1918, would be in time. The *miti khari* sent by the plaintiff, however, did not mention the ss. *Kangean* but the ss. *Karimoean*, which did not bring December shipment. But for the name of the steamer, the *miti khari* notice was undoubtedly a valid notice. Did the insertion of the wrong steamer amount to a breach on the part of the seller? or was it merely an irregularity which could be cured by the subsequent tender of delivery orders of the correct steamer. Reliance is placed by the plaintiff on *South Indian Export Co., Ltd. v. Condiiah Chetty* (3). It was held in that case that:—

“Where a condition in a contract that notice should be given of the arrival of the goods by a particular ship is not an essential part of the contract, failure to give such notice or a mistake in the notice given, is not a breach of contract entitling one party to avoid it for that reason.”

It seems to me the contracts on “*Office Dhara*” or “usual terms” in Karachi are clearly distinguishable from the contract in that case. In the first place the making of *miti khari* in a contract on usual terms is an essential act towards the completion of the contract. Until the seller has made *miti khari* there is no obligation on the buyer to pay the price and take delivery and unless the seller

makes *miti khari* within three days of the arrival of the steamer, the breach is on his part. The making of *miti khari* on “usual terms” is not an offer of an act of performance, but it is far more. It is in itself an essential act towards the completion of the contract. The evidence moreover in the case shows that the making of *miti khari* is closely connected with a steamer, thus for instance Gidoomal the President of the Indian Merchants' Association admitted that the seller can make *miti khari* for any steamer of a particular shipment. Ismail Haji admitted that on usual terms the delivery order of any importing firm can be given provided the goods of that firm have arrived in the ship in respect of which *miti khari* is made. Haridas Lalji said “if a steamer brings correct shipment of 300 tons merchants can make *miti khari* in respect of thousands of tons. Mahomed Ali Husseinbhoi stated that the seller can make *miti khari* for any steamer bringing goods of that shipment.” Sobhraj Chetumal says, “In the *miti khari* notice the name of the steamer bringing the shipment is mentioned.” Hasanand said the same thing. The same fact was to be implied or inferred from the evidence of Hormusji for he stated “a seller can give a *miti khari* notice before he buys the goods. He buys that steamer's goods from the market. The evidence in the present case shows that a person can make *miti khari* without having imported any goods. He can make *miti khari* hoping to be able to secure delivery orders before the due date for giving delivery arrives, and if the *miti khari* is made in respect of the steamer which has brought the correct shipment, the validity of the *miti khari* notice does not in any way depend on the amount of the goods of that shipment in the steamer. There is no doubt evidence to the effect that where two steamers arrive at or about the same time, the name of the steamer is sometimes omitted from the *miti khari* notice. It is not necessary for the purposes of this suit to determine what the effect would be in usual terms if *miti khari* was made without mentioning the name of any steamer. I am, however, satisfied from the evidence that if a *miti khari* is made in respect of a particular steamer and that steamer has

(1) (1925) Ch. 39 at p. 44.

(2) 53 Ind. Cas. 337; 13 S. L. R. 75 at p. 90.

(3) 29 Ind. Cas. 712.

no goods of the correct shipment, the *miti khari* is not a valid *miti khari* in Office Dhara or "usual terms." In the circumstances I am of opinion that there was no breach on the part of the defendant and I would answer the question which has been remanded for decision as follows:—

There was no breach on the part of the defendants and no damages are recoverable from them. I dismiss the suit with further costs on the plaintiffs. Pleador's fee to be taxed as fifteen rupees.

P. B. A.

Suit dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

INSOLVENCY APPLICATION NO. 45 OF 1925.

September 21, 1927.

Present:—Mr. Rupchand Bilaram, A. J. C.

In the matter of AN APPLICATION BY
FIRM OF UTMA MALLOK

VISHENDAS BY THEIR MANAGING
PARTNER JAMNADAS NARAINDAS

TO BE DECLARED INSOLVENT.

Provincial Insolvency Act (V of 1920), ss. 72, 79—
Civil Procedure Code (Act V of 1908), O. XXX—
General Clauses Act (X of 1897), s. 18 (2)—*English Bankruptcy Act, 1914* (4 & 5 Geo. V, Ch. 59), s. 155—
Adjudication of "debtor" which is a firm, effect of, on partners—"Obtaining credit", meaning of.

An application was presented on behalf of a firm for being adjudicated insolvent. The names of the partners of the firm were disclosed in the application and the Court passed an order that the applicant be adjudicated insolvent. One of the partners was adjudicated an insolvent some years later in another insolvency, and a question arose in respect of an application under s. 72, Provincial Insolvency Act, whether he was an undischarged insolvent with reference to the first insolvency:

Held, that the applicant in the first insolvency was the firm and not the individual partner who filed the application and the order of adjudication was an order against the firm and against each and every partner in that firm. [p. 444, col. 1.]

In considering an application under s. 72, Provincial Insolvency Act, the Court has to consider (a) if the opponent is an undischarged insolvent, (b) if he obtained credit to the extent of Rs. 50 or upwards, and (c) if he in fact informed the person from whom he obtained credit that he was an undischarged insolvent. [p. 443, col. 2.]

R. v. Duke of Leinster (1), relied upon.

The expression "obtaining credit" would include within its ambit the securing of goods on trust that they will be sold and sale-proceeds handed over. [p. 444, col. 2.]

[Different meanings of the expression "credit" considered.]

For the purpose of giving sanction for prosecution under s. 72, Provincial Insolvency Act, against an individual partner of a firm, it is immaterial that credit was obtained by him as a partner of the firm. [p. 444, col. 2.]

Application under s. 69, Provincial Insolvency Act V of 1920, by Messrs. Strauss & Co., Ltd. (Creditors of Insolvents) for sanctioning prosecution of the Insolvent Jamnadas Naraindas.

Mr. Pahlajsing B. Advani, for the Creditors-Applicants.

Mr. Suganlal H. Jeswani, for the Insolvent.

ORDER.—These are two applications asking the Court to institute criminal proceedings against the insolvent Jamnadas Naraindas for offences falling under ss. 69 and 72 of the Provincial Insolvency Act.

The broad facts on which the applications are based are hardly in dispute. Prior to 1922 the insolvents worked as a partner in the firm of Pokardas Kishindas. That firm failed in business in the beginning of that year. On November 7, 1921, the insolvent joined his brothers in mortgaging the house jointly owned by them for the sum of Rs. 1,500.

On April 10, 1922, an application was filed in this Court, being Insolvency Application No. 26 of 1922, for an order of adjudication being passed against the firm of Pokardas Kishindas and its partners whose names including that of the insolvent were disclosed therein.

On that application which was not opposed Kennedy, J. C., who then presided over the Insolvency Court passed an order of adjudication, the effect of which is a matter of dispute as will presently appear. In pursuance of that order the Official Receiver dealt with the estate of the insolvent firm and the insolvent Jamnadas appeared before him as an adjudicated insolvent. He, however, handed over no property as he had none to give and failed to apply for his discharge. For two years after the failure of that firm he worked as a paid servant of the firm of Rassomal Ramchand on a monthly salary of Rs. 100 plus Rs. 25 for messing. Partly due to the usual laxity of the creditors of that firm he was not made to pay to the Official Receiver a part of these earnings for the benefit of his creditors. Evidently emboldened by what had trans-

pired, he started a new business in the name of Utma Mallik Vishindas. He states that this new firm consisted of (1) himself (2) his father-in-law Utma Mallik and (3) his son Vishindas. Vishindas was a young boy who had just then left school, and like his father, he possessed no tangible property whatsoever, which in the event of a loss in the business could be made liable to his creditors. Utma Mallik was equally a man of no ostensible means. He was seventy years old and worked as a petty broker at Multan earning about Rs. 30 a month. The only immoveable property possessed by him is said to have been gifted by him to the wife of his predeceased son in the year 1913. That lady, however, continued to live with him, and for reasons which may well be surmised, in her own turn gifted that property to her daughters in the year 1924, just about the time the business of Utma Mallik Vishindas was started in Karachi. Utma Mallik never came down to Karachi and Vishindas took no active part in the business which was solely conducted by Jamnadas. The object of Jamnadas in trading in this assumed name is not far to seek. If he made a profit, he could easily avoid its being made liable for the debts of the firm of Pokardas Kishindas by pleading that he was a paid servant of his father-in-law. If there was a loss there was nothing for his creditors to fall back upon. Under this assumed name Jamnadas was able to induce certain up-country constituents to send down their goods to him on commission sale. He entered into extensive speculative forward transactions on his own behalf with local merchants and for some time paid up his losses by misappropriating to his own use the money of his constituents particularly one Shamdas Bhagwandas. The period of his new activities was about a year. During that period he converted to his own use Rs. 9,750 out of the moneys payable to Shamdas Bhagwandas. He has passed an acknowledgment in their favour for this amount on *Chaita Dino* 5th, i. e., March, 1925. For two months more he continued to carry on his business and in May, 1925, applied for his firm being adjudicated as insolvent and his firm and he have been adjudicated as such.

In support of the application under s. 72, cl. (1) it is urged that Jamnadas obtained credit from diverse constituents by

inducing them to send their goods to him on commission sale on the express or implied promise that he will hand over the sale proceeds to them and that in any case he obtained credit from Shamdas Bhagwandas in March, 1925, when he passed an acknowledgment in their favour for Rs. 9,750 and when according to the admission made by him in his evidence recorded by me on August 30, 1927, he "promised to re-pay this amount in a short time." It has also been urged that his conduct in pledging some of their goods to the Punjab National Bank on 3rd December, 1925, coupled with the diverse means employed by him in putting off payment render him liable for an offence under s. 409, Indian Penal Code.

Now, with regard to the application under s. 72 (1) for which the opponent has due notice, the questions to be answered by the Court are very simple and as laid down in *R. v. Duke of Lenster* (1) are the following :

(1) Is the opponent an undischarged insolvent?

(2) Did he obtain credit to the extent of Rs. 50 or upwards?

(3) Did he in fact inform the person from whom he obtained credit that he was an undischarged insolvent?

With regard to the first question it has been contended that in order to be an undischarged insolvent the opponent must be an adjudicated bankrupt and that as no specific order was passed by Kennedy, J. C., in Insolvency No. 26 of 1922, adjudicating Jamnadas as an insolvent the answer to the first question must be in the negative. I am not prepared to accept the second part of this contention.

It is no doubt true that the rules recently framed by this Court under s. 79, cl. (2) sub-cl. (c) require that a petition filed by one of the partners of the insolvent firm for its adjudication should either be verified by all the partners or be supported by an affidavit by the person filing it that he has the authority of others.

These rules were, however, not in force when the Insolvency Application No. 26 of 1922 was filed. That application complied with the provisions of O. XXX, Civil Pro-

(1) (1924) 1 K. B. 311; 93 L. J. K. B. 144; (1924) B. & C. R. 78; 17 Cr. App. R 176; 130 L. T. 318; 87 J. P. 191; 27 Cox C. C. 574; 68 S. J. 211; 40 T. L. R. 33.

cedure Code, and was accepted as a proper application on behalf of the firm under the procedure then in force.

The order passed by the learned Judicial Commissioner, no doubt, refers to the applicant being adjudicated as an insolvent but the singular includes the plural, *vide* s. 13 cl. (2) of the General Clauses Act X of 1897. Section 79, cl. (2), sub-cl. (c) of the Provincial Insolvency Act provides for the procedure to be followed when "the debtor" is a firm. The order of the learned Judicial Commissioner cannot but be read in the light of the application itself. The applicant was the firm and not an individual, and the order of adjudication against the applicant was an order against the firm and against each and every partner in that firm.

This order was at no time misunderstood. The subsequent proceedings were continued against the firm and each partner therein and all notices issued by the Court were to that effect. Jamnadas himself appeared before the Official Receiver in those proceedings and took part as an adjudicated insolvent, and even in the present proceedings he has admitted on solemn affirmation that he was a partner of the firm of Pokardas Kishindas and was adjudicated as an insolvent. He is undoubtedly an adjudicated insolvent and has not so far applied or obtained his discharge in these proceedings. My answer to the first question is, therefore, in the affirmative.

Now, there can be no doubt that the fact that Jamnadas traded in an assumed name would by itself be an offence under s. 155 of the English Bankruptcy Act, but the whole of that section does not find place in the Indian Statute. It is only cl. (a) of that section which with certain minor amendments has been reproduced in s. 72, cl. (1) of the Indian Act. It is urged by Mr. Suganlal that obtaining goods from constituents for sale on commission on an express or implied promise to hand over the sale-proceeds is not obtaining credit within the meaning of the section. It is further urged that as the words "alone or jointly" which appear in cl. (a) of s. 155 of the English Act find no place in the Indian Act, the obtaining of credit, whatever be its meaning, by the opponent on behalf of a firm which consisted of others besides him is likewise no offence.

Different meanings are attached to the expression "credit". It has, *inter alia*, been defined in Webster's Dictionary and in Oglive's Dictionary as "Trust, transfer of goods in confidence of future payment" in Murray's Dictionary as "Trust or confidence in a buyer's ability or intention to pay at some future time exhibited by entrusting him with goods without present payment", and also as "Reputation of solvency and probity in business enabling a person or body of persons to be trusted with goods or money in expectation of future payment," and in Johnson as correlative of debt.

The different definitions referred to above appear to be very wide, and it is a fairly arguable point that the expression "obtaining credit" includes within its ambit the securing of goods on trust that they will be sold and sale-proceeds handed over. In the present case, however, I do not feel myself bound to give any definite finding on that point as there can be no doubt that when the opponent passed an acknowledgment promising to pay Rs. 9,750 in the future he obtained credit for it. I am also not prepared to hold that the words "either alone or jointly with any other person" which do not appear in s. 72 make any difference. Both the Insolvency Acts render the very person who obtains credit liable to be prosecuted; and it is immaterial if he obtains such credit solely on his own behalf or on behalf of himself and another person or if he joins another person and both together obtain such credit. The fact that the words referred to above have not been reproduced in s. 72 does not, in my opinion, limit the scope of that section, but if at all, it is intended to expand its scope.

I, therefore, hold on this question also against the opponent.

With regard to the third question it is not only disputed that the opponent failed to disclose the fact that he was an undischarged insolvent, but it has on the contrary been contended that as he was not an adjudicated insolvent he could not inform the firm of Shamdas Bhagwandas that he was an undischarged insolvent.

There can be no doubt that this is one of the worst instances brought to the notice of the Court where an undischarged insolvent has attempted to speculate with other men's money, and that it is incumbent on the Court to apply to him such penal pro-

visions of this or other Acts as may be applicable. I, therefore, order that the case of the opponent Jamnadas be sent to the City Magistrate, Karachi, for trial under s. 72, cl. (1) for obtaining credit from the firm of Shamdas Bhagwandas of the sum of Rs. 9,750 by signing an acknowledgment in his favour—on March, 1925.

I further order that the opponents should remain in custody pending his trial unless he gives bail in the sum of Rs. 1,000 (one thousand only) for his appearance before the Magistrate.

During the course of the inquiry, it has been brought to my notice that the conduct of the opponent in raising a loan of Rs. 5,000 from the Punjab National Bank on December 3, 1924, on the pledge of certain goods of Shamdas Bhagwandas is such as *prima facie* renders him liable to a prosecution under s. 409, Indian Penal Code.

As commission agent the opponent had implied authority to pledge the goods of his principals for the purpose of honouring his *hundis* but not otherwise. On December 3, he had in his possession large sums of moneys belonging to the firm of Shamdas Bhagwandas from which he could honour these *hundis*. As he had spent their money for his own purposes he pledged on that day 330 bags belonging to his constituents with the Punjab National Bank for Rs. 5,000, and according to him honoured on that day *hundis* for that amount. Of these 330 bags, 141 were consigned to the Punjab National Bank and were intended to be pledged with that Bank for the purpose of meeting some future *hundis*. Whatever may be said in favour of the opponent in pledging these 141 bags with the Punjab National Bank for meeting future *hundis* and his failure to honour these *hundis*, *prima facie* he had no jurisdiction for pledging the remaining 189 bags which were consigned to him. The opponent not only raised a loan on the 330 bags but falsely intimated to the constituents that he was not able to raise the loan and on that pretext he dishonoured other *hundis* drawn by them which were payable in the following month. In Ex. 12 dated January 18, 1925, he falsely wrote to his constituents that their goods were of inferior quality and that, therefore, the Bank would not make an advance, and in Ex. 13 dated January 22, 1925, he wrote that he was trying to make arrangement with the Bank, and that he would inform

them by wire as soon as he succeeded with the Bank.

It is urged and not without considerable force that he wrote these letters with no other object but to avoid detection that he had already converted to his own use large sums of money belonging to them. It was not till March, 1925, that the constituents were apprised of the pledge and were compelled to redeem their goods by payment of the money.

The English Larceny Act 1916 (6 & 7 Geo. V, c. 50) refers in detail to the different kinds of fraudulent conversion of property and s. 22 (1) of that Act *inter alia* as follows: "22 (1) Every person who, being a factor or agent entrusted either solely or jointly with any other person for the purpose of sale or otherwise with the possession of any goods or any document of title to goods contrary to or without the authority of his principal in that behalf for his own use or benefit, or the use or benefit of any person other than the person by whom he was so entrusted, and in violation of good faith—

(i) Consigns, deposits, transfers, or delivers any goods or document of title so entrusted to him as and by way of a pledge, lien, or security for any money or valuable security borrowed or received, or intended to be borrowed or received by him; or

(ii) Accepts any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer, or deliver any such goods or document of title; shall be guilty of a misdemeanour, and on conviction thereof, liable to penal servitude for any term not exceeding seven years: Provided that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery, was justly due and owing to such agent from his principal, together with the amount of any Bill of Exchange drawn by or on account of such principal and accepted by such factor or agent."

It would appear that the pledge of 189 bags by the insolvent was *prima facie* without authority and for his personal use or benefit and as such a misdemeanour. His act in doing so would equally fall within the purview of the very wide and compre-

hensive provisions of s. 409, Indian Penal Code, read with ss. 403 and 405 of the Indian Penal Code.

A complaint under s. 409 or such other sections of the Indian Penal Code as are applicable to the circumstances of this case does not require any sanction of the Court and it will be for the Official Receiver to consult the Public Prosecutor, and if so advised to institute further proceedings against the insolvent under those sections. If he is advised to ask for specific sanction, it is open to him to apply for it.

With regard to the application under ss. 69 and 70 of the Act, I have no materials before me at present to hold that the mortgage of his house property by the insolvent and his brothers for Rs. 1,500 was based on the requisite fraudulent intent of concealing his interest in the property from his creditors in the prior insolvency or that his failure to disclose that property in the present proceedings was necessarily wilful. The schedules filed along with the present application have been drawn up and verified as true without due care and caution. There is no doubt that the insolvent was bound to and should have disclosed the existence of the property and of the mortgage created on it. But it is possible that his failure to disclose these facts was due to want of care and as at the very first hearing when the insolvent was examined by me in Court he readily disclosed its existence I am prepared to give him the benefit of the doubt. I accordingly discharge the Rule under ss. 69 and 70.

P. B. A.

Rule discharged.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 44 OF 1927.
November 7, 1927.

Present:—Mr. Percival, J. C., and Mr. Rupchand Bilaram, A. J. C.
Seth LALCHAND—APPELLANT

versus

ISSERSING AND OTHERS—RESPONDENTS.

Corporations created by Statute—Corporate acts and meetings—Quorum—Common law rule—Majority of members—Election of Chairman—Corporate act—Bombay Primary Education Act (IV of 1923), s. 4 (5);

When a Statute grants powers on any definite number of persons in respect to a public, as opposed to a private, trust and contains no indication to the contrary, it is necessary that a majority of that number should act together and should attend every meeting when any corporate act is done or purported to be done. [p. 447, col. 2.]

King v. Beeston (1), *Blacket v. Blizzard* (2) and *Merchants of the Staple v. Bank of England* (3), relied upon.

The election of a Chairman of corporate body is a corporate act which has to be performed as a preliminary to further corporate acts being performed by the corporation. [p. 448, col. 2.]

Appeal against a judgment and decree of the District Judge, Sukkur.

Mr. Dipchand Chandumal, for the Appellant.

Mr. Srikishendas H. Lulla, for the Respondents.

JUDGMENT.—The short question raised in this second appeal is as to the number of members which was necessary to form the quorum at the first meeting of the Shikarpur School Board at which the Chairman and the Vice-Chairman are said to have been elected.

It is common ground that the Bombay Primary Education Act of 1923 under which the School Board is constituted contains no express provision in that behalf and the rules framed under the powers vested in Government by s. 27, cl. (1) of the Act provide that the School Board shall from time to time make Regulations not inconsistent with the Act or the Rules framed thereunder *inter alia* with respect to the number of members which should constitute a quorum at the meetings of the Board. This was the first preliminary meeting of the quorum convened for the sole purpose of electing a Chairman and Vice-Chairman, as contemplated by s. 4, cl. (5) of the Act read with r. 21 framed thereunder. This rule reads as follows:—

"At its first meeting, which shall be convened by the President of the local authority, a School Board shall elect from among its members a Chairman and a Vice-Chairman, whose terms of office shall be co-extensive with that of the Board. If either of them resigns his office or ceases to be a member of the Board, a fresh election shall be made."

The total number of members on the Board is seven out of whom one is a lady. She was admittedly absent from the meeting. The plaintiffs Nos. 1 to 3 who are respondents Nos. 1 to 3 in this appeal assembled together outside the meeting

hall but kept themselves away from the meeting. They, however, stayed near enough to keep a watch on what was being done inside the hall. The defendants Nos. 1 to 3 who are the present appellants met together and elected defendants Nos. 1 and 2 as the Chairman and the Vice-Chairman of the Board respectively. They then dissolved the meeting without doing any further act.

The plaintiffs have, *inter alia*, contended that in the absence of a rule prescribing the number of members which should form a quorum at the meetings of the Board and which was necessary before the Chairman could be selected, the Common Law rule applied, and no Chairman or Vice-Chairman could be selected until and unless a majority of the total number of members was present at the meeting and that, therefore, the appointment of both these officers was *ultra vires*.

However objectionable the conduct of defendants Nos. 1 to 3 may have been in keeping themselves aloof from the meeting, there can be no doubt that the plea raised by them is well-founded and has been rightly given effect to by both the Courts.

The School Board is a public corporation as opposed to a private corporation and has been created by Statute. In the absence of a quorum having been prescribed either by the Statute creating it or by the rules framed thereunder, there is no reason why the ordinary common law rule prevailing in England, which seems to have been followed in the United States as well, should not apply here. It is a wise and a just rule and is based on sound reason. If this rule were not to apply the position of the appellants would be much worse. The School Board like every other statutory corporation consists of persons who exist in contemplation of law only and not physically. Its members individually are not the Board and cannot individually exercise their corporate powers or rights or perform their corporate duties. If that is so, it would appear that in the absence of any law or rule to the contrary every one of the members must join in doing corporate acts. This would mean a very serious hardship and would defeat the very objects for which the Board has been constituted. It is for the purpose of relieving this hardship which would be caused otherwise that the Common Law

rule has come into existence. It provides that when a Statute grants powers on any definite number of persons in respect to a public as opposed to a private trust and contains no indication to the contrary, it is necessary that a majority of that number should act together and should attend every meeting when any corporate act is done or purported to be done.

In *King v. Beston* (1) while referring to the exercise of powers vested in certain church-wardens and overseers by 9 Geo. I, c. 7, s. 4, Lord Kenyon, C. J., said:—

"Besides, in common understanding, what is required to be done by the church-wardens and overseers is satisfied by being done by a majority. And indeed if we were to determine otherwise, the inconvenience would be so great as to make it necessary for the Legislature to interfere and pass another law."

In *Blacket v. Blizzard* (2) Mr. Justice Bayley said that it is a general rule of law that where a public trust is to be executed by a definite number of persons it must be exercised at a meeting where a majority of that number is present unless there be a usage to the contrary. And Mr. Justice Parke said:—

"Unless we were to hold that a majority of the number required to constitute (in that case) the select vestry should be present, it is possible that they might be reduced to a number so small as to be unfit to manage the affairs of the parish. It cannot be supposed that that was the intention of the Legislature."

A distinction was drawn in that case between trust of a public and private nature and it was observed that in the latter case, in the absence of any intention to the contrary, the trust must be executed by all the persons to whom it was given.

It would appear that the Common Law Rule of a majority binding the minority in the case of statutory corporations of a public nature is based on the presumed intention in that behalf of the statutory authority; and is in relaxation of the general rule that a trust should ordinarily be executed by all the persons on whom it is conferred.

In *Merchants of the Staple v. Bank of*

(1) (1790) 3 T. R. 592 at p. 595; 1 R. R. 777; 100 E. R. 750.

(2) (1829) 8 L. J. K. B. (o. s.) 85; 9 B. & C. 851; 4 Man. & Ry. 641; 33 R. R. 360; 109 E. R. 317.

England (3) Wills J., has stated the law thus:—

"The acts of a corporation are those of the major part of the corporators, corporately assembled: Com. Dig. tit. Franchise F. 11; and, omitting the words 'corporately assembled,' this is declared by 33 Hen. VIII, c. 27, to be the Common Law. This means that, in the absence of special custom, the major part must be present at the meeting, and that of that major part there must be a majority in favour of the Act or Resolution. It was so decided in Easter Term, 1693; *Hascard v. Somany* (4) quoted in Viner's Abridgment, tit. Corporations, G. 3, pl. 7; and it was said by Lord Mansfield in *Rex v. Monday* (5) to be undoubted law. By 'corporately assembled' it is meant that the meeting shall be one held upon notice which gives every corporator the opportunity of being present: See *Smyth v. Darley* (6)."

It has been faintly suggested that the School Board exercised certain delegated functions of the Municipality and that, therefore, in the absence of any quorum having been prescribed by the Primary Education Act, the quorum prescribed for meetings of the parent body under s. 35, cl. (7) of the Bombay District Municipal Act, which is one-third of the total should prevail. The obvious answer to that argument is that the School Board is a separate corporate body created by a separate Statute which is self-contained. It is applicable not only to areas under the control of City Municipalities governed by the Bombay District Municipal Act III of 1901 but to other areas under the control of smaller Municipalities created by a separate Statute and under the control of Local Boards governed by the District Local Boards Act. It will appear that the School Board consists not only of Municipal Councillors but also others who are in no way governed by and in no way amenable to the provisions of the Bombay District Municipal Act. Under the circumstances, it would be a violation of every canon of construction to incorporate the provisions of the Bombay District Municipal Act III of 1901 into the Primary Education Act of 1923.

There is a further difficulty in the way of the acceptance of this argument. Sections 35 and 43 of the so-called parent Act provide for different quorums in the case of general meetings and meetings of the Committees of the Municipality. A question, therefore, immediately arises which of the two should apply to the School Board which at most resembles a Committee appointed for a specific purpose and is delegated with only some of the functions of the Municipality.

It was also suggested that the election of the Chairman and the Vice-Chairman were not corporate acts. There is no substance in this plea either. Indubitably the election of both the officers was a corporate act. At any rate the election of the Chairman was a corporate act which had to be performed as a preliminary to further corporate acts being performed by the Board. His election entitled him to exercise certain powers throughout the whole period of the Board and in the absence of any special method provided by the Statute as applicable to his election, such election could only take place at a corporate meeting of the Board duly convened and constituted.

We have no hesitation in holding that the election of both the defendant No. 1 and the defendant No. 2 as the Chairman and the Vice-Chairman respectively was *ultra vires* and has been rightly set aside.

With regard to costs we think that it is a fit case in which each party should bear his own costs throughout. In the Court of the first instance the plaintiffs Nos. 1 to 3 raised several other pleas on which they have failed. They are also considerably to blame for this litigation, and it would appear that they purposely kept themselves aloof from the meeting so as to break the quorum. The defendant No. 4 was awarded costs in the Court of the first instance and has not been made a party to this appeal. That order will, however, stand good.

This appeal is, accordingly, dismissed. The appellants should bear their own costs throughout and also the costs of the defendant No. 4 awarded by the lower Court against the appellants. The respondents should likewise bear their own costs throughout.

The interim injunction issued by this Court *ipso facto* stands dissolved.

P. B. A.

Appeal dismissed.

(3) (1888) 21 Q. B. D. 160 at p. 165; 57 L. J. Q. B. 418; 36 W. R. 880; 52 J. P. 580.

(4) (1693) 1 Freeman 504; 89 E. R. 380.

(5) (1777) 2 Cowp. 530; 98 E. R. 1224.

(6) (1849) 2 H. L. O. 789; 9 E. R. 1293; 81 R. R. 392.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

March 10, 1927.

Present:—Viscount Dunedin, Lord
Darling and Sir Lancelot Sanderson.

KRISHNA REDDI—APPELLANT

versus

GANDAVARAM RAGHAVA REDDI AND

ANOTHER—RESPONDENTS.

Hindu Law—Alienation by father—Sham alienation—Father's share, whether passes—Finding that transfer was not bona fide—Remand by Appellate Court for definite finding as to whether transfer was real, legality of—Decree conditional on payment of amounts defrayed by transferee—Appellate Court—Reversal of decree in favour of defendants who have not appealed.

The plaintiff sued to set aside two sale-deeds executed in favour of the third and fourth defendants and a gift deed executed in favour of the fifth defendant and for recovery of possession of the properties covered by the deed. The first sale-deed was executed by the plaintiff's grandfather and the second by the plaintiff's grandfather and the plaintiff's father jointly, and the deed of gift was executed by the plaintiff's father alone. The Subordinate Judge found that the sale-deeds were invalid, as against the plaintiff and his share, and that the gift deed was wholly invalid. On appeal by the third and fourth defendants the District Judge held that the sale-deeds were not *bona fide* ones and made a decree that the plaintiff should recover the properties covered by the sale-deeds on payment to the fourth defendant of a certain sum of money which was found to have been used for defraying family debts. On second appeal, the High Court remanded the case for a formal decision on the question whether the sale-deeds effected a real alienation. The District Judge submitted a finding that no consideration really passed and that the transactions were not genuine, and the High Court declared that the sale-deeds and the gift deeds were null and void and decreed possession of the properties covered by the deeds. On Letters Patent appeal the Judges accepted the finding that the transactions were purely sham, but made the decree for possession of the properties dependent upon payment by the plaintiff of the amount specified by the District Judge. On appeal by the plaintiff to the Privy Council:

Held, (1) that the decree made in Letters Patent appeal was erroneous in so far as it made the recovery of the properties covered by the gift deed also conditional on payment of the sum specified inasmuch as the fifth defendant had not preferred any appeal from the decision of the Subordinate Judge, and the decree so far as he was concerned had become final; [p. 452, col. 2.]

(2) that the Division Bench of the High Court did not act wrongly in calling for a definite finding on the question whether the sale-deeds effected real transfers; [*ibid.*]

(3) that the finding of the District Judge that the transfers were sham and that there was no consideration for them must be considered to have eradicated his previous finding that the fourth defendant had discharged certain family debts, and that the decree of the Letters Patent Bench was, consequently, wrong in so far as it made recovery of possession conditional on payment of the amounts specified in the decree of the District Judge; [p. 453, pl. 1.]

(4) that in view of the finding of the District Judge that no real transfers were intended or effected between the parties, it was not necessary to consider the question whether the third and fourth defendants were entitled to the share of the transferors. [*ibid.*]

Consolidated appeal from a decree of the Madras High Court dated the 19th April, 1920, modifying a decree of the Division Bench of the same Court, dated the 16th February, 1918.

Messrs. K. V. L. Narasimham and P. V. Subba Row, for the Appellant.

Messrs. De Gruyther, K. C., and Raikes, for the Respondents.

JUDGMENT.

Sir Lancelot Sanderson.—This is an appeal by the plaintiff, Krishna Reddi, and a cross-appeal by Gandavaram Raghava Reddi and Kodur Venkataperumal Reddi, defendants Nos. 3 and 4, from a judgment and decree, dated the 19th April, 1920, of the High Court of Madras, in Letters Patent Appeal No. 23 of 1918. The suit was brought as long ago as 1910, and it has had a chequered career. The first defendant, Varada, was the father of the second defendant, Venkatarama, and the plaintiff is the son of the second defendant, and they are members of a joint undivided Hindu family. Venkatarama, the second defendant, had two wives; by his first wife he had a daughter, and by the second he had an only son, *viz.*, the plaintiff.

It was alleged on behalf of the plaintiff that he and his mother were obliged to leave the home of the second defendant and to live with the plaintiff's mother's people for some three and a half years before the suit was brought.

The third, fourth, and fifth defendants were alleged to be close friends of the second defendant.

By a document, dated the 22nd January, 1910, the first defendant, Varada, purported to sell to the third defendant the properties comprised therein and specified in schedule A to the plaint. The consideration was alleged to be Rs. 15,000, and the property was alleged to be the self-acquired property of the first defendant.

On the same day, the first and second defendants (the second defendant purporting to act for himself and his minor son, the plaintiff), by another document, purported to convey to the fourth defend,

ant the property comprised therein, and described in schedule B to the plaint. The consideration was alleged to be Rs. 20,000, through a bond executed in favour of the second defendant for discharging certain debts specified therein, and also other family debts.

On the 9th February, 1910, the second defendant purported by means of an alleged deed of gift of that date, to give certain properties, specified in schedule C to the plaint in favour of a temple, of which the fifth defendant was trustee.

The plaintiff alleged that the properties specified in schedules A, B and C were joint family properties of the family, of which the plaintiff and the first and second defendants were members, that the above mentioned alleged deeds of sale and the deed of gift were fraudulent and devoid of consideration, that there was no legal necessity, and that the alleged deeds were nullities.

On the 31st January, 1910, the alleged deeds of sale were registered, in spite of the plaintiff's mother's objection before the Registrar.

The suit was brought on the 15th April, 1910, and the plaintiff claimed therein a declaration that the sale-deeds and the deed of gift were null and void and that he should be put in possession of the above-mentioned properties on behalf of the joint family. There was an alternative prayer for partition in case it was held that the deeds were in any way binding on the interests of the first and second defendants.

The case of the contesting defendants, viz., defendants Nos. 3 and 4, was that the sales were *bona fide* and that consideration passed for them, and that title was intended to and did actually pass to them.

The first defendant was an old man, and it was alleged that the second defendant was acting as manager of the family.

The learned Subordinate Judge found that the sale-deeds were made to defraud the plaintiff, that they were not *bona fide* to discharge antecedent debts, and that they were not valid as against the plaintiff to the extent of his share, viz., one-quarter. He held that the properties in schedule A were joint family properties. This finding is not now disputed. He held, further, that the gift of the properties in schedule C was

invalid. This finding also is not now disputed.

While holding that there was consideration and that title was intended to pass under the two deeds of sale, he found there was no necessity for the sale and made a decree, dated the 15th April, 1913, that the defendants Nos. 3 and 4 should put the plaintiff in possession of his share of the properties on his paying into Court Rs. 2,945-11-6 (i. e., one-quarter of Rs. 11,782-14-0), to be paid to the third and fourth defendants in the way they might arrange between themselves. It was further ordered that the fifth defendant should put the plaintiff in possession of the properties comprised in schedule C.

The above-mentioned sum of Rs. 11,782-14-0 is explained by the fact that the learned Subordinate Judge found that debts to the extent of Rs. 11,782-14-0 had been discharged by the fourth defendant.

The plaintiff and the defendants Nos. 3 and 4 appealed against this decree to the learned District Judge. The plaintiff alleged that the alienations should have been set aside *in toto* as void, and the third and fourth defendants urged that the alienations were made for justifiable necessity and should have been upheld, and the plaintiff's suit should have been dismissed.

The learned District Judge held that Exs. I and II, which are the alleged sale-deeds of the 22nd January, 1910, were not *bona fide* sales, but were resorted to to screen the properties in case the plaintiff should bring a suit. In a later part of his judgment he held that in pursuance of a scheme to defraud the plaintiff or his family the alienations were made, and the third and fourth defendants actively participated in the fraud. He held, further, that the transactions were void even if consideration passed.

He made a decree reversing the decree of the trial Court, in so far as it was against the plaintiff, and declaring that the plaintiff was entitled to get the sales of A and B schedule lands set aside, and that the plaintiff should recover possession of the said A and B schedule lands on behalf of the family on payment of Rs. 11,782-14-0, the amount of the debts which had been discharged by the fourth defendant. The plaintiff's appeal was allowed and the appeal of defendants Nos. 3 and 4 was dismissed.

Their Lordships understand that the decree of the learned Subordinate Judge, as

regards the properties comprised in schedule C was not interfered with.

The defendants Nos. 3 and 4 appealed to the High Court of Madras and the plaintiff filed cross-objections. The learned Judges of the High Court who heard the appeal remanded the case to the lower Appellate Court on the grounds that the learned District Judge had not recorded a formal decision on the question whether the alleged sale-deeds effected any real alienations, and that the learned District Judge had apparently decided the appeal on the ground that in any event a finding that the sales were merely fraudulent was a sufficient basis for the grant of the relief asked for. They required the learned District Judge to submit findings on the following issues:—

(1) Whether the alienation of A and B scheduled properties is not supported by consideration?

(2) Did either or both of the documents, Exs. I and II, effect a real transfer of the property which they purported to convey?

Exhibit I is the deed of 22nd January, 1910, in favour of Raghava (third defendant), and Ex. II is the deed of 22nd January, 1910, in favour of Venkataperumal (the fourth defendant).

The learned District Judge on remand found that the real object in resorting to the sales was to screen the properties from the plaintiff, and that no consideration really passed; that the parties did not intend that the transactions should be genuine, and that the promissory notes only served to give an appearance of truth to the transactions.

On the two above-mentioned issues he found that Exs. I and II were not supported by consideration and that those documents did not effect a real transfer of the properties which they purported to transfer.

On the further hearing of the appeal and upon the above-mentioned findings of the learned District Judge, the learned Judges of the High Court were agreed that the lower Court's findings must be accepted, and said that they would deal with the decree on the footing that as against the plaintiff at least the alienations of A and B scheduled properties were not for consideration and that Exs. I and II effected no real transfers.

Unfortunately, the learned Judges could not agree as to the course which should be adopted. They, however, came to the

conclusion that the opinion of the Senior Judge should prevail, and accordingly they directed that the learned District Judge should be called upon to submit a further finding as proposed in the judgment of the Senior Judge. The case, therefore, was again remanded to the learned District Judge for a finding on the issue whether as between the first and second defendants and the third and fourth defendants Exs. I and II effected a conveyance wholly or partially valid of the former's shares to the latter.

The learned District Judge submitted his finding as follows:—

“For these reasons and for those set forth in my previous finding, I find that, as between the first and second defendants and the third and fourth defendants, Exs. I and II did not effect a conveyance of the former's share to the latter.”

The appeal then came once more before the learned Judges of the High Court.

The Senior Judge came to the conclusion that the appeal of the defendants Nos. 3 and 4 should be dismissed and that the plaintiff's memorandum of objections should be allowed.

The other learned Judge agreed that the final order should be as proposed by the Senior Judge, but stated that he still adhered to the opinion which he expressed in his previous judgment and would have passed an order in the terms therein mentioned. The decree of the High Court, dated the 15th February, 1918, therefore, was to the effect that the decrees of the lower Appellate Court and of the Court of first instance should be set aside and a declaration was made that the sale-deeds of the 22nd January, 1910, and the deed of gift, dated the 9th February, 1910, were null and void and not binding on the plaintiff's family, and the Court further decreed that the defendants Nos. 3 and 4 should put the plaintiff in possession of the plots A, B and C schedule properties, and that the Subordinate Judge should hold an enquiry regarding future mesne profits until date of delivery or three years from that date, whichever should be nearer, and pass a decree for them under O. XX, r. 12. The decree contained a further direction for the payment by the defendants Nos. 3 and 4 of the plaintiff's costs.

This, however, was not the end of the proceedings in the High Court, for, as the learned

Judges had differed, the defendants Nos. 3 and 4 appealed under the provisions of the Letters Patent from the decision of the learned Senior Judge of the Division Bench. This appeal was heard by the learned Chief Justice and two other Judges of the High Court. The three learned Judges accepted the findings of the learned District Judge, which they stated, were also accepted by the learned Judges of the Division Bench, *viz.*, that the sales were purely sham transactions intended to defeat the plaintiff.

They then stated that the only other question for consideration was whether the learned District Judge was right in making relief which he had given to the plaintiff dependent upon the payment of the sum paid by defendants Nos. 3 and 4 for the discharge of the joint family debts. It should be noted that this order of the learned District Judge was not quoted correctly. The relief given by the learned District Judge to the plaintiff was dependent upon the payment of the debts which had been discharged by the fourth defendant; there was no reference to any sum paid for the discharge of debts by the third defendant in the decree of the learned District Judge.

The learned Judges came to the conclusion that there was no reason for interfering with that part of the decree of the learned District Judge. They, therefore, decided to modify the decree made by the learned Senior Judge of the Division Bench of the High Court by making the decree for possession dependent upon the payment by the plaintiff in the manner provided in the decree of the District Judge, and directing that the amount should bear interest at 6 per cent. from the date of the decree of the Subordinate Judge. The decree, as drawn up, directed that the defendants Nos. 3 and 4 should put the plaintiff in possession of the plaint A, B and C schedule properties on payment by the plaintiff of Rs. 11,782-14-0 and that the said amount should carry interest at 6 per cent. per annum from the 15th April, 1913, until the date of payment.

It is to be noted that the decree, as drawn up, went further than the judgment of the learned Judges who heard the Letters Patent Appeal. The decree of the learned District Judge provided that the plaintiff should recover possession of the said A and B schedule lands on payment of the sum of Rs. 11,782-14-0.

The recovery of the schedule C lands by the plaintiff was not dependent upon the payment of the said sum.

But the decree made by the learned Judges who heard the Letters Patent appeal made the recovery of the schedule C lands dependent upon the above-mentioned payment, as well as the schedules A and B lands.

Since the decree of the learned Subordinate Judge, which directed that the fifth defendant should put the plaintiff in possession of the schedule C lands, there had been apparently no question as to this part of the case.

The decree in the Letters Patent appeal directed the defendants Nos. 3 and 4 to put the plaintiff in possession of the schedule C lands, although, as far as their Lordships know, defendants Nos. 3 and 4 had nothing to do with the schedule C lands.

It is, therefore, apparent that the decree appealed from cannot stand in its present form.

There is, however, a serious question whether there is any reason why the decree of the Division Bench of the High Court, dated the 15th February, 1918, should be interfered with. It was argued on behalf of the defendants Nos. 3 and 4 before the Board that the learned Judges of the Division Bench of the High Court were wrong in remanding the case for a finding upon the two issues, which have already been referred to. Their Lordships are not prepared to hold that the learned Judges were wrong in remanding the case for a clear and definite finding upon the issues, whether the alienation of A and B scheduled properties was not supported by consideration, and whether either or both of the documents, Exs. I and II, effected a real transfer of the property which they purported to transfer.

Their Lordships agree with the learned Judges that definite findings on these issues were material and necessary.

If, then, the remand was not wrong, the findings of fact made by the learned District Judge upon these two issues were binding upon the High Court unless it could be said that there was no evidence to support them. Their Lordships are clearly of opinion that such an objection to the findings cannot be upheld. The findings of the learned District Judge were adopted by the learned Judges of the Division Bench which heard the second appeal and by the learned

Judges who heard the Letters Patent appeal, and their Lordships see no reason for differing from the conclusion arrived at by all the High Court Judges in this respect.

There remains the question whether, in view of these findings, there was any ground for altering the decree of the Division Bench dated the 15th February, 1918.

The learned Judges who heard the Letters Patent appeal apparently concluded that it would not be equitable to allow the plaintiff to recover possession of the A and B schedule property unless he paid the amount of the debts discharged by the fourth defendant. In view, however, of the above-mentioned findings, which must be accepted, it cannot be held that the fourth defendant did discharge family debts as alleged.

The finding to that effect, which may be said to arise from the learned District Judge's decree of the 26th February, 1915, must be considered to have been eradicated, when the learned District Judge, on remand and on further consideration of the evidence, came to the conclusion that there was no consideration for either of the alleged sale-deeds, Exs. I and II, and that these deeds did not effect a real transfer of the properties.

Subject to a further question which was raised by the learned Counsel on behalf of the third and fourth defendants, their Lordships are of opinion that there was no ground for interfering with the decree of the Division Bench of the High Court, dated the 15th February, 1918.

The other point to which reference has been made is as follows:—It was argued on behalf of defendants Nos. 3 and 4 that, as between defendant No. 2 (*viz.*, Venkatarama, the father of the plaintiff) and the defendants Nos. 3 and 4, there was no reason for holding that the transfer was not complete, and that a decree should be made declaring that the defendants Nos. 3 and 4 were entitled to the share of the defendant No. 2 in the above-mentioned properties.

Their Lordships are not satisfied that this point was raised before the learned Judges who heard the Letters Patent appeal, and in view of the findings of the learned District Judge, that no real transfer was intended or effected between the above-mentioned parties, they are not prepared to enter upon the question further.

For the reasons herein contained their Lordships will humbly advise His Majesty that the plaintiff's appeal should be allowed and that the defendants Nos. 3 and 4 should pay to him his costs of the appeal before this Board; that the decree of the High Court in the Letters Patent Appeal No. 23 of 1918, dated the 19th April, 1920, be set aside, and that the decree of the High Court in Second Appeal No. 711 of 1915, dated the 15th February, 1918, should be restored, and that the cross-appeal of the defendants Nos. 3 and 4 should be dismissed with costs.

A. N. A. *Appeal allowed.*

Solicitors for the Appellant:—Messrs. Douglas Grant and Dold.

Solicitors for the Respondents:—Messrs. T. L. Wilson & Co.

PRIVY COUNCIL.

APPEAL FROM HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.

November 7, 1927.

Present:—Lord Chancellor, Lord Buckmaster, Lord Carson, Lord Darling, and Lord Warrington of Clyffe.

JAFFERALI BHALOO LAKHA AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE STANDARD BANK OF SOUTH AFRICA, LIMITED—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), ss. 247, 251—Minor partner's liability for obligations of firm—Partnership property, what constitutes—Managing partner's power to mortgage.

In accordance with s. 247 of the Contract Decree, applicable in Zanzibar (corresponding to s. 247 of the Indian Contract Act, 1872), where a minor is admitted to the benefit of the partnership, the result of that admission is, that, while he cannot, before he comes of age, be made personally liable for the obligations of the firm, yet his share in the partnership property is liable to the obligations of the firm. [p. 454, col. 2.]

Where partners are jointly entitled to property, and the question arises whether that property has been thrown into the assets of a partnership, that is a pure question of fact. [p. 455, col. 1.]

By virtue of the provisions of s. 251 of the Contract Decree, applicable in Zanzibar (corresponding to s. 251 of the Indian Contract Act, 1872), the managing partner of a trading firm has power to mortgage the partnership property, so as to bind the firm. [*ibid.*]

Appeal by special leave from a judgment of His Majesty's Court of Appeal for Eastern Africa, affirming the judgment of Mr.

Justice Tomlinson of His Majesty's Court of Zanzibar.

The material facts are set out in their Lordships' judgment.

JUDGMENT.

Lord Chancellor.—This is an appeal three of the defendants in this suit from judgment of the Court of Appeal for Eastern Africa, affirming the judgment of Mr. Justice Tomlinson of His Majesty's Court at Zanzibar in favour of the present respondents, who were plaintiffs in the suit.

The facts may be quite shortly stated. One Bhaloo Lakha, who was a member of the Khoja community, carried on business as a clove merchant at Zanzibar under the style of Lakha Velani & Co. In the year 1908 he acquired as his separate property the house in which the business was carried on. In the year 1913 he executed a deed of gift of all that he possessed in favour of his six sons. Later on in the same year he made a Will in which he declared that he had no property or estate of any description, and appointed his eldest son, Mahomedali, to be the guardian of his minor children. He died on the 6th October, 1916, leaving living all his six sons, of whom two, the first and second appellants, were then minors under the age of 18, and also leaving surviving him his widow, the third appellant. The business was, in fact, carried on under the management of three of the adult sons. On the 3rd September, 1919, an equitable mortgage of the house and other property was executed in favour of the respondents, the Standard Bank of South Africa, Ltd; but it was afterwards realised that an equitable mortgage was not effective, and, on the demand of the Bank, a mortgage-deed, dated 26th February, 1921, was executed in the name of the firm by Hussein Bhaloo Lakha, one of the three sons who were managing the business. By that deed the firm purported to mortgage to the Bank the house in question, with other property. Afterwards the business got into difficulties, and in the year 1922 this suit was commenced by the Bank against the firm, the Official Assignee of one son who was insolvent, and the other five sons, together with the widow. The claim was to enforce the mortgage, and a decree to that effect was made by the Court in Zanzibar, and was affirmed by the Court of Appeal for Eastern Africa.

The two sons, who were minors at the

date of the death of Bhaloo Lakha, and his widow, bring this appeal.

On these facts three questions in effect arise. The first question is whether the two sons, who are appellants, became, before or on their father's death, partners in the business. It has been found by both Courts that they did so become partners. In that connection the deed of gift has been referred to, and the question has been raised whether that deed was valid or not. That question has now become immaterial, for it is plain that, whether the deed of gift was valid or not, the business and the business assets of Bhaloo Lakha were, or on his death became, vested in his six sons, subject to the widow's right of maintenance; and the real question is whether after his death there was a valid arrangement under which the business was carried on for the benefit of the six sons, but under the management of the three managing partners. On that point it is of vital importance that, immediately after the death of Bhaloo Lakha, a request was signed to the Bank to open an account in the name of the firm, and that request contained a statement by Mahomedali, the guardian of the two minors, that all the six sons were partners in the business. If the guardian had power to bind the minor sons, then that request is decisive; and it appears to their Lordships that, both on the law as stated in Mr. Tyabji's book, and on the terms of the Will appointing him guardian, Mahomedali had that power. He had to decide how the business and the business assets, in which the minors were interested, could best be dealt with for their benefit; in other words, he had to say whether the business should be wound up or whether it should for a time be carried on.

He decided in favour of the latter view; and the profits of the business were divided among all the six sons. The effect was that, in accordance with s. 247 of the Contract Decree, which is applicable in Zanzibar, the two sons who were minors were admitted to the benefit of the partnership; and as the result of that admission, while they could not before they came of age be made personally liable for the obligations of the firm yet their shares in the partnership property were liable to the obligations of the firm. The document signed by the appellants on the 12th June, 1922, in no way affected that liability.

Then arises a second question: Was this

house part of the partnership assets? It has been found by both Courts that it was part of the business assets and of the partnership assets, and that concurrent finding of the two Courts cannot now be disturbed. Where partners are jointly entitled to property, and the question arises whether that property has been thrown into the assets of a partnership, that is a pure question of fact. In the present case that question of fact has been decided, and, as far as can be seen, correctly decided, in favour of the respondents.

A third question has been raised, namely, whether one of the partners (Hussein) had power to mortgage the property to the Bank so as to bind the firm. That question is really not material to the appellants; for even if the mortgage was ineffective, the house, being part of the business assets, would be available for the general body of creditors, and no share in it would come to the appellants. But it appears to their Lordships that upon the terms of s. 251 of the Decree the managing partner had power to execute the mortgage.

The result is that the appeal fails as regards the two sons who are appellants. As to the widow's claim to maintenance, the answer is given in the judgment of Mr. Justice Tomlinson, when he says:—

"With regard to the widow, as I understand it, she is entitled by Khoja custom to maintenance out of the estate. She has, however, no specific interest in any particular item of the family property, and her rights are subject to the general dealings with the estate by those in charge."

The result is that this appeal fails, and their Lordships will humbly advise His Majesty accordingly; but, as the appellants have come here *in forma pauperis*, there will be no order as to costs.

K. J. R.

Appeal dismissed.

Solicitors for the Appellants:—Messrs. Charles Russell & Co.

Solicitors for the Respondents:—Messrs. Thompson Quarral and Attneave.

Note:—This pronouncement of the Privy Council may set at rest the conflicting decisions of the Indian High Courts as regards a partner's authority to mortgage partnership property; see (*inter alia*) 2 M. L. A. 401; 15 E. R. 386; 6 W. R. P. O. 10; 1 Suth. P. C. J. 109; 1 Sar. P. C. J. 222—5 O. 792; 6 O. L. R. 34; 2 Ind. Dec. (N. S.) 1112—4 A. 437 at p. 459; A. W. N. (1882) 87; 2 Ind. Dec. (N. S.) 1013; and 31 M. 206; 4 M. L. T. 66—[K. J. R.]

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

June 20, 1927.

Present:—Viscount Haldane, Viscount Sumner, Lord Shaw, Lord Merrivale and Lord Warrington of Clyffe.

THE MUNICIPAL COUNCIL OF SYDNEY

—DEFENDANTS—APPELLANTS

versus

MARGARET ALEXANDRA TROY—

—PLAINTIFF—RESPONDENT.

Interpretation of Statutes—Retrospective operation—Land Acquisition Act (I of 1894)—Interest on compensation awarded.

Generally speaking, a Statute conferring or dealing with substantive rights has no retrospective operation. Accordingly, s. 17 of the Sydney Corporation Act, 1924 (corresponding, in India, to the Land Acquisition Act, 1894), declaring that "the rate of interest payable upon compensation for land acquired by the Council by resumption—or by any compulsory purchase, shall be six per centum per annum" cannot be construed retrospectively so as to affect the rate at which interest was payable before the Act came into operation. [p. 456, col. 1.]

Appeal from the Supreme Court of New South Wales.

The material facts are given in their Lordships' judgment.

JUDGMENT.

Viscount Haldane.—This is an appeal from a judgment of the Supreme Court of New South Wales, delivered in favour of the respondent who was plaintiff in an action. The appellants were defendants and the question decided was raised by a special case.

Before 1924 the respondent was owner in fee simple of a piece of land in City of Sydney. On June 6th, 1924, appellants, in accordance with the provisions of the Sydney Corporation Act, 1902, and the amending Acts, caused improvement purposes, a notice for acquisition of the piece of land, published in the Gazette and other newspapers and complied in all respects with the provisions necessary for the acquisition. Thereupon, by virtue of the publication of the notice, the land, under the existing statutory provision, became vested in the appellants for an estate in fee simple, and the respondent became entitled to receive compensation. Within due time from the publication, the respondent served a notice of her claim to compensation. The appellants made a valuation, and the amount payable to the respondent was agreed at £60,823. The only

question that arises is as to the rate of interest properly payable under the circumstances upon the amount so ascertained as due. At one time, under the Public Works Act, 1900, providing for the acquisition of land for public works, the interest payable on the amount of compensation for land resumed thereunder was 6 per cent. The provisions of this Act were incorporated by reference in the Sydney Corporation Acts, the interest rate being lowered to 4 per cent. Subsequently the interest rate under the Public Works Act was similarly reduced. The provisions as to resumption were altered in other respects in 1905 by an Act of that date, under which, in lieu of service of notice, publication in the Gazette and certain newspapers was substituted for it, and the land was to vest on the publication of the notice and description. There was another amending Act of 1916 into the provisions of which it is not necessary to enter. But in 1924 the Sydney Corporation Act of that year enacted that the 1924 Act and the 1902 Act and the Acts amending it should be construed along with the 1924 Act as the principal Act.

The 1924 Act as thus defined also enabled the appellants to acquire land subject to certain reservations in favour of the owner and to effect re-alignments for the purposes of widening. On these provisions, in the opinion of their Lordships, nothing turns for the purpose of the present question. The only material provision is that contained in s. 17, which is in these terms:—

“Notwithstanding the provisions of any other Act the rate of interest payable upon compensation for land acquired by the Council by resumption or by the re-alignment method, or by any compulsory purchase, shall be six per centum per annum”.

The Act of 1924 came into operation on September, 17th in that year, and, as already stated, the acquisition (called resumption) had taken place under the existing Statute on June 6th.

The respondent claims that on the proper construction of s. 17 of the Act of 1924 interest at 4 per cent. was payable on the agreed amount of compensation as from June, 6th in that year, the date of the publication of the notice and of consequent vesting in the Corporation, up to September 17th and thereafter at 6 per cent. notwithstanding that the Act did not

become operative until September 17th when it received the Royal Assent. The appellants contend, on the other hand, that the title to interest at 6 per cent. under s. 17 could not arise in regard to an acquisition before the Act became operative. One reason for this contention is that the Act of 1924 for the first time enabled the “re-alignment method” to be adopted, and that accordingly s. 17, which extends to interests accruing under that method must be treated as limited to land acquired after the Royal Assent was given to the Act, inasmuch as the re-alignment method was established by the Act for the time. The realignment method is thus, according to the argument for the appellants, a key to the scope of this section. But they go further and contend that even as regards ordinary acquisition or resumption there is a similar indication of intention to be found in the language of s. 17, in that the payment of interest at 6 per cent. is to be limited to cases of acquisition or resumption after the Act of 1924 had become operative. Resumption, they argue, by means of public notification instead of by service of notice on the owner, was first authorised by the Act of 1905. The compensation was to be ascertained under the provisions of the Public Works Act, 1900, the scheme of which for this purpose is to be incorporated with the Act of 1905. Under the Public Works Act, 1900, by s. 119 (2) if compensation is payable in respect of land taken by notification in the Gazette (the then mode) it is to bear interest as from the date of this notification. As the Act of 1924 is to be read with the Act of 1905 it is argued that the word “acquired” in s. 17 of the Act of 1924 should be read as meaning acquired after that Act came into operation.

The learned Judges of the Supreme Court of New South Wales agreed in rejecting this contention, and held that the respondent was entitled to succeed. The main ground of their reasoning turned on the ambit and scope of s. 17.

“It cannot be contended,” said the Chief Justice, “and it is not contended, that it is retrospective in its operation so as to affect the rate at which interest was payable before it came into operation, but the question is whether the direction that interest thereafter is to be at the rate of 6 per cent. per annum applies only to subsequent acquisition of land, or applies

as well to prior acquisitions, the compensation for which was still unpaid when it came into force. The words used are perfectly general. What is spoken of is the rate of interest payable upon compensation for land acquired by the Council. No distinction is made between land acquired before the Act and that acquired after, and to give effect to the contention of the Municipal Council it would be necessary to substitute for the wide and general word 'acquired' some such words as 'to be acquired', or 'hereafter acquired'. I can find nothing in the section to justify the imposition of any such limitation, and there is no rule or presumption which requires that the word should be so limited in its meaning".

The learned Chief Justice goes on to say that it is plain that the purpose of the section was to bring up the rate of interest from one which was too low to 6 per cent. the lower rate being inadequate to ruling rate of interest.

Their Lordships find themselves in full agreement with the conclusion thus expressed. In their opinion this conclusion is neither affected by the well-known rule of construction against retrospective interpretation, nor by anything to be imported from the expressions used in the earlier Statutes in the series which has to be read in conjunction. Section 17 must in their opinion be read as laying down a principle standing by itself, and to prevail, as the section declares, notwithstanding the provisions of any other Act. The new rate of interest relates to the amount of compensation for land acquired by any of the alternative methods. This provision is a substantive one which is not made to depend on any reference to corresponding provisions in the earlier Statutes, and does not give rise to any question of retrospective operation.

On June 6th, 1924, the entire title to the piece of land in question was acquired by and became vested in the appellants, who became then entitled to compensation. On September 17th 1924, the new standard rate of interest was declared to be applicable to the compensation for all land acquired. Their Lordships think that these words are unambiguous. They give a title to the higher rate of interest as from September 17th and apply subsequently to the passing of the Act which contains this fresh provision to compensation for

land acquired prior thereto, notwithstanding that the Act was assented to later. Accordingly, between June 6th and September 17th the rate will remain 4 per cent. and after that is 6 per cent.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

K. J. R.

Appeal dismissed.

Solicitors for the Appellants:—Messrs. *Light and Fulton*.

Solicitors for the Respondents:—Messrs *Hughes and Sons*.

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT OF SINGAPORE)

July 18, 1927.

Present:—Viscount Haldane, Lord Atkinson, Lord Blanesburgh, Lord Darling and Lord Warrington of Clyffe.
LIM YAM HONG, TRADING AS LEE HONG & Co.—DEFENDANTS—APPELLANTS

versus

LAM CHOON & Co.—PLAINTIFFS—RESPONDENTS.

Evidence—Inadmissible evidence—Hearsay—Counsel not objecting—Practice—Appellate Court—Finding of fact of trial Judge, weight attaching to.

Hearsay evidence which ought to have been rejected as irrelevant does not become admissible as against a party merely because his Counsel erroneously failed to take the objection when the evidence was being given. [p. 458, col. 2.]

Due regard ought to be paid to the findings of a Judge who has decided matters of fact deposed to by witnesses at the trial before him. [p. 459, col. 1.]

Appeal from the Supreme Court of the Straits Settlements.

The material facts are given in their Lordships' judgment.

JUDGMENT.

Lord Darling.—This case was tried by Sir James Murison, Chief Justice, and the nature of the matter in dispute is sufficiently stated by him in these words:—

"The plaintiffs in this case sue the defendants for \$10,164 for breach of contract to take delivery of fifteen tons of Singapore Standard Flat Bark Crepe at \$1.03½ per pound. The defendant denies that he ever made such a contract. The damages represent the difference in price when the rubber in question was sold in

the open market after defendant's repudiation of the agreement.

"The only issue is whether defendant made the agreement or not.

"The plaintiff says that the agreement was made on his behalf by Cheng Kee, clerk of Messrs. Green and Collier, Brokers, with the defendant on the 4th August, 1925.

"The burden of proof lies upon the plaintiff. His witnesses are Cheng Kee, clerk to Messrs. Green and Collier, and Mr. Green.

The Chief Justice was not satisfied that the plaintiffs had proved the making of the alleged contract, and he, therefore, entered judgment for defendant. On appeal to the Supreme Court of The Straits Settlements, this judgment was set aside and judgment entered for the plaintiffs for the amount claimed, Mr. Justice Reay dissenting from the opinion expressed by Mr. Justice Brown and Mr. Justice Deane, the other members of that Court.

The evidence given by Mr. Green for the plaintiffs, although accepted entirely by the learned Chief Justice, was rightly declared by him to be of itself quite insufficient to prove the making of the contract. For that purpose, therefore, reliance was placed on the testimony of Cheng Kee, a clerk or broker employed by the plaintiffs. This man the learned Chief Justice qualified as "not a very bad witness", and added that if he could get definite corroboration of his story the denials of the defendant and his witnesses would not have availed to displace the evidence called on behalf of the plaintiffs. "But", said the Chief Justice, "I find very great difficulty about the corroboration of Cheng Kee's evidence". He, therefore, held that the burden of proof was not discharged; and so he pronounced in favour of the defendant.

The corroboration of Cheng Kee mainly relied upon by plaintiffs' Counsel was the established fact that a confirmation slip of the contract was prepared in the plaintiffs' office, and, further, that Cheng Kee swore that he himself on 4th August gave this note into the defendant's own hand. This statement was denied by the defendant, who swore that he did not see Cheng Kee on that day.

It was stated by Mr. Green that on 11th August he, with Cheng Kee, went to the defendant's office and there saw his manager, Ah Choon, "who said he had seen Cheng

Kee hand our confirmation slip to the defendant". It was not alleged that the defendant was then present, and it is clear that, he being absent, this conversation was not evidence against him. Further, Cheng Kee, in his evidence, was allowed to say: "On the 11th August the defendant's manager (Ah Choon) told the plaintiffs' *towkay* and Green, that he had seen the confirmation slip." This also is not evidence against the defendant, and regarding it Ah Choon swore "Cheng Kee did not call on the 4th August. I did not see him. I never said I had seen the confirmation slip—Cheng Kee said that."

Now all this evidence was relied on by the two learned Judges, who allowed the appeal, and especially by Mr. Justice Deane, as being sufficient corroboration of Cheng Kee's testimony to justify the reversal of the judgment of the Chief Justice.

It is true that the evidence of what Ah Choon, who was not alleged to have any authority to represent the defendant, had said in his absence was not objected to by the defendant's Counsel, but still the fault of an Advocate cannot so alter the character of testimony as to convert into corroborative evidence that which the law regards as merely fit for rejection as hearsay, yet this was also accepted as good evidence of the contents of a written document; since the paper, said to have been delivered to Ah Choon, was treated as a note confirming a contract. Moreover, it was impossible to treat statements by Cheng Kee as corroborating his own evidence, for these were merely parts of that very evidence itself.

To their Lordships it appears that the two learned Judges of the Supreme Court, who came to a conclusion opposed to that of the Chief Justice who had tried the case, did so upon grounds which cannot support their conclusion.

Their Lordships agree with Mr. Justice Reay—who dissented from the opinions expressed by his colleagues in the Supreme Court—that the Chief Justice's decision was attacked on the ground that he "overlooked, or did not attach sufficient weight to this (Ah Choon's) admission. It is a sufficient and it is obviously a fair answer to this attack that the admission was irrelevant, and that the evidence regarding it should not have been admitted. If it was disregarded, it was rightly disregarded."

Applying the well-established rules as to the amount of regard to be paid to the findings of a Judge who has decided matters of fact deposed to by witnesses at the trial before him, and having considered all the evidence admitted, their Lordships are of opinion that the judgment of Chief Justice Murison should stand, and they will, therefore, humbly advise His Majesty that this appeal should be allowed with costs, the judgment of the Court of Appeal set aside, and the judgment of the Chief Justice restored with costs in both Courts.

K. J. R.

Appeal allowed.

Solicitors for the Appellants:—Messrs. Parker, Carrett & Co.

Solicitors for the Respondents:—Messrs. Peacock & Goddard.

Note.—See also *Miller v. Madho Das*, 19 A. 76; 23 I. A. 106; 7 Sar. P. O. J. 73; 9 Ind. Dec. (N. s.) 50 (P. O.). where there was an erroneous omission to object before the Courts below to the admission of evidence that was not relevant, and their Lordships of the Privy Council held that that was not enough to make irrelevant evidence relevant. This pronouncement of the Privy Council has led to some conflict of judicial opinion in India; see (*inter alia*) 1 O. W. N. 530—2 Ind. Cas. 998;—9 Ind. Cas. 211; 13 C. L. J. 18—28 C. 142—66 Ind. Cas. 15; 49 C. 93; 34 C. L. J. 107; A. I. R. 1922 Cal. 267. Their Lordships' present judgment, although on an appeal from the Straits Settlements, will be a useful guide to the Courts in this country, as it reiterates the principle laid down by the Board as far back as 1896 in *Miller's case*.—[K. J. R.]

Where a partnership is entered into for a fixed term, and the term expires but the partners continue the business as partners at will without fresh articles, the business is deemed to be continued upon the old terms so far as they are applicable to a partnership at will. [p. 460, col. 1.]

Where under partnership articles it was provided that in the event of a partner dying or becoming insane, and during the term of the partnership, the surviving or remaining partner would pay to the representatives of the partner so dying etc., a share of the "nett annual profits" of the partnership business:

Held, that the nett annual profits, by which the amount of the sum to be paid by the surviving partner was to be measured, should be ascertained by deducting from the receipts and earnings of the business such outgoings and ordinary business expenses as were under the partnership articles or by the practice of the partners so deducted during the partnership, the business being for this purpose treated as a continuation of the partnership business. A payment, however, which under the partnership articles ceased with the dissolution of the partnership could not be properly deducted. [*ibid.*]

Ex parte Harper (1), referred to.

Where a partnership is dissolved by death of a partner the business, if carried on by the surviving partner, is so carried on by him on his own sole account and for his own benefit, the annual sum payable (under the partnership articles) to his deceased partner's executors being, in substance, purchase-money for his interest in the assets of the business. [p. 461, col. 1.]

Upon the construction of the partnership articles in this case, their Lordships held that, without an express provision to that effect, the surviving partner was not entitled to a salary. [p. 461, col. 1.]

In construing the provisions of an agreement there is no *rigid* rule that the same meaning ought to be given to an expression in every part of the document in which it appears. A difficulty or ambiguity may be solved by resorting to such a device, but it is only in such cases that it is necessary or permissible so to do. [*ibid.*]

Appeal from the Court of Appeal of New Zealand.

The material facts are given in their Lordships' judgment.

JUDGMENT.

Lord Warrington of Clyffe.—This appeal raises a question of construction upon articles of partnership between the appellant John Lachlan Mc Gillivray Watson and Arthur Bryam Haggitt. The business of the partnership was that of Barristers and Solicitors.

The articles were dated the 18th May, 1905, and the term of the partnership was 15 years from that date. The term expired on the 18th May, 1920, but the partners continued the business as partners at will without fresh articles, and, therefore, upon the old terms so far as they were applicable to a partnership at will,

PRIVY COUNCIL.

APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

November 17, 1927.

Present.—Lord Chancellor, Lord Buckmaster, Lord Carson, Lord Darling, and Lord Warrington of Clyffe.

JOHN LACHLAN MCGILLIVRAY
WATSON.—APPELLANT

versus

BERTHA ELINOR LILIAN HAGGITT
AND OTHERS.—RESPONDENTS.

Contract Act (IX of 1872), ss. 253, 256—Partnership business continued after expiry of term agreed upon—Partnership at will—Presumption of continuance of old terms—Share of nett annual profits payable to the executors of deceased partner—Ascertainment of profits—Surviving partner's claim for salary—Construction of documents—Meaning of expression used in several parts.

Mr. Haggitt died on the 5th January, 1926, and the partnership was thereby dissolved. The respondents are his executors.

The articles contained the following clause (No. 21):—

"If at any time during the terms of the said partnership either of the said partners shall die or become permanently incapacitated for work or shall become insane or of unsound mind to such an extent as to render him unable or unfit to carry on the business of the partnership then and in any such case the surviving or remaining partner shall during the period of five years from the occurrence or happening of such event of contingency pay to the executors and administrators of such partner so dying as aforesaid or as the case may be to the Committee or representatives of such partner so incapacitated as aforesaid a sum equivalent to a one-third part or share of the nett annual profits of the said partnership business for each year of the said term of five years."

Taken by itself that clause presents no difficulty of construction. The nett annual profits, by which the amount of the sum to be paid by the surviving partner in each of the five years is to be measured, would be ascertained by deducting from the receipts and earnings of the business such outgoings and expenses as were under the articles or by the use and want of the partners so deducted during the partnership, the business being for this purpose treated as a continuation of the partnership business [*Ex parte Harper* (1)]. A payment however, which under the articles ceased with the dissolution of the partnership would not be properly deducted.

The appellant, however, contends—and his contention was upheld by the Judge of first instance and by one of the four Judges in the Court of Appeal—that he is entitled to deduct, in addition to the ordinary business expenses and outgoings, an annual sum payable to him by way of "salary" during the partnership. Whether this contention is correct is the question for decision.

The clause of the articles providing for

payment of "salaries" to the partners is cl. 3 which is in the following terms:—

"The said Arthur • Bryan Haggitt shall receive a salary of £600 for the first year of the said partnership term, a salary of £750 for the second year of the said partnership term and the said John Lachlan McGillivray Watson shall draw all the nett profits of the said business during the first two years aforesaid. During each of the third, fourth and fifth years of the said partnership term the said J. L. M. Watson shall draw a salary of £1,500 per annum and also one-half of the nett profits for each such year and the said A. B. Haggitt shall draw a salary of £750 per annum for each of the said third, fourth and fifth years and also one-half of the nett profits for each such year. Thereafter and during the continuance of the said partnership term the said J. L. M. Watson shall draw a salary of £1,500 per annum and one-half of the nett profits each year and the said A. B. Haggitt a salary of £1,000 per annum and one-half of the nett profits for each year during the terms of the said partnership, and the said partners shall be allowed to draw the aforesaid amounts by monthly instalments in anticipation of their respective shares or profits in the said partnership business."

Clause 5 is a common form of provision for the payment of expenses, outgoings and losses out of the receipts and earnings of the business. "And in case of deficiency thereof then by the said partners in the shares in which they shall for the time being be entitled to the nett profits of the said business".

The contention of the appellant and the judgments of the two Judges who decided in his favour are based upon a supposed rule of construction that the same meaning ought to be given to an expression in every part of the document in which it appears.

Applying this supposed rule it is said that "nett profits" in cl. 3 and in cl. 5 means what is left after the deduction of salaries, and, therefore, it must have the same meaning in cl. 21. If this conclusion were logically applied the "salary" of A. B. Haggitt should also be deducted and paid to his executors, but the absurdity of paying a "salary" to the executors of a dead partner who cannot give any assistance in the business is recognised and

(1) (1857) 1 De G. & J. 180; 26 L. J. Bk. 24; 3 Jur. (N. S.) 724; 5 W. R. 537; 44 E. R. 692; 29 L. T. (G. S.) 168; 118 R. R. 80.

the Judges who were in the appellant's favour stop short of the logical application of their conclusion by deciding that the "salary" of the appellant alone ought to be deducted.

The truth is there is no rule of such general application as is contended for by the appellant. A difficulty or ambiguity may be solved by resorting to such a device, but it is only in such cases that it is necessary or permissible so to do.

In the opinion of their Lordships it is in the present case quite clear that in cl. 21 the expression "nett profits" has a different application to that which it has in cl. 3 and cl. 5. Clause 21 is dealing with a state of things wholly different from that dealt with in cl. 3. The partnership is dissolved, the "salaries" which were payable "during the continuance of the partnership term" have ceased and the business is being carried on by the appellant on his own sole account and for his own benefit, the annual sum payable to his deceased partner's executors being, in substance, purchase money for his interest in the assets of the business. Under such circumstances it is impossible to hold, without an express provision to that effect, that the partners intended to allow a salary to the surviving partner.

Their Lordships are of opinion that the appeal fails and ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

K. J. R.

Appeal dismissed.

Solicitor for the Appellant:—Mr. C. J. Wray.

Solicitor for the Respondent:—Messrs. Blyth, Dutton, Hartley & Blyth.

Note.—1. As regards the surviving partner's claim for a "salary," reference may usefully be made to the judgment of the Privy Council in 81 Ind. Cas. 525; A. I. R. 1924 P. C. 93; 19 L. W. 425; 34 M. L. T. 69; 22 A. L. J. 382; (1924) M. W. N. 660; 29 C. W. N. 161; L. R. 5 A. (P. C.) 109 (P. C.) (on appeal from 64 Ind. Cas. 861; 48 C. 906; 33 C. L. J. 411; 26 C. W. N. 463; A. I. R. 1922 Cal. 122 where their Lordships allowed fair remuneration to the surviving partner for the management of the business.

2. This was a case from New Zealand, where a partnership between Barristers and Solicitors is apparently not forbidden. Generally speaking, such partnership are not recognized. "Any dealings between members of the Bar and Solicitors as regards sharing costs or profits are incompatible with the discipline of the Bar"; [Consolidated Regulations of the Four Inns of Court (January, 1907), (s. 15)]; Halsbury's Laws of England, Vol. 2 p. 370.—[K. J. R.]

PRIVY COUNCIL.

APPEAL FROM THE RANGOON HIGH COURT.

December 6, 1927.

Present:—Viscount Sumner, Lord Atkinson, Lord Sinha, Sir John Wallis and Sir Lancelot Sanderson.

V. P. R. V. CHOCKALINGAM
CHETTYAR—PLAINTIFF—APPELLANT
versus

E. N. M. K. CHETTYAR FIRM AND OTHERS
—DEFENDANTS—RESPONDENTS.

*Trusts Act (II of 1882), s. 5—Deed of trust—
tion of property—Registration Act (XVI of
s. 21.*

Where a deed of trust in relation to immovable property is registered, the instrument must contain a description of such property sufficient to identify the same, as required by s. 21 of the Registration Act, 1908. [p. 464, col. 1.]

Appeal from a judgment and decree of the Rangoon High Court (Rutledge and Brown, JJ.) dated the 29th September, 1925, confirming that of the District Court, Pegu, dated the 7th June, 1924.

The material facts are stated in their Lordships' judgment.

Messrs. Parikh and Pennell, for the Appellants.

Sir Geo. Lowndes, K. C., and Mr. Raikes, for the Respondents.

Sir George Lowndes, in arguing the respondents' case, took the objection that the immoveable property in suit was not specifically mentioned in the trust deed. He referred to s. 17 of the Indian Registration Act and contended that immoveable property of the value of Rs. 100 and upwards can only be transferred by a registered document.

Reads s. 21 of the Registration Act. Here the document contains no description at all.

[LORD SINHA.—In fact there is no mention at all of the property in the trust deed.]

[SIR JOHN WALLIS.—Some part of the property must be situate in the Registry District.]

Reads s. 28 of the Registration Act.

[SIR JOHN WALLIS.—The question of registration apparently occurred to no one in the case before.]

Mr. Parikh, in replying, objected that the question of registration should not be taken up at this late hour, as it was not mentioned in the Courts in India nor in the respondents' "case."

(Their Lordships considered that it was a point of law which could be urged for the first time in argument.)

You have to look at the Indian Trusts Act,

[SIR JOHN WALLIS.—Do you say that registration is not necessary?]

No, but I contend that we must be guided solely by the Trusts Act and cannot bring in the provisions of the Registration Act.

[SIR JOHN WALLIS.—Refers to the definition of registration as given in s. 3 of the Indian Trusts Act.]

[LORD SINHA.—Is it your point that you do not require a registered instrument for conveying property in trust?]

[SIR JOHN WALLIS.—The procedure for registering document is to be found in the Registration Act.]

[LORD ATKINSON.—Sir Geo Lowndes's point is that this property is not in the trust deed at all. The whole purpose of the Registration Act is that people can come to the Registry Office and get information as to encumbrances on the property. That is the very object of the Registration Act.]

In India, there is no registration of title.

[SIR JOHN WALLIS.—The object of the Registration Act is to give notice to people who want to deal with the property.]

Mr. Parikh again urges that the question of registration was never raised in India. He refers to s. 5 of the Trusts Act.

[LORD ATKINSON.—That section is no authority for registration of a property that is not named. It would be an absolute farce.]

Mr. Parikh reads the definition of "trust" in s. 3 of the Trusts Act. I contend that the trust deed here satisfies the requirements of that definition.

[SIR JOHN WALLIS.—Do you suggest that if the property is not described in the deed, the Registering Officer would accept it for registration?]

[LORD ATKINSON.—You cannot go to the Registry Office and ask them to register a document without specifying the property.]

JUDGMENT.

Sir Lancelot Sanderson.—This is an appeal by the plaintiff against a judgment and decree, dated the 29th September, 1925, of the High Court of Judicature at Rangoon, which affirmed a judgment and decree of the District Court of Pegu, dated the 7th June, 1924, by which the plaintiff's suit was dismissed with costs.

The suit was instituted in November, 1922, and thereby the plaintiff prayed for a declaration that he was the owner of the properties described in the schedule to the plaint, delivery of possession of the said properties, and mesne profits.

The material facts were as follows:—

An undivided Hindu Chetty family of Pallatur, in the Ramnad District of Madras, carried on an extensive money-lending business under the style of the K. P. firm in different places, including Pegu, in Burma—and one, K. P. Ramanathan Chetty, was the *karta* or manager thereof.

On the 10th February, 1906, the said K. P. Ramanathan Chetty, as the manager of the joint family, executed a power-of-attorney in favour of one Singaram Chetty, who was then at Pegu acting as agent for the firm under a salary agreement.

The power-of-attorney authorised Singaram to act under the style of Kana Pana, or K. P. Singaram Chetty, to use the name of Ramanathan Chetty and, amongst other things, to sell or exchange all or any of the immoveable property of or to which Ramanathan Chetty, was or should at any time thereafter become possessed or entitled, for any estate or interest whatsoever or which he then had or at any time thereafter should have power to dispose of.

The properties in suit, which are situated at Pegu, belonged to the above-mentioned joint family, and were undoubtedly part of the subject-matter of the said power-of-attorney.

In 1908 the business of the K. P. firm was in a critical condition, and on the 6th April, 1908, a trust deed was executed between Ramanathan Chetty for himself, and as head and manager of the undivided family, and certain other members of the family of the one part, and V. M. Somasundaram Chetty of the other part.

Somasundaram was to collect the debts owing to the family, pay the creditors, and carry on the business.

By the terms of the deed Somasundaram was given "a right over, by way of trust, all the properties, assets and interests mentioned in schedules A and B" for the purpose of selling the same.

The trust deed contained other powers, such as management, the appointment and removal of agents, including the agents then working in the K. P. firm.

One, M. S. M. Maygappa Chettyar, was appointed coadjutor to counsel and advise the trustee, and it was provided that the trustee should obtain the consent in writing of the coadjutor before appointing agents, or selling or mortgaging immoveable properties in connection with the trust,

It was further provided by cl. 21 of the deed that—"all properties, assets, claimed and suits that may come under dispute (or to Court) of the K. P. firm have in this way been transferred to the trustee. He has power to receive them as they are paid, to convert them all into money and, if convenient, to transfer (or assign) them to creditors."

In 1911 the coadjutor mentioned in the trust deed died, and no other coadjutor was appointed.

On the 4th January, 1912, Somasundaram, purporting to act as trustee by virtue of the powers conferred upon him by the above-mentioned deed, appointed Singaram Chetty his agent, to transact, conduct and manage the affairs, concerns and matters in which he was interested, as trustee, and to use the name of Somasundaram Chetty, trustee to the said estate.

On the 23rd June, 1912, Singaram, by a registered deed of that date, purported to sell to E. N. M. K. Muttaya Chetty, the first respondent, for the consideration of Rs. 12,500, the properties in suit. This deed was not produced at the trial, but a copy of it was put in by consent of the parties at the hearing of this appeal.

The other respondents are purchasers of some of the properties from the first respondent.

On the 1st August, 1913, the trustee was discharged.

On the 7th January, 1918, on the application of a creditor, Ramanathan Chetty individually, and as managing member of the joint family, was adjudicated insolvent by the District Judge of Ramnad, who directed that all the personal assets of Ramanathan and the joint family assets should vest in the Official Receiver.

On the 26th January, 1920, the appellant bought the properties in suit at a public auction for the sum of Rs. 580, and the property was conveyed to him by two deeds, dated the 8th May, 1920, and the 7th December, 1921, and executed by the Official Receiver. The appellant instituted this suit, as already stated, on the 6th November, 1922, basing his title to the properties on the two above-mentioned sale deeds.

The first respondent relied upon his alleged purchase on the 23rd June, 1912.

The learned Additional District Judge dismissed the plaintiff's suit with costs.

On appeal, the High Court held that Singaram continued as agent for the K. P. firm in the Pegu District from 1906 until

after the conveyance to the first respondent that the power-of-attorney granted in 1906 to Singaram continued unimpaired and uncanceled, and that he had ample power to convey the property and give a good title.

The High Court dealt with certain questions of fraud and collusion, to which reference need not now be made, as they have been raised on the hearing of this appeal.

The learned Counsel, who appeared for the appellant, relied mainly upon two points.

In the first place, it was contended that the power-of-attorney of 1906 in favour of Singaram came to an end by reason of the execution of the trust deed of the 6th April, 1908. It was argued that by the trust deed the whole of the property of the undivided family was transferred to the trustee, that Ramanathan and the family had thereby deprived themselves of all power to sell the property, and that thereafter as the principal had no power to sell, the agent, Singaram, likewise had no authority or power to sell the property.

It was also argued on behalf of the appellant that the power-of-attorney given by the trustee on the 4th January, 1912, was of no effect, as far as the sale of immoveable properties was concerned, inasmuch as the trustee had not obtained the consent in writing of a coadjutor to the sale thereof as provided by the deed.

The last-mentioned point may be disposed of at once.

It was not seriously contended on behalf of the respondents that they could rely on the power-of-attorney executed by the trustee on the 4th January, 1912, as authority for the sale by Singaram of the properties, and their Lordships are of opinion that the appellant's contention on that point may be taken to be correct.

In the second place, it was argued that the trust did not come to an end when the trustee was discharged in August, 1913, that the Court on a proper application would have appointed another trustee, and that the property was still subject to the trust and vested in the trustee.

The learned Counsel for the respondents replied to these points by arguing, first, that the trust deed of the 6th April, 1908, did not include the immoveable property in Pegu which is now in suit, and secondly, that there was a finding of fact by both the Courts in India that the power-of-attorney in favour of Singaram, dated 10th February, 1906, had not come to an

end, but that it was in force and of full effect at the time Singaram sold the property to the first respondent.

It is clear that the immoveable properties in Pegu are not specifically mentioned in the trust deed.

The properties mentioned in schedule A are situated at Pallatur and the other places mentioned therein, and they do not include the immoveable properties at Pegu, the subject of this suit.

Schedule B includes "the firm under the mark of K. P. at Pegu and all the rights such as money-lending, etc."

The property mentioned in the schedule to the plaint consists of four lots of paddy land, two houses, and two lots of garden land—situated in Pegu.

In their Lordships' opinion the property so claimed in this suit cannot be said to be covered by the description of the properties in the above-mentioned two schedules to the trust deed.

This opinion is confirmed when reference is made to the provisions of the Registration Act III of 1877—which was in force at the time of the execution of the trust deed, dated the 6th April, 1908. The deed was registered, and if it had been intended to make the immoveable property at Pegu subject to the trust for sale, it would have been necessary to insert in the deed a description of such property sufficient to identify the same, as was in fact done in the case of the property at Pallatur and other places referred to in schedule A of the trust deed.

It was, however, argued on behalf of the appellant that the terms of cl. 21 of the deed, which have already been stated, are sufficient to vest all the property of the K. P. firm, including the immoveable property at Pegu, in the trustee.

The deed has to be construed as a whole, and upon such a construction it is not possible, in their Lordships' opinion, to hold that the above-mentioned words are sufficient to transfer to the trustee the immoveable properties at Pegu, which have not been mentioned in the deed or the schedule containing the description of the immoveable properties which, it was intended by the parties, should be transferred to the trustee.

Their Lordships, therefore, are of the opinion that the properties, which are the subject-matter of the suit, were not transferred to the trustee by the deed of the 6th April, 1908, and that the authority given to Singaram to sell the property was

not terminated by reason of the execution of that trust deed.

It was further argued on behalf of the appellant that Singaram was appointed agent at Pegu in 1905 by a salary agreement which usually exists for three years, that he returned to India in or about 1909, and that the power-of-attorney which had been given to him in 1906 must be considered to have come to an end when he left Pegu and returned to India.

It appears, however, that Singaram returned to Pegu in 1911 and again acted as agent for the K. P. firm.

The learned Assistant District Judge, who tried the suit, held that the original power-of-attorney of 1906, in favour of Singaram was evidently never withdrawn or cancelled.

The High Court considered that it was clearly established that Singaram continued as agent of the K. P. firm in the Pegu District from 1906 until after the conveyance in question in the suit, and the learned Judges of the High Court were also of opinion that the trial Judge was fully justified on the evidence in holding that his powers under the power of attorney granted in 1906 continued unimpaired and uncanceled.

These are concurrent findings, and it was argued on behalf of the respondents that they are findings of fact, and, therefore, that their Lordships should not interfere with them.

It may be that, strictly speaking, the question, to which the findings are relevant is not merely one of fact, and that the question whether the power-of-attorney of 1906 was still effective at the time Singaram conveyed the property to the first respondent is a mixed question of law and fact. However that may be, their Lordships, after consideration of the evidence, see no sufficient reason for disagreeing with the above-mentioned conclusions of the two Courts in India in respect of this matter.

Their Lordships, therefore, are of opinion that Singaram had authority to convey the property and to give a good title, to the first respondent, and that the appeal should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

K. J. R.

Appeal dismissed.
Solicitor for the Appellant:—Mr. J. E. Lambert.

Solicitor for the Respondent:—Messrs. Bramall & Bramall.

CALCUTTA HIGH COURT.APPEAL FROM APPELLATE DECREE No. 793
OF 1925.

November 23, 1927.

Present:—Mr. Justice Mukerji.

Bibi AIMANA KHATUN—PLAINTIFF—
APPELLANT
versusSABURANNESSA BIBI AND OTHERS—
—DEFENDANTS—RESPONDENTS.*Co-sharers—Exclusive possession of one co-sharer—
Other co-sharers, whether entitled to joint possession—
Equitable consideration.*

Although as a general proposition one co-sharer has no right to take exclusive possession of a joint property, yet the question whether such exclusive possession amounts to an ouster or not depends on the circumstances of each case, and where the Court is unable to hold that there was an ouster, it would not be right to refuse defendant who is in possession the benefit of the equitable principle that the mere fact of sole occupation by one co-sharer does not necessarily constitute an ouster of the other co-sharers, and does not entitle the latter to a decree for joint possession. [p. 466, col. 2.]

*Nawadwip Chandra Chakravarti v. Bhagaban Chandra Chowdhury (1), followed.**Lakhan Chandra Malo v. Gopal Sheikh (2), distinguished.*

Appeal against a decree of the Subordinate Judge, Jessore, dated the 22nd of January, 1925, modifying that of the Munsif, First Court, Narail, dated the 21st of June, 1923.

Babu Hemendra Chandra Sen, for the Appellant.

Babu Prafulla Kamal Das, for the Respondents.

JUDGMENT.—The plaintiff is the appellant in this appeal. The suit out of which this appeal has arisen was instituted by the plaintiff on the allegations that the lands in suit which are described at the foot of the plaint formed part and parcel of a *jama* of Rs. 32 which at one time belonged to two brothers, Kachimaddi and Madhu Molla, Kachimaddi having two-thirds share Madhu Molla the remaining one-third. The plaintiff's case was that there was a partition between Kachimaddi and Madhu Molla and that the disputed lands together with other lands fell to the share of the latter. Madhu Molla, it is said, died leaving three sons and four daughters and the plaintiff who is one of the daughters became according to the plaintiff, entitled to a twelfth share in the land owned by Madhu and the lands in suit fell in the plaintiff's share on a partition which took place amongst the sons and daughters of Madhu and the plaintiff,

therefore, prayed for a declaration of her *jote* right to the said lands and for confirmation of possession therein. There was an alternative prayer in the plaint asking for a decree for joint possession with the defendant, in case it was found that there was no such partition as was alleged on behalf of the plaintiff. The contesting defendant in the suit was the defendant No. 3 who is in possession of the lands in suit. The trial Court made a decree in plaintiff's favour declaring her right to an one-twelfth share in the lands in suit and giving her a decree for joint possession with the defendant No. 3 who appears to have been the principal contesting defendant in the suit. The case of the defendant No. 3 in so far as it is necessary for the purpose of this appeal was that he had obtained a lease of the said lands from the three sons of Madhu and that Madhu's daughters did not get any of the lands belonging to the latter inasmuch as Madhu had made a gift of his lands in favour of his sons. The parties thereupon preferred an appeal and a cross-appeal with the result that the plaintiff's suit has been dismissed in its entirety by the learned Subordinate Judge.

The contention that has been urged on behalf of the appellant here is that in view of the finding at which the learned Subordinate Judge has arrived she is entitled to a decree for joint possession to the extent of the share which has been found in her favour by the Court below. The learned Subordinate Judge found that the plaintiff owned one-tenth share in the property left by Madhu and that the story of partition that had been set up by the plaintiff was not true. It is contended on behalf of the appellant that under these circumstances there is no reason why the plaintiff should not get a decree for joint possession to the extent of her one-tenth share with the defendant No. 3 in the disputed lands. The reasons upon which the learned Subordinate Judge has dismissed the plaintiff's suit are mainly the following: (1) that in the suit which the plaintiff instituted she has not prayed for a decree for joint possession. So far as this reason is concerned the learned Subordinate Judge is not perhaps right, because the prayer *kha* in the plaintiff's plaint is not incapable of being construed as including such a prayer. In

support of the learned Subordinate Judge's view it may no doubt be said that the words used in this prayer describing the lands in suit as being the lands marked X are indicative of a distinction which the plaintiff desired to make between the said lands and the entire quantity of lands which fell to the share of all the co-sharers which are intended to be meant by the words *Mote Bandal*. Any way this matter need not be pursued any further, because I am willing to proceed on this footing that the prayer included the claim for a decree for joint possession to the extent of the plaintiff's share in respect of plot X which forms the subject-matter of the suit. The other reasons are the following: (2) that the plaintiff had no possession in the lands in suit and that the only possession which she could be said to have in the suit lands was through her co-sharers, because the learned Judge below distinctly says that the story of the plaintiff's possession falls to the ground along with the story of partition; (3) that the lessors, that is to say, the plaintiff's co-sharers were in exclusive possession of all the lands left by Madhu but without any denial of the plaintiff's right; (4) that the said lessors let out a plot meaning plot X out of the said lands to defendant No. 3 on receipt of a substantive *selami*; (5) that on a partition the lessors of defendant No. 3 would be entitled in respect of their share to more lands than what was settled with defendant No. 3, and (6) that so long as the lands were in possession of the sons of Madhu Molla the plaintiff did not object, but when the possession passed to the defendant, the plaintiff instituted a suit perhaps because the land lies adjacent to her homestead. These grounds upon which the learned Subordinate Judge has proceeded disclose equitable considerations which should not be lost sight of in a case of this description. I am clearly of opinion that in view of these grounds which the learned Subordinate Judge has given, the plaintiff in the present suit when she failed to establish her case as to the partition, should not be allowed to have a decree for joint possession to the extent of her share—a decree which if passed would have the effect of disturbing the possession of defendant No. 3. The principles that should be applied to cases of this description have

been discussed in a recent decision of this Court in the case of *Nawadwip Chandra Chakravarti v. Bhagaban Chandra Chowdhury* (1). It has been stated there on consideration of the case-law on the point that as a general proposition one co-sharer has no right to take exclusive possession of a joint property, but the question whether such exclusive possession amounts to an ouster or not depends upon the circumstances of each case and where the Court is unable to hold that there was an ouster, it would not be right to refuse the defendant who is in possession the benefit of the equitable principle that the mere fact of sole occupation by one co-sharer does not necessarily constitute an ouster of other co-sharers, nor does it entitle the latter to a decree for joint possession. My attention has been drawn to a decision of this Court in the case of *Lakhan Chandra Mulo v. Gopal Sheikh* (2). It will, however, be seen that there is a broad distinction between that case and the present one, because in that case a co-sharer gave a lease of the entire quantity of land belonging to all the co-sharers and in such a case it may be said that when such lease is granted by a body of co-sharers, their intention is to oust the other co-sharers who is not a party to the lease. I am of opinion that the reasons given by the learned Subordinate Judge for refusing to pass in plaintiff's favour a decree for joint possession are good and valid.

There is, however, one point in connexion with which, it seems to me, the learned Subordinate Judge has been in error. His finding being that the plaintiff owns one-tenth share in the property left by Madhu; and there being nothing to show that this title of the plaintiff has in any way been extinguished by adverse possession, there is no reason why the plaintiff should not have a decree declaring her title to a tenth share in the property. The learned Vakil who appears on behalf of the respondents concedes that it would be proper to allow the plaintiff a decree in respect of the said declaration.

The result then is that this appeal fails and is dismissed, subject to the modification in the decree passed by the learned Subordinate Judge, in this respect

(1) 101 Ind. Cas. 27; 31 C. W. N. 496; A. I. R. 1927 Cal. 462.

(2) 98 Ind. Cas. 912; 31 C. W. N. 60.

only, namely, that the plaintiff should be allowed a declaration that she is entitled to a tenth share of the property which forms the subject-matter of the suit.

I make no order as to the costs.

A. N. A.

Decree modified.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 825 AND 826 OF 1927.

November 10, 1927.

Present:—Mr. Justice Duval.

CHANDRA NATH SEN AND ANOTHER

—PETITIONERS

versus

Babu NAGENDRA NATH GANGULY

—OPPOSITE PARTY.

Provincial Insolvency Act (IV of 1920), ss. 4, 68, 75, (3)—Attachment by Receiver of property of third person—Application to District Judge to set aside Receiver's act—Order dismissing application whether appealable—Person aggrieved, meaning of.

A Receiver in insolvency attached certain properties of the petitioners and sold some of them as belonging to the insolvent. The petitioners applied to the District Judge to enquire into and rectify the acts of the Receiver, but the applications were dismissed by the District Judge on the ground that they were time-barred:

Held, (1) that the orders of the District Judge on the applications were appealable by leave under s. 75 (3) of the Provincial Insolvency Act;

(2) that even if they were not appealable by leave the matter decided was one under s. 4 of the Act and appealable as such;

(3) that the petitioners were persons aggrieved by the orders, and as such entitled to appeal against them.

The question whether a person is aggrieved or not by an order of Court is a question of fact.

Hanseswar Ghosh v. Rakhal Das Ghose (1), distinguished.

Rules against an order of the Court of the District Judge, 24-Perganas (Alipore), dated the 13th May, 1927.

Babu Prafulla Kamal Das, for the Petitioners.

Babu Nripendra Chandra Das, for the Opposite Party.

JUDGMENT.—These two Rules have been obtained against an order of the District Judge of 24-Perganas holding that an application to enquire into and rectify certain acts of the Receiver in an insolvency case was out of time and so could not be entertained. It appears that in a certain insolvency case a Receiver was appointed and he attached from the Bar-

gadars of one of the petitioners' paddy and sold it as being the property of the insolvent and in the other case he attached certain furniture. It appears that he also warned the tenants not to pay any more rent except to himself. The two petitioners feeling aggrieved at this order moved the District Judge but he held that the matter came under s. 68 of the Provincial Insolvency Act and so, as the application was made more than twenty-one days after the Receiver had taken possession of the properties, the matter was barred.

Thereupon applications were made to this Court and two Rules obtained on the 24th June, 1927. Subsequently, it appears that in July the two petitioners appeared before the District Judge and applied for leave to appeal to this Court against his order and the Judge granted them leave.

A preliminary point is taken and it seems to me one of substance that as the order of the District Judge in these two matters is appealable, s. 115 of the Code of Civil Procedure has no application. Now, it is clear to my mind that the case must at least come under s. 75 (3) which makes appealable to this Court by leave. Even if it did not become appealable by leave it is a matter decided by the Judge under s. 4 and is appealable. It is urged, however, for the petitioners that somehow or other they are strangers and not persons aggrieved and in this connection I am referred to the case of *Hanseswar Ghosh v. Rakhal Das Ghose* (1), but whether a person is aggrieved or not appears to be a question of fact and cannot believe that a man whose paddy has been taken away and a man who has had his furniture taken away are not people who are aggrieved. I must, therefore, hold that the Rules must be discharged as an appeal lies, a fact which the learned Judge himself has admitted and the petitioners have admitted.

I, therefore, discharge both the Rules with costs to the Receiver, hearing-fee one gold mohur in each case.

Let the records be sent down as early as possible.

A. N. A.

Rules discharged.

(1) 20 Ind. Cas. 633; 18 C. W. N. 366; 18 C. L. J. 359.

CALCUTTA HIGH COURT.APPEAL FROM APPELLATE DECREE No. 267
OF 1925.

November 30, 1927.

Present:—Mr. Justice Mukerji.

MAKBUL ALI CHOWDHURY—

DEFENDANT No. 1—APPELLANT

versus

SASI KUMAR MALLA—PLAINTIFF No. 1

AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Kabuliyat—Nature of tenancy—Construction of deed.

The material portion of a *kabuliyat* relating to a tank with its banks and a plot of land adjoining thereto ran as follows: "I shall graze cattle on the banks after fencing them all round, I shall rear new fish and catch them and shall not make any objection to your catching the old fish. I shall enjoy the fruits of the fruit-bearing trees now existing on the banks." The *kabuliyat* was further headed as a '*Kabuliyat* for nine years' and the executant was described as cultivator for nine years:

Held, that the tenancy created was an agricultural tenancy.

Appeal against a decree of the Subordinate Judge, Additional Court, Chittagong, dated the 16th of January, 1925, reversing that of the Munsif, Second Court, Satkania, dated the 23rd of June, 1923.

Babu Narendra Kumar Das, for the Appellant.

Babu Chandra Sekhar Sen, for the Respondents.

JUDGMENT.—The contention that has been urged in this appeal is that the Subordinate Judge was wrong in holding that the tenancy in suit is governed by the Transfer of Property Act and that the Munsif who tried the suit had rightly held that the Bengal Tenancy Act applied to it.

The subject-matter of the tenancy is a tank with its banks and a plot of land adjoining thereto. It had its origin in a *kabuliyat* the material portion of which runs in these words "I shall graze cattle on the banks after fencing them all round, I shall rear new fish and catch them and shall not make any objection to your catching the old fish. I shall enjoy the fruits of the fruit-bearing trees now existing on the banks. I shall be entitled to catch fish throughout year and shall not be competent to raise any objection to your catching fish on any festive occasion. If I fill up the tank without your permission I shall not be entitled to raise any objection to your getting *khas* possession of it. I shall always clear the weeds of the tank and if the

tank is not cleared I shall be liable for damage."

Were these terms the only materials from which the purpose of the tenancy had to be determined, I would have agreed with the respondents' contention that it was not made out that the tenancy was for agricultural or horticulture purposes. The defendant's (appellant's) case in the written statement was that he had cultivated paddy etc. on the lands and had grown fruits trees on the banks of the tank, and that he had not used the lands for the purpose of grazing. The Munsif held that he did not cultivate the lands but used the same for the purposes of grazing. This finding has not been reversed by the Subordinate Judge. On this finding the defendant seeks to argue that the grazing was for a purpose ancillary or incidental to his cultivation of other lands in the village, in respect of which he is a settled *ryot* as is shewn by the *khata*. Whether having put forward a definite case which failed, the defendant can be, or at any rate should be, permitted to construct another case upon the findings that have been arrived at against him, may be debatable question. But, in my opinion, there is much surer indication than all this in the *kabuliyat* itself as regards the status of the defendant which it purported to create.

The *kabuliyat* is headed as a "*Kabuliyat* for nine years." Below this heading, when naming the defendant as the executant, it speaks of him as "*Naysena Meadi Chasa Sree Makbul Ali*" (i. e., Makbulali cultivator for nine years). I am of opinion that it was so said because the object was to create in favour of the defendant an agricultural tenancy for nine years or to make him a cultivating tenant for that period. I think there is no ambiguity in the meaning of the document and that the view taken by the Munsif of the defendant's status is the correct one.

I accordingly allow the appeal, set aside the decree of the Subordinate Judge and restore that of the Munsif with costs in this as well as the lower Appellate Court.

A. N. A.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 919 OF 1927.

November 16, 1927.

Present:—Mr. Justice Duval.

KASIRADDIN PARAMANIK—PLAINTIFF

—PETITIONER

versus

KASIR MANDAL—DEFENDANT

—OPPOSITE PARTY.

Practice—Putting parties to box after hearing to note their demeanour, legality of.

The procedure of putting the plaintiff and the defendant to the witness-box, after the case has been concluded without putting them on oath to see them confront each other and to note their demeanour is not warranted by law.

Rule against an order of the Court of the Sub-Judge at Bogra, having power of a Court of Small Causes, dated the 28th April, 1927.

Mr. M. Syed Nasim Ali, for the Petitioner.

Messrs. M. Nur-ud-din Ahmed and M. Amir-ud-din Ahmed, for the Opposite Party.

JUDGMENT.—In this matter the plaintiff sued to recover Rs. 500 the balance due on a certain jute transaction. The defendant in his written statement stated that the case was false but, on the other hand, he was entitled to a certain amount from the plaintiff. He did not mention in his written statement in the suit that he had sued in the Court of the Second Munsif for his counter-claim the suit which was dismissed a little over a month after the present suit before the Small Cause Court Judge was disposed of. The case came on for hearing. The Judge heard the plaintiff and his witnesses, the defendant and his witnesses and arguments on both sides. It then appears that he took the ordinary noon-day adjournment and on coming back to the Court, it is admitted by him the explanation he furnished was that he put the plaintiff and the defendant both in the box to confront each other and note their demeanour and did not swear them but heard them argue in support of their cases. It appears that they said nothing more than what they stated in evidence. He then let them leave the box and passed judgment dismissing the suit.

This Rule has been obtained on the ground that his procedure in putting those two parties in the box without putting them on oath and let each talk to the other is not warranted by law and has

vitiating the whole trial. No doubt in his explanation the learned Judge says that he decided on the evidence but he had to decide on that evidence considering the probabilities of the case and it is difficult to believe in deciding as to who was more likely to speak the truth that what occurred after the lunch did not weigh with him in some way, even though he does not think that he did and it is clear that this method of putting the two men into the box after the case had been concluded excepting for judgment is not warranted by law. I am, therefore, compelled in the circumstances to set aside the decree in the case and remit the case for a re-hearing. The case must be tried by some Judge with the necessary powers and there is none in the Civil Division of Pabna and Bogra it will be transferred to a Judge exercising such Small Cause Court jurisdiction in the District of Rajshahi.

In the circumstances, I pass no order as to costs.

A. N. 4.

*Decree set aside.**Case remanded.***CALCUTTA HIGH COURT.**

CIVIL RULE No. 917 OF 1927.

November 16, 1927.

Present:—Mr. Justice Duval.

JOTIRMOY GOSWAMI AND OTHERS—**PLAINTIFFS—PETITIONERS**

versus

GURU GOBINDA GOSWAMI AND OTHERS

—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Application for withdrawal of suit with liberty to bring fresh suit—Order for withdrawal without liberty, legality of—Proper procedure.

The proper course to be adopted where an application is made for withdrawal of a suit with liberty to bring a fresh suit, and the Court considers that such an application should not be granted, is to dismiss the application altogether and proceed with the case. The Court has no power to make a declaration that the plaintiff is permitted to withdraw without liberty to bring a fresh suit.

Makani Bihari Dasji v. Parshottamdas Ramdas (1), Kamini Kumar Roy v. Rajendra Nath Roy (2), and Supadhani Debya v. Chandra Nath Pramanik (3), followed.

Rule against an order of the Munsif, Third Court, Bankura, dated the 15th June, 1927.

Mr. Bankim Chandra Mukherjee and Mr. Bansorilal Sarcar, for the Petitioners.

JUDGMENT.—This Rule is heard in *parte*. In this matter the plaintiff sued to recover a certain share of a tank on declaration of his title thereto. The defendant appeared, the case was adjourned until it was over a year old and on the 15th June it came on for hearing. The plaintiff was examined and the defendant was examined in part. A verbal application followed by a written application was then made on behalf of the plaintiff as there were formal defects—leave was prayed to withdraw from the suit with liberty to bring a fresh suit. This application was strenuously opposed and the learned Munsif rejected it. But instead of then finishing the case and deciding it on the evidence on the record and on such further evidence in the case as might be adduced he made declaration that the plaintiff is permitted to withdraw from the suit without liberty to bring a fresh suit with costs to be paid to the contesting defendant and subsequently made a memo. of such costs. Now as was pointed out in the case of *Mahant Biharidasji v. Parshotamdas Ramdas* (1), the proper course is if the Munsif did not consider that the application for withdrawal with liberty to bring a fresh suit should be granted to dismiss the application and then go on with the case. This ruling has been followed also in the case of *Kamini Kumar Roy v. Rajendra Nath Roy* (2), and is also in accordance with the decision of a Division Bench of this Court in the case of *Suradhan Debba v. Chandra Nath Pramanik* (3). I must hold, therefore, that the order of the Munsif does not amount to a dismissal of the suit or to the suit being withdrawn unconditionally. I, therefore, set aside what appears to be an order disposing of the suit in this way and order that the case do go back to the learned Munsif to proceed to dispose of the suit on the assumption that the application to withdraw with liberty to bring a fresh suit has been refused. It follows too that the present order for costs in favour of the defendants must also be set aside as it will be for the Munsif now to dispose of the suit as a contested suit in the ordinary way.

(1) 32 B. 345; 10 Bom. L. R. 293.

(2) 90 Ind. Cas. 432; 42 C. L. J. 219; A. I. R. 1926 Cal. 233.

(3) 37 Ind. Cas. 131; 20 C. W. N. 1011.

To this extent the Rule is made absolute. No one appearing on the opposite side, I make no order as to costs in the Court.

A. N. A.

Rule made absolute.

CALCUTTA HIGH COURT.

CIVIL RULE No. 958 OF 1927.

December 1, 1927.

Present:—Mr. Justice Mukerji.

Sheikh DALILUDDI—DEFENDANT No. 2

—PETITIONER

versus

Sayed MATAHAR ALI—PLAINTIFF—

OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), s. 153—Rent decree—Appeal—Decision as to question of amount of rent annually payable.

In order to bring a case within the exception to s. 153 of the Bengal Tenancy Act it is not necessary that there should be a declaration in the order or decree as to the amount of rent annually payable in respect of the *jama*. It is sufficient if a question as to the amount of rent annually payable has been decided in the decree or order. [p. 471, col. 2.]

The plaintiff claimed rent in respect of a tenancy alleging that it comprised an area of 41 acres and bore a rental of Rs. 3 per year. His case was that originally the *jama* consisted of 53 acres on a rental of Rs. 4 but that afterwards 12 or 13 acres were taken out of the *jama* and the rent reduced to Rs. 3. The defendant contended that the area of the *jama* was 53 acres and the rent was Rs. 4, and that there ought to be a total suspension of rent inasmuch as he had been dispossessed of a portion of the lands of the *jama*. The suit was decreed by the District Munsif:

Held, that there was a decision by the District Munsif on the question of the amount of rent annually payable and that his decision was, consequently, appealable under s. 153 of the Bengal Tenancy Act. [p. 471, col. 1.]

Rule against an order of the Court of the District Judge, Faridpur, dated the 21st of May, 1927.

Babu Nirmal Chandra Chakravarti, for the Petitioner.

Mr. Nuruddin Ahmed, for the Opposite Party.

JUDGMENT.—This Rule relates to a suit for rent which was tried by the Munsif, Second Court, Madaripur. The suit was valued at Rs. 15 and odd. The Munsif decreed the suit. The defendant preferred an appeal to the District Judge and the learned Judge held that the appeal was not maintainable in view of the provisions of s. 153 of the Bengal Tenancy Act. He held that the trial Court could not be considered to have decided any question of the amount

of rent annually payable. The Rule has been issued to show cause why this order of the learned District Judge should not be set aside upon two grounds first, "that the decision of the learned Munsif having decided a question of the amount of rent annually payable, the learned Judge ought to have held that he had jurisdiction to hear the appeal", and, second "that the Court of Appeal below ought to have held that the Court of first instance has also decided a question of title to or interest in 12 acres of land between the plaintiff and the defendants in this case and, therefore, the appeal was competent.

So far as the second of these grounds is concerned, I may say at once that I do not feel pressed by the argument advanced in support of it. As regards the first ground the position seems to be different. The facts relevant for the purposes of that ground are these. The plaintiff claimed rent in respect of this tenancy alleging that it comprised of an area of 41 acres and bore a rental of Rs. 3 per year. His case was that originally the *jama* consisted of 53 acres of land and the rental was Rs. 4, but that afterwards 12 or 13 acres of land was taken out of this *jama* for digging a tank thereon and the plaintiff paid Rs. 30 for the said quantity that was thus taken; and further that on account of this reduction in the area of the *jama* the rental was reduced by Re. 1. The defendant's case on the other hand, appears to have been that the area of the *jama* was 53 and that the rental was Rs. 4 as is evidenced by the Settlement Khatian, Ex. 4-A. The defendant, besides setting up various other defences, also contended that there ought to be a total suspension of rent inasmuch as he had been dispossessed from a portion of the lands of the *jama*. The questions which had necessarily to be determined amongst others in order to dispose of this suit were: whether the relationship of landlord and tenant existed between the parties, whether the plaintiff's allegation that the original *jama* of Rs. 4 was reduced to Rs. 3 in consequence of a portion of the lands of the *jama* having been taken by the plaintiff for digging a tank and whether the rent at the aforesaid rate as was alleged on behalf of the plaintiff was due from the defendant or not. Without determining the question whether the *jama* bore a rental of Rs. 3 as was the case put forward on behalf

of the plaintiff or it bore a rental of Rs. 4 and consisted of additional lands in which case the plaintiff perhaps would not have been entitled to a decree, no decision could be arrived at on the merits of the plaintiff's claim. It is true that there is no declaration in the order or in the decree as to the amount of rent that is annually payable by the defendant to the plaintiff in respect of the *jama*. But having regard to the wording of the exception contained in s. 153 it does not appear that any such declaration is necessary in order to bring the case within the exception. It is sufficient if a question as to the amount annually payable has been decided in the decree or order. It certainly appears upon the judgment that there has been a decision as regards the amount of the *jama* payable in respect of this tenancy. The only difference between this case and cases of the type that ordinarily come up before the Courts is that in the latter class of cases the *jama* alleged on behalf of the plaintiff is more than what is alleged on behalf of the defendant and in this particular case the position is reversed on account of its peculiar circumstances. The fact, however, reminds that the question of the amount of rent annually payable has been decided. In this view of the matter I am of opinion that an appeal lay from the decision of the learned Munsif.

The Rule is accordingly made absolute; the decision of the learned District Judge is set aside and it is directed that the appeal which the petitioner had filed in the Court of the learned District Judge from the decision of the Munsif be now heard and dealt with in accordance with law. Costs of this Rule one gold *mohur* will abide the result of the appeal.

A. N. A.

Rule made absolute.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1065 OF 1927.

November 23, 1927.

Present:—Mr. Justice Mukerji.

Syed MUJIBUDDIN CHOWDHURY AND
ANOTHER—DECREED-HOLDER AND AUCTION-
PURCHASER—PETITIONERS

versus

REAJUDDI MATBAR AND OTHERS—
JUDGMENT-DEBTORS—OPPOSITE PARTIES.
Bengal Tenancy Act (VIII of 1885), s. 153—Civil

Procedure Code (Act V. of 1908), O. XXI, r. 90—Order setting aside execution sale—Right of appeal—Allegation of fraud, effect of.

Fraud in publishing or conducting a sale is not meant to be kept separate from irregularities in the publication or conduct thereof for the purpose of the Explanation to s. 153 of the Bengal Tenancy Act and where an application is made under O. XXI, r. 90 of the Code of Civil Procedure for setting aside a sale on the ground of material irregularity or fraud, the mere fact that fraud is alleged would not give rise to a question of title within the meaning of the Exception so as to take the case out of the substantive provision of s. 153 of the Bengal Tenancy Act and thus give a right of appeal which is forbidden by that section. [p. 472, cols. 1 & 2.]

Maharaj Bahadur Singh v. Karani Mai (1), followed.

Kali Mandal v. Ramsarbaswar Chakravarti (2), referred to.

Rule against an order of the Court of the District Judge, Faridpur, dated the 10th May, 1927.

Babu Pran Sankar Sen Gupta, for the Petitioners.

Babu Nirmal Chandra Chakravarty, for Opposite Parties.

JUDGMENT.—This Rule has been made to show cause why the order of the District Judge of Faridpur, dated the 10th May, 1927, should not be set aside. Such other order passed as to this Court may seem fit and proper. The order referred to in the Rule is one by which the District Judge dismissed an appeal in his Court and affirmed the order of the Sadar Munsif of Faridpur, dated the 8th January, 1927, setting aside an execution sale. The Rule has been obtained by the decree holders-auction-purchasers.

A preliminary objection has been taken on behalf of the opposite party, namely, that the judgment-debtors, which is to the effect that in point of fact no appeal lay from the learned District Judge from the order of the Munsif inasmuch as the Munsif was vested with final powers under s. 153 of the Bengal Tenancy Act and there was no question which could arise in the case within the exception mentioned in that section. In support of this preliminary objection reference has been made to the case of *Maharaj Bahadur Singh v. Karani Mai* (1). The decision in this case is an authority for the proposition that fraud in publishing or conducting a sale is not meant to be kept separate from irregularities in the publication or conduct thereof for the purpose of the Explanation to s. 153 of

the Bengal Tenancy Act and that where an application is made under O. XXI, r. 90 of the Code of Civil Procedure for setting aside a sale on the ground of material irregularity or fraud the mere fact that fraud is alleged would not give rise to a question of title within the meaning of the Exception so as to take the case out of the substantive provision of s. 153 of the Bengal Tenancy Act and thus give a right of appeal which is forbidden by that section. In opposition to that argument reference has been made to the Full Bench decision of this Court in the case of *Kali Mandal v. Ramsarbaswar Chakravarti* (2) and to a very recent decision a note of which is to be found in 31 C. W. N. (Notes portion) page 107 the case being that of *Prosad Kumar Dutt v. Surendra Nath Mitra* (3). Having read this last mentioned decision and also the cases referred to and relied upon therein I do not find any reason to dissent from the view which I expressed in the case of *Maharaj Bahadur Singh v. Karani Mai* (1). I am, therefore, of opinion that the appeal which was filed before the District Judge from the decision of the learned Munsif was incompetent. The effect of holding that the preliminary objection is well-founded is to hold that the order against which this Rule is directed was passed without jurisdiction and one result of this a very curious result—is that that order will necessarily have to be set aside—a thing which the petitioner also asks for. But the justice of the case demands that the order of the Munsif which would be revived by reason of that of the learned District Judge being set aside should also be considered in this Rule because the order of the District Judge merely affirms the order of the learned Munsif. On perusing the order of the learned Munsif I find that it is not passed upon any sufficient or proper findings. The learned Munsif has set aside the sale holding that the petitioner came to know of the sale in the month of Falgun last when he was resisted in his attempt to plough the land by the decree-holder No. 1's son and he has also found that the processes were concealed. It is needless to say that these two findings even if they are accepted as

(1) 104 Ind. Cas. 199; 32 C. W. N. 57; 45 C. L. J. 6; A. I. R. 1927 Cal. 633.

(2) 32 C. 957; 1 C. L. J. 476; 6 C. W. N. 721.

(3) 31 C. W. N. cvii (notes).

entirely correct would not be sufficient for an order for setting aside the sale under O. XXI, r. 90 of the Code. But then there is a further unsatisfactory feature in these proceedings, namely, that this order was passed on the basis of the uncross-examined testimony of the judgment-debtor himself, the petitioner in the present Rule not having appeared on the day when the case was taken up and his application for summoning his witnesses having been refused by the learned Munsif. It may be that there were some laches on the part of the petitioner in summoning his witnesses, but having taken into consideration the various orders that were passed from time to time in connection with the case I am not at all sure that the learned Munsif exercised a proper discretion in refusing the petitioner's application on the 8th January, 1927, and then proceeding with the case *ex parte*. On the whole in view of the circumstances of the case I think it would be more satisfactory to have the proceedings re-tried in the presence of both the parties, if possible, giving the petitioner an opportunity to adduce such evidence as he may desire. I am accordingly of opinion that the Rule should be made absolute. Having regard, however, to the fact that the petitioner adopted a wrong course in filing an appeal against the order passed by the learned Munsif although no appeal lay from his decision and also in view of the fact that for what has happened the petitioner has got to blame himself, the order that I shall make would be conditional on the petitioner paying the costs to the opposite party.

I accordingly direct that in the event of the petitioner paying to the opposite party within a month of the arrival of the records in the Court of the learned Munsif the decretal costs of this Rule hearing-fee therein being assessed at Rs. 16 together with Rs. 8 as Pleader's fee for the proceedings in the Court of the Munsif the Rule will be made absolute, the orders passed by the learned District Judge and by the learned Munsif will be set aside and the proceedings under O. XXI, r. 90 of the Code will be re-tried. If the petitioner fails to make the said payment within the time aforesaid the Rule will stand discharged with costs—one gold *mohur*.

A. N. A.

Order accordingly.

CALCUTTA HIGH COURT.

CIVIL RULE No. 800 OF 1927.

November 10, 1927.

Present:—Mr. Justice Duval.

JAJNESWAR KARMAKAR—DEFENDANT

—PETITIONER

versus

KAILASH CHANDRA GHOSE—PLAINTIFF

—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Arts. 49, 115, 115—Suit for recovery of gold delivered to defendant for making ornaments, or their value—Limitation—Deposit—Wrongful possession after demand, effect of.

A suit for recovery of gold and ornaments delivered to the defendant for making new ornaments, or the price thereof, is governed by Art. 145 of Sch. I of the Limitation Act and the mere fact that depository continued to retain possession of them after demand was made does not take the case out of the said Article.

Kristo Kamini Dassi v. Administrator-General of Bengal (1), Gangahari Chakrabarti v. Nabin Chandra Banikya (2) and Promotho Nath Mullick v. Prodyumno Kumar Mullick (3), followed.

Rule against an order of the Munsif, First Court, Narail (Jessore), exercising the powers of a Court of Small Causes, dated the 30th May, 1927.

Babu Prafulla Kamal Das, for the Petitioner.

Babu Hemendra Chandra Sen, for the Opposite Party.

JUDGMENT.—In this case the plaintiff sued for refund of certain gold and silver kept in the custody of the defendant or in lieu of the price thereof. His case was that he handed over two *tolas* of gold and some silver ornaments to the defendant in 1923 for making some ornaments but the defendant never made the ornaments and refused to return the gold and silver. The defendant pleaded among other things limitation and denied receipt of these ornaments from the present plaintiff. The learned Small Cause Court Judge found as a matter of fact that the plaintiff did make over the gold and silver to the defendant but the defendant did not make the ornaments and did not carry out his share of the contract. He held further that Art. 145 of the Limitation Act applied to the case.

A Rule has been obtained on behalf of the defendant and one point is whether Art. 145 of the Limitation Act applies or whether there should be a shorter period of limitation under Art. 49 or 115. It is argued that the handing over of the ornaments for making into other jewellery is not deposit at all. On the other hand, I am

ound by the authorities of this Court and it is perfectly clear that Art. 145 does not merely apply even when property is not recovered in species. See the case of *Kristo Kamini Dassi v. Administrator-General of Bengal* (1). An exactly similar case to this appears to be also the case of *Gangahari Chakrabarti v. Nabin Chandra Banikya* (2) where it was held that the case was one under Art. 145 of the Schedule. It is argued however, that a time is fixed within which the new jewellery was to be delivered and that after that time expired the defendant ceased to be depository and became a person in wrongful possession, and so Art. 145 will not apply. In this connection I would only refer to the case of *Promotho Nath Mullick v. Prodymno Kumar Mullick* (3) where the learned Judge points out that the mere fact of possession by the depository after demand becoming wrongful does not take the case out of Art. 145.

In this view, I hold that the proper Article under the Limitation Act has been applied and the suit is in time. The Rule is, therefore, discharged with costs, hearing-fee two gold mohurs.

A. N. A.

Rule discharged.

(1) 7 C. W. N. 476.

(2) 34 Ind. Cas. 959; 20 C. W. N. 232; 23 C. L. J. 145.

(3) 69 Ind. Cas. 900; 26 C. W. N. 772.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 970
OF 1925.

August 3, 1927.

Present:—Mr. Justice Page and
Mr. Justice Graham.

BARSIK NANDI MANDAL AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

GURUDAS PAL AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Document under which mortgagor gives up his rights to mortgagee, effect of—Necessity of registration.

A document under which a mortgagor gives up his right and possession of the properties mortgaged to the mortgagee and by so doing absolves himself from the mortgage-debt is in effect a document transferring all the right and interest of the mortgagor in the properties to the mortgagee in consideration of the mortgagee foregoing his right to recover the mortgage-debt and is, therefore, compulsorily registrable under s. 17 of the Registration Act.

Appeal against a decree of the Subordinate Judge, Murshidabad, dated the 13th February, 1925, reversing that of the Munsif, First Court, Berhampur, dated the 8th October, 1923.

Babus Jagat Chandra Bose and Sekhar Kumar Bose, for the Appellants.

Babu Hemendra Chandra Sen, for the Respondents.

JUDGMENT.—This suit is brought to recover *khas* possession of certain land on declaration of the plaintiff's title thereto. The lower Appellate Court has passed a decree in favour of the plaintiff in respect of only one of the plots of land in dispute. Now, the plaintiff seeks to recover *khas* possession. He was a mortgagee of the property in suit and the mortgage-debt and the interest thereon at all material times exceeded Rs. 100 and it has been found as a fact by the lower Appellate Court that the value of the mortgaged property was not Rs. 100. In his capacity as a mortgagee the plaintiff is not entitled to immediate *khas* possession of the property. But in support of his claim to *khas* possession he tendered in evidence a document in the following manner. "Being unable to pay up the mortgage-debt principal and interest I give up the right and possession of the properties mortgaged to the mortgagee and by so doing I am absolved from the liability of the mortgage debt." That document was not registered but it was the foundation of the plaintiff's claim to possession in the suit.

The only issue which need be considered upon this appeal is whether or not it was incumbent upon the plaintiff to prove that this document had been duly registered before it became admissible in evidence for the purpose of proving his title to *khas* possession. The document was in Bengali, but as we apprehend the meaning of the document, (it has been translated into English) we think that the effect of the document was that the mortgagor assigned all his right and interest in the immoveable property subject to the mortgage in consideration of the mortgagee foregoing his right to recover the mortgage-debt and the interest thereon. In our opinion, a document of that description must necessarily be registered under s. 17 of the Registration Act; and if it was not registered it was not permissible for the plaintiff to rely upon that document for the purpose of founding his claim in the suit. The

result is that this document was not admissible in evidence and the plaintiff's claim to *khas* possession of the one plot for which the decree was passed in the lower Appellate Court must fail.

The result is that the appeal is allowed, the decree appealed against set aside and the suit dismissed with costs in all Courts.

The cross-objection is not pressed and is dismissed without costs,

A. N. A.

*Appeal allowed;
Cross-objection dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 214 OF 1927.

March 21, 1927.

Present:—Mr. Justice B. B. Ghose and
Mr. Justice Mallik.

MATILAL LYALL—PETITIONER

versus

PREMI LYALL—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 115—
Divorce suit—Interlocutory order—Revision—Inter-
ference—Divorce Act (IV of 1869), s. 11.*

The High Court will not ordinarily interfere in revision with an order made by a lower Court in an interlocutory matter in a divorce suit.

Rule against an order of the District Judge, Alipore, dated the 21st January, 1927.

Babu Suresh Chandra Talukdar, for the petitioner.

JUDGMENT.—This is a Rule against an order refusing an application for addition of a party as a co-respondent in a suit under the Indian Divorce Act. The application was rejected by the Court below. The plaintiff obtained a Rule against that order. As it is not the usual practice of this Court to interfere in revision with an order made by the lower Court in an interlocutory matter this application is rejected. If the petitioner has any real grievance on account of the adverse order by the Court below he has a right of appeal against the final order and upon the appeal this Court will be able to pass the proper order.

The Rule is, therefore, discharged. No order is made as to costs as there is no appearance on behalf of the opposite party.

A. N. A.

Rule discharged.

CALCUTTA HIGH COURT.

CIVIL RULE No. 867 OF 1927.

November 10, 1927.

Present:—Mr. Justice Duval.

Sheikh DILJAN—PLAINTIFF—

PETITIONER

versus

MAKBUL KHAN—DEFENDANT—

OPPOSITE PARTY.

Deed—Material alteration—Decree for admitted amount, whether can be given.

Plaintiff sued on a promissory note for Rs. 10. The defendant pleaded that the promissory note was for Rs. 5 only and that the amount had been paid off. It was found that the document was altered by the plaintiff but that the discharge pleaded by the defendant was untrue:

Held, that inasmuch as the deed had been materially altered, it was entirely void and the plaintiff could not be given a decree even for the amount of Rs. 5.

Rule against an order of the Munsif, Second Court, Contai (Midnapur), exercising the power of a Court of Small Causes, dated the 5th May, 1927.

Babu Gopendra Nath Das, for the Petitioner.

Babu Harendra Nath Mukherjee, for the Opposite Party.

JUDGMENT.—In this case the plaintiff sued on a bond to recover a sum of Rs. 10 borrowed in 1922 with interest. The defendant contended that the bond was only for Rs. 5 and that it had been paid off. The learned Small Cause Court Judge found that the consideration was only Rs. 5 and the bond had been tampered with. But he found that the plea of payment of the defendant was not true. He dismissed the suit on the ground that it was based on a false document. Against this order a Rule has been obtained. I have been referred to the case of *Parbati Charan Mukherjee v. Amarendra Nath Bhattacharjee* (1) for the proposition that although the bond had been tampered with it was admissible to prove the existence of the debt of Rs. 5. On the other hand I have been referred to the English case of *Suffel v. Bank of England* (2), and the old cases therein cited against such proposition. It appears to me to be an established principle of law that when a deed is altered on a material point by the plaintiff himself, thereby it becomes void. Now, in this case it cannot be said that the plaintiff has really produced any evidence at

(1) 96 Ind. Cas. 97; 53 C. 418; A. I. R. 1926 Cal. 831.

(2) (1882) 9 Q. B. D. 555; 51 L. J. Q. B. 401; 47 L. T. 346; 30 W. R. 932; 46 J. P. 500.

all apart from the tampered deed to prove the debt. The mere fact that the defendant said in the written statement that the original deed was for Rs. 5 should, not in my opinion, be used for the benefit of the plaintiff who tampered with the deed and, therefore, in my opinion, the learned Judge has rightly dismissed the suit.

The Rule is, therefore, discharged with costs, hearing-fee, one gold mohur.

A. N. A.

Rule discharged.

CALCUTTA HIGH COURT.

CIVIL RULE No. 629 OF 1927.

November 21, 1927.

Present:—Mr. Justice Mukerji.

UMESH CHANDRA MAJUMDAR,
SECRETARY, MYMENSINGH LOAN
OFFICE LTD.—PETITIONER

versus

SAFIYATANNESSA KHATUN AND

OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 92, 93—Application for setting aside sale—Omission to serve notice on party affected, effect of—Order setting aside sale, whether void—Order for refund of purchase-money, legality of.

An order setting aside a Court sale cannot be treated as a nullity merely because notice on the application for setting aside the sale was not issued to a party who was affected by the order. The party to whom notice was not issued on the application cannot, therefore, be allowed to impugn the validity of the order in an application which is not directed against that order, but against a subsequent order which has been passed directing him to refund the purchase-money withdrawn by him. [p. 477, col. 1.]

Jai Berham v. Kedar Nath Marwari (1) and *Raja Rao v. Anantha Narayan Chetty* (2), distinguished.

Rule against an order of the Munsif at Jamalpur (Mymensingh), dated the 16th February, 1927.

Babu Prafulla Chandra Nag, for the Petitioner.

Babu Birendra Kumar De, for the Opposite Party.

JUDGMENT.—The facts which have given rise to the order against which this Rule is directed are shortly as follows: The petitioners obtained a decree against certain judgment-debtors in 1910 in Money

Suit No. ⁷⁵⁰₁₁₆₄ of that year. In 1920 a *jote* of the judgment-debtors was sold in execution of a rent decree obtained by the landlords and was purchased by some other

parties and the sum of Rs. 525 was deposited by them in Court in two instalments. The petitioners had failed to realise the amount of their decree of 1910 and they, on the amount of Rs. 525 being put in by the auction-purchasers, applied for attachment of a certain portion of the said amount, Rs. 287-10 having gone towards the satisfaction of the decree for rent and Rs. 237-6 being left in Court as surplus sale proceeds. As a result of the proceedings thus instituted by the petitioners, they were allowed to withdraw Rs. 79-2 from Court, out of the aforesaid amount deposited by the auction-purchasers, in part satisfaction of their decree of 1910. In 1922 the amount of Rs. 79-2 was thus withdrawn by the petitioners. It appears that thereafter there were certain proceedings under O. XXI, r. 90, Civil Procedure Code, to which the petitioners were not parties and of which, it is said, no notice was given to them, as a result of which the sale in execution of the rent decree to which I have already referred was set aside by the Court. On the sale being set aside, as aforesaid, the auction purchasers applied to get back their purchase-money and upon that the learned Munsif made an order in their favour against which the present Rule is directed.

The substance of the contention that has been urged in support of the Rule is to the effect that the order setting the sale aside was passed in contravention of the provisions of O. XXI, r. 92 of the Code which makes it obligatory on the Court to issue notices of the application for setting aside the sale to all the parties affected by the order that has to be passed on such application. It is urged that, in the present case the petitioners were not given such notices, that the order setting aside the sale was, therefore, one passed without jurisdiction and that inasmuch as the petitioners would suffer irreparable loss, if they are now called upon to refund the amount which they have withdrawn in part satisfaction of their own decree, the learned Munsif acted without jurisdiction and also improperly in making the order aforesaid. The whole basis of the petitioners' contention seems to me to be what is alleged by them in para. 10 of their petition and which is to the effect that the order setting the sale aside was passed without jurisdiction inasmuch as

no notice was served on them and further that the proceeding held in connexion with the application for setting the sale aside was a collusive and *benami* affair. It may be conceded that if the order setting the sale aside may be looked upon as a nullity, the petitioners are entitled to urge that they are not bound by it and that any further or consequential orders that may have been passed on the basis of it should also be set aside. It may also be conceded that in view of the proviso to sub-r. 2 of r. 92 the Court should not have passed an order on the application for setting aside the sale without giving notice of the application to all the persons affected by such an order. But I find it very difficult to hold that merely because no notice was given of the application, the order which the Court passed was one that can be said to have been passed without jurisdiction. It was an order which the Court was wrong in passing and the parties whose interests were affected by the order may very well complain of its validity. But it is quite a different thing to say that it can be regarded as an order passed entirely without jurisdiction. The petitioners do not appear to have challenged the validity of the order itself either by an application for review or by moving against it or by taking such other measures as the law allows. So long as the order is not set aside all consequences that it may legitimately lead to will follow. The present application on which this Rule has been granted is not directed against that order but against a subsequent order, which has been passed directing the petitioners and the judgment-debtors to refund the amount which had been withdrawn by them. I am unable to see what relief the petitioners can expect in this Rule so long as this Court is not competent to go behind the order that was passed setting aside the sale. The provisions of O. XXI, r. 93 of the Code are imperative. The rule runs in these words: "Where a sale of immoveable property is set aside under r. 92, the purchaser shall be entitled to an order for re-payment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid". In the present case the sale has been set aside under r. 92. The order by which the sale has been set aside is at the present moment a subsisting order and so long as it subsists it must attract the

operation of r. 93. In support of the argument that the equities are in favour of the petitioners and that they should not be made to suffer in consequence of an order passed in the proceedings to which they were not parties, reference has been made to the decision of the Judicial Committee in the case of *Jai Berham v. Kedar Nath Marwari* (1), and also to a decision of the Madras High Court in the case of *Raja Rao v. Anantha Narayanan Chetty* (2). These two decisions have very little bearing upon the present case as the statutory obligations arising under r. 93 of O. XXI, Civil Procedure Code did not come in for consideration in either of them. Whatever other remedies the petitioners may have in connexion with this matter, I am clearly of opinion that on the facts, as they are, the present Rule cannot be made absolute. The Rule is accordingly discharged; but in view of the circumstances of the case, I make no order as to the costs.

A. N. A.

Rule discharged.

(1) 69 Ind. Cas. 278; 27 C. W. N. 582; A. I. R. 1922 P. C. 269; 4 P. L. T. 61; 32 M. L. T. 10; 37 C. L. J. 351; 44 M. L. J. 735; 21 A. L. J. 490; 25 Bom. L. R. 613; (1923) M. W. N. 338; 2 Pat. 10; 18 L. W. 802; 49 I. A. 351 (P. C.).

(2) 67 Ind. Cas. 369; 15 L. W. 303; 42 M. L. J. 308; (1922) M. W. N. 255; A. I. R. 1922 Mad. 228.

CUTTACKA HIGH COURT.

CIVIL RULE No. 946 of 1927.

November 16, 1927.

Present:—Mr. Justice Duval.

SAMBHUNATH BASAK AND ANOTHER
—PLAINTIFFS NOS. 2 AND 3—PETITIONERS
versus

ABDUL KADER AND OTHERS—DEFENDANTS
—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Suit on behalf of minor—Compromise by guardian—Leave of Court—Application by guardian to withdraw from compromise before granting of leave—Power of Court to enforce compromise.

A Court is not bound to refuse to pass a decree in terms of a compromise entered into by a guardian on behalf of a minor merely because, before the compromise has been sanctioned, the guardian has applied for withdrawing from the compromise.

Ranga Rao v. Rajagopala Raju (1) and *Gulab Dei v. Vaish Motor Co.* (2), distinguished.

Rule against an order of the Court of the Sub Judge and Assistant Sessions Judge, Dacca, in T. Suit No 666 of 1925 of the Munsif, Second Court at Narayangunj (Dacca).

Mr. Atul Chandra Gupta and Babu Deblal Sen, for the Petitioner.

Mr. M. A. S. M. Akram, for the Opposite Parties.

JUDGMENT.—In this case one Harendra Lal Basak and two minors represented by their mother sued in ejectment certain defendants. On the 14th of June, 1926, the plaintiffs and defendant No. 3 filed a petition of compromise and a petition by the guardian for leave to compromise under the provisions of O. XXXII, r. 7 of the Code of Civil Procedure was also put in. By the compromise defendant No. 3 was to pay a certain *nazar* and get the tenancy of some of the lands. With the other defendants there was no proposed compromise. The learned Munsif did not then consider the petition of compromise because, as he expressed in his judgment, he wished to be satisfied after hearing the case as to whether it was in the interests of the minors. But on the 28th August, 1926, the three plaintiffs by another petition sought to withdraw from the compromise on the ground that there had been misrepresentation and that the guardian of the minors in fact knew nothing about it. The Munsif during the trial came to the conclusion that there was no misrepresentation by defendant No. 3 and he found that the compromise was not against the minors' interests and, therefore, so far as the defendant No. 3 was concerned he gave a decree in terms of the compromise. The other defendants had apparently admitted the plaintiffs' title and decrees were also made as against them. The appeal came before the Subordinate Judge and was rejected.

A Rule was then obtained from this Court and it is urged that no compromise on behalf of the minors could be effected except with leave of the Court and that, therefore, as before the compromise was sanctioned by the Court the guardian who wished to compromise had resiled from it the decree on compromise was illegal at least so far as these minors were concerned. Now, it is argued that in view of the cases of *Ranga Rao v. Rajagopala Raju* (1)

and *Gulab Dei v. Vaish Moter Co.* (2) as the petition for compromise had been followed by another petition for leave to withdraw from compromise before the leave was granted, therefore, the Courts were bound not to accept the compromise as regards these two minors. This case, however, is not similar to those cases. In those cases the next friend of a minor agreed to compromise subject to leave of the Court and withdrew before leave was applied for. In the present case, leave was applied for and the Munsif put off deciding whether he should give leave or not until he knew all about the position of the parties. The action of the Munsif I can quite understand. In the present case, leave was applied for and the learned Munsif's decision on the later petition and the decision in appeal had been that this later petition asking to withdraw was not a *bona fide* one. It is to be noted that the petition was not by the minors alone. It is by all three of the parties and is mainly concerned on whether there was misrepresentation to the major plaintiff. It is only in the last sentence of the petition that it is said that the lady guardian knew nothing about it. The learned Munsif has found that this petition was not a *bona fide* one but was got up by other interested parties owing to other facts in the suit. I cannot, therefore, say that the learned Munsif and the learned Subordinate Judge were wrong though the Munsif may not have acted strictly in accordance with the words of the Code in not granting leave to compromise on the first day. In this view and especially as the rulings I have referred to are not on the same facts as in the present case I am not prepared to exercise jurisdiction under s. 115 of the Code and the Rule is, therefore, discharged with costs, hearing-fee one gold *mohur*.

A. N. A.

Rule discharged.

(2) 88 Ind. Cas. 429; 47 A. 782; 23 A. L. J. 523; L. R. 6 A. 390 Civ.; A. I. R. 1925 All. 570.

CALCUTTA HIGH COURT.

CIVIL RULE No. 832 OF 1927.

November 29, 1927.

Present :—Mr. Justice Mukerji.
MADHAB CHANDRA DUTTA

—DEFENDANT—PETITIONER

versus

JAJNOO RAM—PLAINTIFF AND OTHERS

—Pro forma DEFENDANTS—

OPPOSITE PARTIES.

Torts—Wrongful attachment—Property placed by Police in custody of third person—Damages to property during such custody—Suit for damages, maintainability of—Custody of Police, whether custody of Court—Criminal Procedure Code (Act V of 1898), ss. 107, 146.

Where possession of a certain property becomes the possession of the Court, a person at whose instance the rightful owner may have been deprived of his possession in respect of the property no longer remains liable for any damages that may be caused to it. [p. 480, col. 1.]

Peruvian Guano Co. v. Dreyfus (1), referred to.

But where an attachment is made by the Police in the exercise of those powers which the Police have for the prevention of a breach of the peace, either with or without reference to a Magistrate, the latter acting not in his judicial capacity, the attachment cannot be said to have been made under an order passed by a Court of competent jurisdiction and the person in whose custody the property is kept cannot be said to be in possession on behalf of the Court. [*ibid.*]

The defendant applied for proceedings being taken against the plaintiff under s. 107 of the Criminal Procedure Code and while the said proceedings were either pending or in contemplation the paddy standing on the land in dispute was attached by the Police and kept in the custody of a third person. There was nothing to show that the attachment was made under s. 146, Criminal Procedure Code. The plaintiff to whom the property was finally restored sued the defendant for damages for injury caused to the crops during the time that it was in the custody of the third person.

Held, that the plaintiff was entitled to recover the damages claimed from the defendant. [p. 480, col. 2.]

Smith v. L. & S. W. Ry. (3), *Mudvirapa Kulkarni v. Fakirapa Kenardi* (4) and *Goma Mahad Patil v. Gokaldas Khimji* (5), relied on.

Rule against an order of the Judge, Court of Small Causes, Barpeta, dated the 31st March, 1927.

Babu Manmathanath Roy (Jr.), for the Petitioner.

Babu Satindra Nath Roy Chowdhury, for the Opposite Parties.

JUDGMENT.—This Rule has been issued to show cause why the decree passed by the Small Cause Court Judge of Barpeta, dated the 31st of March, 1927, should not be set aside. The Rule has been issued at the instance of the defendant in a suit. The plaintiff claimed

damages from the defendant on the allegations that certain crops which had been grown by him were attached at the instance of the defendant and that subsequently the land was given back to the plaintiff but that the crops which had been attached were damaged and in consequence thereof, the plaintiff alleged, he was entitled to recover damages. The defence of the defendant, so far as it was necessary for the purpose of the argument that had been advanced on his behalf was that there was a petition filed by the defendant for proceedings being taken against the plaintiffs under s. 107, Criminal Procedure Code, and that while the said proceedings were either pending or under contemplation, the paddy standing on the land was attached by the Police and kept in the custody of a third person named Ranjit Ram Keot and that the damage that had been caused to the paddy was caused during the time that it was in such custody. The defendant states in his petition to this Court that the said attachment was apparently made under the provisions of s. 146, Criminal Procedure Code. It may be stated, however, that the materials on the record are wholly insufficient for the purpose of arriving at a definite conclusion as to the circumstances under which and the provisions of the law in consonance with which the said order of attachment was made. All that appears from the record is that the paddy was attached by the Police and kept in the custody of Ranjit Keot and that an order was passed by the Criminal Court on the 16th March, 1926, which ran in these words: "This primarily is a matter for the Civil Court to decide as to who should get the paddy. If the claim is decided here, it will not be final. Proceedings struck off." The Munsif gave the plaintiff a decree for Rs. 54; that is to say, the price of 27 maunds of paddy calculated at the rate of Rs. 2 per maund.

The substantial contention that has been urged in support of the Rule is to the effect that inasmuch as the paddy was not in the custody or possession of the defendant, but that the Police had made it over to a third person named Ranjit Ram Keot it should be taken that such attachment was made under some sort of order legally passed by a Court of competent jurisdiction, as a presumption should always be made in favour of the validity

of an act done by a public servant and if that view be taken, the petitioner cannot be held responsible for any damages that may have been caused to the paddy. In support of this contention reliance has been placed upon the decision in the case of *Peruvian Guano Co. v. Dreyfus* (1) and a passage in Mayne on Damages, 10th Edition, page 394, where the principles laid down in that case have been discussed. Broadly stated, the principle laid down by the House of Lords in that case was that where the possession of some property becomes the possession of the Court, a person at whose instance the rightful owner may have been deprived of his possession in respect of property no longer remains liable for any damages that may be caused to it. To apply that principle to the present case it will be necessary to find such as was found in that case, that the paddy passed into the custody of the Court—a fact with regard to which there is absolutely no evidence and no attempt even appears to have been made on behalf of the petitioner to establish that it was really under the order of the Court that the paddy was taken possession of or that the possession of Ranjit Keot could in any sense be construed as being the possession of the Court. If the attachment that was made by the Police was made in the exercise of those powers which the Police have for the prevention of a breach of the peace either with or without reference to a Magistrate the latter not acting in his judicial capacity it stands to reason that the attachment cannot be said to have been made under an order passed by a Court of competent jurisdiction and the person in whose custody the property is kept can hardly be said to be in possession on behalf of the Court. If the attachment was made under an order of the Magistrate under s. 146, Criminal Procedure Code of which, however, there is no evidence it may be said that the property was *custodia legis* and for certain purposes the possession of the Court will have to be treated as being the possession of the rightful owner; for instance, as regards the question of limitation such as was held in the case of *Abinash Chandra Chowdhury v. Tarini Charan Chowdhuri* (2). So long, (1) (1892) A. C. 166; 61 L. J. Ch. 749; 66 L. T. 536; 7 Asp. M. C. 225. (2) 95 Ind. Cas. 117; 30 C. W. N. 541; A. I. R. 1926 Cal. 782.

however, as the defendant is unable to establish that the Court was in possession it is obvious that he remains liable for all the damages that may have been caused to the property in respect of which he has wrongfully put the plaintiff out of possession. The principle was very well stated in the case of *Smith v. L. & S. W. Ry.* (3) where it was stated that in a case originating even in negligence "the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." The principle applies with greater force to a case where it is not merely negligence but a wilful wrong that is committed. Such a person remains liable much more for the consequences, at least for the natural consequences of his wilful wrong. The facts that false allegations were made to the effect that the defendant himself was the owner of the paddy, having grown the same and that upon the basis of such false allegations proceedings under s. 107 were sought to be instituted and that the plaintiff was kept out of possession of the paddy which really belonged to him, the paddy being taken by the Police and made over to a third person for safe custody—these facts taken together establish a case of wilful wrong as against the defendant; and unless he is able to show that there are circumstances which would justify the Court in passing the order which would have the effect of enabling him to escape from the responsibility for the natural consequences of his act, I think the plaintiff is entitled to recover damages from him. That an action of this description based on grounds such as appear in the present case is maintainable is apparent from the cases of *Mudvirapa Kulkarni v. Fakirapa Kenardi* (3) and *Goma Mahad Patil v. Gokaldas Khimji* (4) and other cases which need not be specifically mentioned. I am accordingly of opinion that there is no reason to interfere with the decree that has been passed in this case and that, therefore, the Rule should be discharged.

The Rule is accordingly discharged with costs one gold mohur.

A. N. A.

Rule discharged.

(3) (1871) 6 C. P. 14 at p. 21; 40 L. J. C. P. 21; 23 L. T. 678; 19 W. R. 230.

(4) 7 B. 427; 8 Ind. Jur. 48; 4 Ind. Dec. (N. S.) 287.

(5) 3 B. 74; 2 Ind. Dec. (N. S.) 49.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2016 OF 1926.

November 17, 1927.

Present:—Mr. Justice Tek Chand.

BASANT SINGH—DEFENDANT—**APPELLANT***versus***SHIBBA MAL—PLAINTIFF—RESPONDENT.***Party wall—Co-owner's right to raise wall—Acquiescence—Mandatory injunction.*

It is settled law that one co-owner of a party wall is not entitled to raise its height without the consent or acquiescence of the others and if he does so he makes himself liable to an action for injunction or damages: [p. 482, col. 1.]

Cubitt v. Porter (1), *Watson v. Gray* (2), *Ikrām Ullah Khan v. Muhammad Yunis Ali Khan* (3) and *Shivputrappa Parappa v. Shivrudrappa Kalappa Huli* (4), followed.

If a co-owner of a party wall stands by and suffers the building to proceed to a considerable extent, his acquiescence in the erection will be implied therefrom. [*ibid.*]

Second appeal from a decree of the District Judge, Ambala, dated the 23rd May, 1926, reversing that of the Subordinate Judge, Third Class, Ambala, dated the 12th February, 1926.

Mr. Dev Raj Sawhney, for the Appellant.

Mr. Shamair Chand, for the Respondent.

ORDER.—The parties to this case are neighbours who own houses in the Ambala Cantonment which adjoin each other. The defendant raised the height of the intervening wall by 7 feet and in the portion so built he kept a niche and an almirah. The plaintiff instituted the suit, out of which this appeal has arisen for demolition of this portion of the wall and for closing the niche and the almirah. In the plaint the plaintiff based his title on the sole ground that the wall was his exclusive property with which the defendant had no right to interfere. The defendant denied the plaintiff's exclusive ownership of the wall and alleged that it belonged to both the parties jointly. He further pleaded that he had raised the wall with the permission of the plaintiff. In para. 7 of the *jawab dawa* he also urged that the plaintiff had stood by when the construction was going on and having acquiesced in the act of the defendant, he was not entitled to the injunction asked for.

The first Court raised two issues as follows:—

1. Is the wall in suit owned exclusively by the plaintiff.

2. If issue No. 1 be found in plaintiff's

favour was the wall raised with the plaintiff's permission?

It will be seen that these issues did not cover the determination of the respective rights of the parties on the basis that the wall was a jointly owned party wall. The Subordinate Judge found the first issue against the plaintiff, holding that he had failed to prove that the wall was his exclusive property. On this finding he held that the second issue did not arise and accordingly he dismissed the plaintiff's suit.

The plaintiff appealed to the District Judge again basing his claim solely on his exclusive ownership. The learned District Judge did not, however, think it necessary to record any finding on the plaintiff's exclusive title, as he was of opinion that even if the wall was jointly owned by the parties it was necessary for the defendant to obtain the permission of his co-owner, the plaintiff, before he could raise the wall. The learned District Judge also found that the defendant had failed to prove that any express permission had been taken by him from the plaintiff before constructing the wall. He did not go into the question of acquiescence but in his finding on the legal point, he accepted the appeal and decreed the plaintiff's suit in full.

The defendant has, however, preferred a second appeal to this Court and the first point raised on his behalf by Mr. Dev Raj Sawhney is that the plaintiff claimed the injunction on the sole ground that he was the exclusive owner of the wall, that he produced no evidence in support of his contention and, therefore, his suit should have been dismissed. He contends that the learned District Judge should not have set up a new case for the plaintiff and decreed the suit on the basis of the wall being a jointly owned party wall. Mr. Shamair Chand for the respondent urged in reply that no new case had been set up as the defendant himself had admitted in his *jawab dawa* that the wall was owned by both parties and that if the case is to be decided on the allegations in the plaint, it should be sent back to the District Judge for a finding on issue No. 1. He, however, concedes that the plaintiff led no evidence to prove his exclusive ownership of the wall except that he produced the defendant as a witness who deposed that the wall was joint. There is no other evidence on the

record, even the plaintiff himself did not go into the witness-box and states on oath that the wall belonged to him alone. In these circumstances, I do not think it necessary to remand the case for this purpose and hold that the plaintiff has failed to prove issue No. 1.

I agree, however, with Mr. Shamair Chand that this finding is not sufficient toarrant this dismissal of the plaintiff's suit. As already stated, the defendant, in his *jawab dawa*, did not allege that he was the exclusive owner of the wall. On the other hand, he stated that the wall was jointly owned by both the parties. It was, therefore, necessary to determine the rights of the parties on the basis that the wall was a party wall owned by both. The issues framed by the Subordinate Judge did not cover this point and the learned District Judge was not, in my opinion, justified in decreeing the plaintiff's suit without examining the case in all its aspects. It is settled law that one co-owner of a party wall is not entitled to raise its height without the consent or acquiescence of the others and, if he does so, he makes himself liable to an action for injunction or damages. This was clearly laid down so far back as 1828 in *Cubitt v. Porter* (1) and again in the well-known case of *Watson v. Gray* (2), which is considered to be the leading authority on the subject. In India the same view has been taken in *Ikram Ullah Khan v. Muhammad Yunis Ali Khan* (3), and recently by the Bombay High Court in *Shivputrappa Parappa v. Shivrud-rappa Kalappa Huli* (4).

The defendant alleged that he had taken the permission of the plaintiff before building the wall and led oral evidence in support of this contention. This evidence, was however, disbelieved by the learned District Judge who held that no express consent was proved to have been given. This is a finding of fact which I cannot disturb in second appeal. It must, therefore, be taken that the defendant built the wall without the express permission of the plaintiff.

But the question of acquiescence still re-

mains and as I have pointed out in an earlier part of the judgment this point was raised by the defendant in para. 7 of the *jawab dawa*. But no issue was framed on it nor were the minds of the parties or of the Judges of either of the Courts below applied towards it and there are no materials on the record from which I could come to a definite finding upon it. In fact, the learned Counsel for both the parties are not agreed even as to the period that elapsed between the construction of the wall and the institution of the suit. The allegation in the plaint that the wall was built on the 20th of May, 1925, about a fortnight before the suit was brought, was denied in the *jawab dawa* and no evidence was led on this point. Mr. Shamair Chand has not controverted the position that if a co-owner of a party wall stands by and suffers the building to proceed to a considerable extent, his acquiescence in the erection will be implied therefrom, and, if this be so, it is in each case a matter for consideration whether a mandatory injunction for the demolition of the structure should be granted. It is, therefore, necessary to have these matters enquired into.

Accordingly under O. XLI, r. 25, Civil Procedure Code, I remand the following issues to the trial Court:

(a) "Did the plaintiff acquiesce in the construction of the wall of the defendant?"

(b) "Has he by his act or conduct otherwise disentitled himself from claiming the mandatory injunction asked for?"

Parties will be allowed to lead fresh evidence on this issue and the Subordinate Judge and the District Judge will record their findings on it. The report must be submitted to this Court within three months.

R. L.

Case remanded.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 840 OF 1927.

December 5, 1927.

Present:—Mr. Justice Broadway and
Mr. Justice Jai Lal.

FARZAND ALI AND ANOTHER—ACCUSED

—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Evidence regarding motive and production of corpse—Conviction.

(1) (1828) 32 R. R. 374; 8 B. & C. 257; 2 Man. & Ry. 287; 6 L. J. K. B. (o. s.) 306; 108 E. R. 1039.

(2) (1880) 14 Oh. D. 192; 49 L. J. Oh. 243; 42 L. T. 294; 28 W. R. 438; 44 J. P. 537.

(3) 30 Ind. Cas. 33; 13 A. L. J. 473.

(4) 96 Ind. Cas. 432; 28 Bom. L. R. 708; A. I. R. 1926 Bom. 387.

tion for murder, propriety of—Circumstantial evidence—Suspicion as basis for conviction.

It is not safe to base a conviction under s. 302, Penal Code, where the only evidence against the accused is the presence of motive and the production of the corpse by him. [p. 484, col. 2.]

Rannu v. Emperor (1) and *Basant Singh v. Emperor* (2), followed.

However suspicious the circumstances may be, suspicion alone cannot be regarded as sufficient for a conviction. [p. 484, col. 1.]

Criminal appeal from an order of the Sessions Judge, Lyallpur, dated the 28th July, 1927.

Dr. Sir Mian Muhammad Shafi, Kt., for the Appellants.

Mr. J. M. Mackay for the Government Advocate, for the Respondent.

JUDGMENT.

Broadway, J.—One Ghulam Rasul, an *Araïn* of Onak No. 376 G. B. died five or six years ago leaving a widow *Musammât* Fatima and half a dozen children by her of whom the eldest was Fazal. She is said to have contracted an intimacy with one Ghulam Muhammad, another *Araïn* of the same Chak, who, some time in September, 1926, went through the ceremony of marriage with her and took her to live with him in his own house. This Ghulam Muhammad was already possessed of a wife named *Musammât* Jano who had borne him six children, the eldest son being one Farzand Ali, aged about 25 years and married to his cousin, the daughter of Nizam Din, a brother of Ghulam Muhammad. When the marriage ceremony was performed in September, 1926, both sides made report to the Police. On the 9th of December, 1926, Ghulam Muhammad made a report at Toba Tek Singh Police Station saying that his wife had left him with somebody else. Two days later Fazal, the son of *Musammât* Fatima, petitioned the Superintendent of Police, Lyallpur, saying that his mother had disappeared and that he suspected foul play. The Sub-Inspector went to the spot but was unable to obtain any information, either of any crime having been committed or of the whereabouts of the woman. He left the village on the 18th of December, 1926, leaving Aman Ullah Head Constable, to carry on the investigation. On the 20th of December, 1926, Farzand Ali and two uncles of his, namely, Nabi Bakhsh and Nizam Din, are said to have made statements which resulted in the recovery of the corpse of the woman and later of certain jewellery. The statement, as

set out by P. W. No. 16 Aman Ullah Head Constable, showed that it was Farzand Ali who first disclosed the whereabouts of the corpse to him and that his two uncles merely repeated what he had said. Later Farzand Ali is stated to have told Aman Ullah that Nabi Bakhsh was aware of the whereabouts of the jewellery and Nabi Bakhsh, when questioned, took the Police and others to his sugarcane field and from it dug out certain ornaments. Two other persons appeared, Shera (P. W. No. 3) and Ghulam Din (P. W. No. 4) who said to the Police that they had witnessed certain events. The result of the enquiry was that Nizam Din, Nabi Bakhsh and their nephew Farzand Ali were tried for the murder of *Musammât* Fatima. Farzand Ali was found guilty by the assessors and the learned Sessions Judge of an offence under s. 302 of the Indian Penal Code and sentenced to death. Nabi Bakhsh was found guilty of an offence under s. 201 and sentenced to five years' rigorous imprisonment, while Nizam Din was acquitted.

Against their convictions Farzand Ali and Nabi Bakhsh have preferred this appeal, while the case is also before us under s. 374 of the Criminal Procedure Code for orders as to the confirmation or otherwise of the death sentence.

So far as the case against Nabi Bakhsh is concerned, it seems to me that there can be no doubt as to his having been rightly convicted. There is evidence on the record showing that he in the presence of reliable witnesses, as for instance P. W. No. 5 Faiz Muhammad and P. W. No. 8 Nabi Bakhsh, took Aman Ullah and others to a sugarcane field and from it dug out certain ornaments which, in my opinion, have been sufficiently identified as having belonged to the deceased *Musammât* Fatima. His appeal I would, therefore, dismiss.

The case against Farzand Ali is on a somewhat different footing. There is evidence, which has been relied upon by the learned Sessions Judge as well as the assessors, to the effect that there was ample motive for his having taken part in the killing of *Musammât* Fatima. He was, it is said, incensed at her, having married his father as it was feared that she would bear Ghulam Muhammad children and thus reduce the inheritance that Farzand Ali had at that time a right to expect. It is unnecessary to elaborate this question of motive or discuss the evidence relating to

it, as it has been sufficiently dealt with in the judgment of the learned Sessions Judge. Suffice it to say that, in my opinion, motive undoubtedly existed and the suggestion that possibly or even probably the deceased's own son Fazal killed his mother is, in my opinion, too fanciful to bear further consideration.

The next piece of evidence against the appellant Farzand Ali is the production by him of the corpse. In regard to this point Sir Muhammad Shafi strenuously urged that there was evidence to show that the *jhal* from which the corpse was ultimately discovered had been searched without avail two or three days before. That is true, but the explanation of that is to be found in the fact that when this *jhal* was first examined the canal was flowing and the water in the *jhal* was very deep. I see no reason whatever to doubt the testimony of Aman Ullah Head Constable when he says that a careful search of this *jhal* was made on the 20th of December, after Farzand Ali had told him that he had thrown the corpse of Musammât Fatima into it. The corpse was found in a *trangar*, the hands tied with hemp, a rope passed under its legs and tied behind its neck and the whole bundle was weighted by bricks which Farzand Ali had said had been obtained from a certain culvert, an examination of which showed that bricks had been removed therefrom. Taking all these circumstances into consideration, I see no reason to differ from the conclusions arrived at by the learned Sessions Judge and the assessors that the body was discovered as a result of information given to the Police by the appellant Farzand Ali.

There is, however, no other evidence connecting him with the actual murder of the woman and his conviction, therefore, rests entirely on circumstantial evidence. Now, however, suspicious the circumstances may be, suspicion alone cannot be regarded as sufficient for a conviction. It has been urged by the learned Counsel for the Crown that, inasmuch as there was motive for the commission of murder and inasmuch as there can be no doubt that the appellant produced the corpse, the facts as related, by him, showed such an intimate knowledge of the occurrence as rendered it practically certain that he took part in the actual murder. Emphasis was laid on the fact that the deceased was living in the same house as the appellant and further that a *panchayat* had been held at which the

appellant had confessed to the murder itself. Now, the confession has been ruled out by the learned Sessions Judge and the evidence in regard to it has only to be read when it will be seen that the learned Sessions Judge was quite right in the view taken by him of it. The exact words in all confessions of this nature are always very difficult to establish, and in the present case when one of the *lambardars* Ilahi Bakhsh states that after the *panchayat* had been held and after the confessions had been made by Farzand Ali and his companions he and his brother *lambardar* sent in a report to the Police in which no reference whatever is made to the confession, and in fact in which it is not even stated that any murder had been committed, renders it impossible to place any reliance on the so-called confessions. The other facts mentioned above by the learned Counsel for the Crown merely increase the suspicion that rests on the appellant but do not to my mind establish his guilt beyond doubt. Reference has been made to *Rannu v. Emperor* (1), in which it was laid down that, where the only evidence against a person accused of murder consisted of evidence of motive and his production of the corpse from his field, that evidence would not ordinarily warrant a conviction under s. 302 of the Indian Penal Code. To the same effect is an unreported case to be found in *Basant Singh v. Emperor* (2), although the circumstances in the latter case were slightly different. In my judgment, having regard to the fact that the only evidence against Farzand Ali is that he had a motive and that he produced the corpse, it would be unsafe to uphold the conviction in this case. He has, however, undoubtedly committed an offence under s. 201 of the Indian Penal Code, and I would, therefore, accept this appeal and setting aside his conviction and sentence under s. 302 of the Indian Penal Code, convict him of an offence under s. 201 of the said Code and sentence him to rigorous imprisonment for a period of seven years including three months' solitary confinement.

Jai Lal, J.—I agree.

R. L.

Appeal allowed in part.

(1) 94 Ind. Cas. 201; 7 Lah. 84; A. I. R. 1926 Lah. 88; 27 Cr. L. J. 709; 27 P. L. R. 583.

(2) 103 Ind. Cas. 97; 28 Cr. L. J. 641; A. I. R. 1927 Lah. 541; 8 A. I. Cr. R. 254.

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 1520 OF 1926.

December 3, 1927.

Present :—Mr. Justice Dalip Singh.

HARI KISHAN AND OTHERS—ACCUSED—

PETITIONERS

versus

Malik KANSHI RAM—COMPLAINANT—

RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 133, 139-A—Bona fide dispute as to public right—Jurisdiction of Criminal Court—Duty of Court—'Reliable evidence,' meaning of.

The existence of a *bona fide* dispute about the right of the public to pass over a certain path does not oust the jurisdiction of a Magistrate to proceed under s. 133, Criminal Procedure Code. [p. 486, col. 1.]

Abdul Wahid Khan v. Abdullah Khan (3) and *Ram Sagar Mondal v. Alek Naskar* (6), referred to.

Under s. 139-A, Criminal Procedure Code, the Magistrate, in an enquiry under s. 133 of the same Code, has to find if there is any *reliable evidence* in support of the denial of the party alleged to cause obstruction. By *reliable evidence* is not meant that the Magistrate should weigh the evidence produced by both sides and then come to the conclusion which he believes or which he prefers, but the Magistrate should take the evidence as it stands and see whether, on the face of it, if there was no evidence to the contrary, he should come to the conclusion that the evidence was false and was, therefore, unreliable. [p. 486, col. 2.]

Thakur Sao v. Abdul Aziz (5), followed.

Case reported by the Sessions Judge, Shahpur at Sargodha.

Facts appear from the following report of the Sessions Judge.

REPORT.—"Malik Kanshi Ram on the 13th February, 1925, complained under s. 133, Criminal Procedure Code, that he and the accused (six persons) were the joint owner of the vacant sites as shown at Nos. 6 and 13 on the plan filed by him, that the accused have put walls on the boundaries of the plot No. 6 which have obstructed the public ways marked Nos. 2 and 7 going from Pipliwala well and Baghwala well to the *abadi*, that this obstruction should be removed under s. 133, Criminal Procedure Code, and the walls should be demolished.

The accused denied the existence of any public right in respect of the way through plot No. 6.

The complainant produced 11 witnesses, and the accused produced 4 witnesses in support of their respective positions. The accused further pleaded that the so-called way was never recorded in any Revenue Record.

The Magistrate came to the conclusion that the evidence produced by the accused, was not reliable.

The accused, on conviction by Chaudhri Pir Mohammed exercising the powers of a Magistrate of the First Class in the Shahpur District were directed by order, dated the 15th of April, 1926 under s. 137 of the Criminal Procedure Code to demolish the walls erected by them.

The principles laid down as applicable to such cases in a number of rulings, e.g., *Phalla v. Niaz Ahmad* (1), *Bhagwan Das v. Emperor* (2), *Abdul Wahid Khan v. Abdullah Khan* (3) and *Debendra Nath Chowdhury v. Chairman Local Board, Asansol* (4), are that the provisions of s. 133, Criminal Procedure Code, are not intended to be applicable to a case where there is a *bona fide* dispute as to the existence of a public way; that such a dispute should be left to be determined by a Civil Court; that these summary powers were primarily intended to be exercised in cases where there was no question that the way was one vested in the public, and when that question is seriously disputed and its decision becomes a difficult matter of mixed fact and law, the Magistrate clearly had jurisdiction to exercise his discretion by declining to decide it and sending the parties to the Civil Court; that private property cannot be converted into public merely because it looks as though it ought to be, and because to do so would be *convenient* to a section of the public who have enjoyed permissible user over it.

All these principles have been overlooked by the learned Magistrate. He has inspected the spot, but it is admitted that the alleged public way passes through the admittedly private property of the parties. It is also clear from the Revenue Records that the Revenue Authorities never recognised this *pag-dandi* (a foot path) to be a regular thoroughfare and never recorded it as such during any Settlement. The fact that people pass through the property of the accused, which was lying as a waste land, as a short-cut, does not necessarily establish the right of the public to its user. A difficult matter of mixed

(1) 63 Ind. Cas. 828; 22 Cr. L. J. 700.

(2) 73 Ind. Cas. 523; A. I. R. 1923 Oudh 152; 9 O. & A. L. R. 35; 24 Cr. L. J. 635.

(3) 74 Ind. Cas. 849; A. L. R. 1924 All. 1; 21 A. L. J. 529; 24 Cr. L. J. 817; 45 A. 656.

(4) 81 Ind. Cas. 904; A. I. R. 1925 Cal. 268; 25 Cr. L. J. 1080.

facts and law was involved in this case which ought to have been referred to a Civil Court.

In a recent case *Thakur Sao v. Abdul Aziz* (5), it was held that all that the Magistrate has to find out, is whether the denial by the respondent, is *bona fide* or a mere pretence. He can proceed to make his order absolute only when he is satisfied that the denial is a mere pretence. If he finds that the denial is *bona fide*, his jurisdiction is ousted and he has no authority to enquire further. The Magistrate is not entitled to demand that the evidence shall be sufficient to satisfy him that no public right exists. The only condition is that upon the material before him, the Magistrate must have no reason to think the evidence false. The Magistrate has no jurisdiction to weigh the evidence and to determine on which side the balance leans. In the case under reference the Magistrate has clearly discussed the evidence of both sides and tried to weigh it. There is clear room for difference of opinion. It cannot possibly be said that the denial by the respondents was a mere pretence and if the denial is held to be *bona fide*, that was enough to oust the jurisdiction of the Magistrate.

In view of the authorities quoted, it is recommended, therefore, that the order of the Magistrate making the conditional order given to remove the obstruction from the way absolute may be set aside and the complainant referred to the Civil Court."

Mr. Ram Lal Anand, for the Petitioners.

Lala Ram Chand Manchanda, for the Respondent.

ORDER.—This case has been referred by the learned Sessions Judge on the ground that the learned Magistrate in proceedings under s. 133 of the Criminal Procedure Code is not entitled to proceed under that section and the following sections where there is a *bona fide* dispute about the right of the public to pass over a certain path. This I do not consider is the law, see *Abdul Wahid Khan v. Abdullah Khan* (3) and *Ram Sagar Mondal v. Alek Naskar* (6), in which the matter has been discussed at great length. These rulings are under the old law and even under that law the latest pronouncements of the Courts

are in favour of the view that the Magistrate has jurisdiction. Section 139-A, which has been recently enacted now lays down that the Magistrate in such an enquiry has to find if there is any reliable evidence in support of the denial of the party alleged to cause the obstruction. As to what the learned Magistrate has to do to determine that question, the only authority which I have been able to find is *Thakur Sao v. Abdul Aziz* (5). It is there pointed out that reliable evidence is evidence of reliable persons. I take it that what is really meant is not that the Magistrate should weigh the evidence produced by both sides and then come to the conclusion which he believes or which he prefers, but the Magistrate should take the evidence as it stands and see whether on the face of it, if there was no evidence to the contrary, he could come to the conclusion that the evidence was false and was, therefore, unreliable. I have read the evidence given in this case and I do not see that on the face of it this evidence is unreliable or of unreliable persons. The order of the Magistrate shows clearly that he proceeded to weigh the evidence and to inspect the spot and then came to the conclusion that the evidence given by the petitioners was unreliable. This, in my opinion, was a wrong exercise of the powers given under s. 139-A. Although a Magistrate has jurisdiction to decide whether the evidence is reliable or not, in this particular case the Magistrate has failed to notice how he had to arrive at that finding. I, therefore, accept the reference and set aside the order of the learned Magistrate making the conditional order to remove the obstruction absolute.

B. L.

Reference accepted.

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS CASE No. 582

OF 1927.

(IN CIVIL APPEAL CASE No. 2763 OF 1927).

November 14, 1927.

Present:—Mr. Justice Dalip Singh.

Rai Sahib Lala RUP NARAIN—

DEFENDANT—PETITIONER

versus

SHIBBU MAL AND ANOTHER—PLAINTIFFS

—RESPONDENTS.

Appeal—Appeal from preliminary decree—Stay of

(5) 91 Ind. Cas. 41; A. I. R. 1926 Pat. 170; 4 Pat. 783; 27 Cr. L. J. 9; 7 P. L. T. 136.

(6) 67 Ind. Cas. 177; 49 C. 682; 26 C. W. N. 442; 35 C. L. J. 247; 23 Cr. L. J. 353 (F. B.).

Further proceedings till disposal of appeal, desirability of.

Where an appeal is preferred from a preliminary decree all further proceedings in the lower Court should be stayed until the disposal of the appeal.

Obiter.—Once a preliminary decree has been appealed against, especially when the appeal has been launched before a final decree is passed, then the presence of a final decree does not make the appeal from the preliminary decree unmaintainable even if the final decree is not appealed from.

Ramditta v. Maru (1), *Ganda Ram v. Sundar Lal* (2) and *Chandulal Maganlal v. Motilal Harilal* (3), referred to.

Petition under O. XLI, r. 5 of the Civil Procedure Code, for stay of further proceedings pending the decision of the appeal case noted above by the High Court.

Mr. Kishan Dayal and Lala Sardha Ram, R. S., for the Petitioner.

Lala Moti Sagar, R. B., for the Respondents.

ORDER.—In this case a preliminary decree was passed on a mortgage which is under appeal in this Court. The appellant-mortgagor has applied for stay of further proceedings, that is, for stay of a final decree until his appeal is disposed of. The position as to what would be the result of the passing of a final decree is not clear in this Court; see *Ramditta v. Maru* (1) and *Ganda Ram v. Sundar Lal* (2). Personally I am inclined to hold that once a preliminary decree has been appealed against especially when the appeal has been launched before a final decree is passed then the presence of a final decree does not make the appeal from the preliminary decree unmaintainable even if the final decree is not appealed from. The position, however, is not absolutely clear, *Chandulal Maganlal v. Motilal Harilal* (3). However, whatever the position may be on the point discussed above, in *Gajadhar Singh v. Kishan Jiwan Lal* (4) a Full Bench ruling, it was held that the Legislature did not contemplate more than one final decree, and where a preliminary decree had been appealed against the right to have the final decree ceased or remained in suspense until the preliminary appeal was decided. The ruling itself was on the question of limitation but it has been approved in

(1) 93 Ind. Cas. 851; A. I. R. 1926 Lah. 534; 27 P. L. R. 180.

(2) 67 Ind. Cas. 278; 2 Lah. L. J. 673; 82 P. L. R. 1922.

(3) 92 Ind. Cas. 545; 27 Bom. L. R. 1492; A. I. R. 1926 Bom. 43.

(4) 42 Ind. Cas. 93; 39 A. 641; 15 A. L. J. 734.

a Division Bench ruling *Fitzholmes v. Bank of Upper India Ltd.*, (5) and has been followed in *Lalman v. Shiam Singh* (6) as laying down that no final decree can be obtained until the appeal from the preliminary decree is disposed of. In the circumstances though I am not prepared to endorse the reasoning of the Full Bench of the Allahabad High Court I consider that it is best to stay all further proceedings in the suit until the disposal of the appeal. I accordingly stay all further proceedings. An early date should be given for the hearing of the appeal and printing should be finished within four months.

R. L.

Petition accepted.

A. N. A.

(5) 81 Ind. Cas. 649; 5 Lah. 257; A. I. R. 1924 Lah. 582; 1 Lah. Cas. 65.

(6) 92 Ind. Cas. 608; A. I. R. 1926 All. 291; 24 A. L. J. 288.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1781 OF 1923.

November 7, 1927.

Present:—Mr. Justice Broadway and Mr. Justice Jai Lal.

HIRA—DEFENDANT—APPELLANT

versus

TEK CHAND, MINOR, THROUGH JHANDA

—PLAINTIFF—RESPONDENT.

Custom—Ancestral land—Ancestor not owning but simply possessing land—Land, whether ancestral—Punjab Courts Act (VI of 1918), s. 41—Second appeal—Finding of fact when not binding.

To establish the ancestral nature of land it is necessary to prove that the ancestor owned it; mere proof of possession by such ancestor in any capacity is not enough.

Sewa Singh v. Bholi (1), *Lal v. Gauhr* (2) and *Harji v. Chanan Mal* (3), referred to.

A finding of fact based on no evidence is not binding in second appeal.

Second appeal from a decree of the District Judge, Karnal, dated the 9th May, 1923, affirming that of the Subordinate Judge, First Class, Rohtak, dated the 27th February, 1922.

Mr. Shamair Chand, for the Appellant.

Mr. Amar Nath Chona, for the Respondent.

JUDGMENT.

Broadway, J.—This second appeal has arisen out of a suit brought by one Tek Chand, a minor, suing through a next

friend for possession of 84 bighas 1 biswa and 5 biswasis kham of land alleged to have been sold by the plaintiff's father Mukh Ram about two years before the suit. Hira, the defendant-vendee, pleaded that the property sold to him was the self-acquired property of the vendor Mukh Ram, in any event, the sale had been for full consideration and necessity. The trial Court held that no consideration had passed and that the land sold was ancestral, having been owned by one Rusan, the common ancestor of the vendor and his son.

Hira, appealed to the District Judge who while agreeing with the trial Court that no consideration had been proved, was not apparently prepared to endorse the finding that Rusan, the original ancestor, had ever owned the land in suit. What he does find is that the ancestors of the plaintiff amongst other persons were originally tenants of certain land in this village and inasmuch as Mukh Ram vendor had succeeded to some of the land sold by him as the collateral of its original owner Khubi, it should be regarded as ancestral because the original ancestor Rusan occupied the whole of the land in dispute not as owner but in some other capacity.

Now, there is no evidence whatever on the record to show that Rusan ever occupied any part of the land in suit. This, Mr. Amar Nath Chona, for the respondent-plaintiff, has been constrained to admit. He endeavoured to drag in an intermediate ancestor named Suggan but had to admit that there was no evidence to show that even Suggan was in possession in any capacity, of the land in suit. The finding, therefore, that Rusan occupied the land in dispute is one that is based on no evidence and by which we are, therefore, not bound. Next, it was held by the District Judge that it was not necessary to prove that the ancestor owned the land, mere possession in any capacity being sufficient. To this contention, I am not prepared to accede. It is diametrically opposed to a series of cases such as *Sewa Singh v. Bholi* (1), *Lal v. Gauhr* (2) and *Harji v. Chanan Mal* (3). Admittedly land held by Bhoru, father of Mukh Ram, is ancestral.

I would, therefore, accept this appeal

and grant the plaintiff respondent a decree for possession free of all encumbrances of such land as his father Mukh Ram had inherited from his father Bhoru which according to the grounds of appeal, comes to 17 bighas 4 biswas. The suit *qua* the remainder of the land must be dismissed. The plaint shows a total area of 84 bighas kham whereas the land inherited by Mukh Ram from Bhoru is 17 bighas 4 biswas pacca. This should be made clear in the decree. As the decree granted to the plaintiff comes to about half of the land sold I would leave the parties to bear their own costs throughout.

Jai Lal, J.—I agree.

R. L.

Appeal accepted.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 1369 OF 1927.

November 15, 1927.

Present :—Mr. Justice Tek Chand.

BHAGELA SHAH—JUDGMENT-DEBTOR—

APPELLANT

versus

SITA RAM—DECREE-HOLDER AND

GURDITTA MAL AND ANOTHER—

JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 101, O. XXI, r. 90, O. XLIII, r. 1 (j)—Order dismissing application to set aside sale on ground of irregularity—Appeal—Second appeal.

An order under O. XXI, r. 90 refusing to set aside a sale in execution of a decree on the ground of irregularity in publishing or conducting it is appealable under O. XLIII, r. 1 (j) and not under s. 47, Civil Procedure Code, and is, therefore, not open to second appeal.

Sheo Prasad Singh v. Premma Kuar (1) and *Mahdeo Singh v. Dhobi Singh* (2), referred to.

Miscellaneous second appeal from an order of the Senior Subordinate Judge, Jelum, dated the 21st December, 1926, affirming that of the Subordinate Judge, Fourth Class, Chakwal, dated the 31st August, 1926.

Mr. Shah Nawaz, for the Appellant.

Mr. Ram Lal Anand, for the Respondents.

JUDGMENT.—In execution of a money decree for Rs. 317-10 obtained by Sita Ram respondent against Bhagela Shah etc., appellants, a house belonging to the judgment-debtors was sold to the decree holder. The sale was confirmed on the 11th

(1) 36 Ind. Cas. 382; 129 P. R. 1916; 83 P. L. R. 1917.

(2) 44 Ind. Cas. 129; 5 P. R. 1918.

(3) 63 Ind. Cas. 908; 2 Lah. 195.

of July, 1924. More than a year after, i. e., on the 28th of November, 1925, one of the judgment-debtors, Sube Shah, applied under O. XXI, r. 90; Civil Procedure Code, to have the sale set aside pointing out several irregularities in publishing and conducting the sale. About a year later, i. e., on the 16th of November, 1926, Bhagela Shah also joined in the application pointing out further irregularities in conducting the sale. The application was dismissed by the Executing Court and a miscellaneous appeal was preferred to the Senior Subordinate Judge who dismissed it affirming the order of the lower Court. The judgment-debtors have preferred a second appeal to this Court.

I am of opinion that this second appeal is incompetent. The memorandum of appeal to the lower Appellate Court against the order dismissing the judgment-debtor's application under O. XXI, r. 90, was described as having been filed under s. 47, Civil Procedure Code, but in reality the appeal was under O. XLIII, r. 1 (j) as that is the only section under which an appeal could lie. Section 104 (2) of the Civil Procedure Code lays down that orders passed on appeal under O. XLIII, are final and no second appeal lies therefrom. Reference may also be made to *Sheo Prasad Singh v. Premma Kuar* (1) and *Mahadeo Singh v. Dhobi Singh* (2).

Even if it be assumed that the appeal to the lower Appellate Court was correctly filed under s. 47, Civil Procedure Code, no second appeal lies to this Court as the execution proceedings in which the application was filed related to a decree which had been passed on a suit of small cause nature valued at Rs. 317. Under the Punjab Courts Act no second appeal lies to this Court against a decree passed on appeal in such a suit. I, therefore, dismiss the appeal with costs.

Mr. Shah Nawaz has asked me to interfere in revision urging that the lower Courts had erred in holding that the application under O. XXI, r. 90 was barred by time and that the rule was vitiated by many irregularities. Even if these contentions are correct I am not prepared to interfere on the revision side as the lower Courts have not acted without jurisdiction

or with any material irregularity resulting in injustice to the judgment-debtor.
R. L. Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 796 OF 1923.

November 28, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Bhide.

AHMAD DIN AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

Musammat FATIMA BIBI, MINOR, THROUGH
Musammat UMRAN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Custom—Alienation—Female heir—Right of alienation—Succession—Daughters exclude collaterals—Special custom excluding daughters—Burden of proof.

Under the general Customary Law of the Punjab collaterals in the sixth degree of the deceased male holder are not entitled to inherit his estate in preference to his daughters especially when the estate has not been proved to be ancestral. The onus of proving a special custom in favour of their right of succession to the exclusion of daughters rests on the collaterals. [p. 490, col. 1.]

The rule of Customary Law is firmly established that a female inheriting landed estate from a male holds the property on life-tenure and it is immaterial whether the female is a widow, a daughter or a mother. [ibid.]

Abul Hassan v. Habib Ullah (1), followed.

A female is not competent to alienate property inherited by her except for necessity and the reversionary heirs of the last male holder are entitled to contest an alienation made by her even if the property is not proved to be ancestral. [p. 490, cols. 1 & 2.]

First appeal from a decree of the Senior Subordinate Judge, Gujranwala, dated the 21st December, 1922.

Messrs. *Des Raj Sawhney and Din Dayal Kapur*, for the Appellants.

Chandhri Zafrulla Khan, Messrs. Bashir Ahmad and Khurshid Zaman, for the Respondents.

JUDGMENT.—On the 19th March, 1918, one Musammat Umar Bibi, acting on behalf of her two minor daughters, mortgaged the land in dispute to the defendants Umar Din and Muhammad Din for Rs. 755. The estate originally belonged to Musammat Umar Bibi's deceased husband Sadar Din, a Jat of Kotli Maharan in the Gujranwala District, and on the latter's death it was inherited by his widow. The widow subsequently contracted a marriage with one

(1) 43 Ind. Cas 522; 40 A. 122; 15 A. L. J. 920.

(2) 74 Ind. Cas. 838; (1923) Pat. 283; 4 P. L. T. 721; 2 Pat. 916; A. I. R. 1924 Pat. 111.

Jalal, and consequently forfeited her life-estate; with the result that the property was mutated in favour of the two daughters of Sadar Din.

The plaintiffs, who claim to be the collaterals of Sadar Din, have brought the present action for the declaration that they are entitled to inherit the land as soon as the daughters get married or attain majority, and that the alienation shall not prejudicially affect their right of succession to the estate. Now, the trial Judge holds, after examining the evidence on the record, and we have no hesitation in endorsing his conclusion that the plaintiffs are collaterals of Sadar Din, in the sixth degree and not in the fifth degree as claimed by them. We do not, however, agree with the learned Judge that the property in question has been proved to be ancestral *qua* the plaintiffs. It is beyond dispute that it was their duty to satisfy the Court that the property descended from the common ancestor Ghariba, and the mere fact that the Revenue Records are silent on the question of the acquisition of the land by any of the descendants of Ghariba does not justify the conclusion that it belonged to him. A mere conjecture, however, plausible, cannot be a substitute for proof, and the learned Counsel for the plaintiffs is unable to invite our attention to any evidence which would show that the property descended from the common ancestor.

Nor do we think that the plaintiffs, who are related to the last male holder in the sixth degree, are entitled to inherit the estate in preference to his daughters, more especially when it is not proved to be ancestral. The onus rested upon them to establish a custom in favour of their right of succession to the exclusion of the daughters, and this onus they have wholly failed to discharge.

The trial Judge is, however, wrong in dismissing the suit merely on the ground that the daughters have got a preferential right of succession. The rule of the Customary Law is firmly established that a female inheriting landed estate from a male holds the property on life-tenure, and it is immaterial whether the female is a widow, a daughter or a mother, *vide, inter alia, Abul Hassan v. Habib Ullah* (1). A female is not competent to alienate the property except for necessity, and the rever-

sionary heirs of the last male holder are entitled to contest the alienation, even if the property is not proved to be ancestral.

It is, therefore, clear that the alienation cannot adversely affect the plaintiffs when the succession opens out to them, unless the mortgagees prove not only consideration but also necessity for the mortgage. The learned Subordinate Judge was, therefore, wrong in dismissing the suit without determining the question of the consideration and necessity for the alienation.

We accordingly accept the appeal and remit the case to the trial Judge for re-decision with reference to the foregoing remarks. The costs in this Court shall abide the event.

R. L.

*Appeal accepted.
Case remanded.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 1435 OF 1923.

November 24, 1927.

Present :—Mr. Justice Broadway and
Mr. Justice Jai Lal.

BEHARI LAL AND OTHERS—CREDITORS—
APPELLANTS
versus

Rai Sahib Lala CHUNI LAL, OFFICIAL
RECEIVER OF AMRITSAR—APPLICANT—
RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 100—
Provincial Insolvency Act (V of 1920), s. 54, 75—
Second appeal—Fraudulent preference, whether
question of fact.*

The question whether a transaction is a fraudulent preference is one of fact and not of law. [p. 491, col. 1.]

Har Parshad v. Bhagat Singh (1), followed.

Miscellaneous second appeal from an order of the District Judge, Amritsar, dated the 21st April, 1923, affirming that of the Judge, Insolvent Estates Court, Amritsar, dated the 31st, January, 1923.

Mr. Jiwan Lal Kapur, for the Appellants.

Mr. Mool Chand, for the Respondent.

JUDGMENT.

Broadway, J.—On the 8th of August, 1921, one Nathu Mal made a payment of Rs. 624 1-6 to his brother Hira Nand who was his creditor. On the 12th of August, 1921, Nathu Mal became an insolvent. According to the learned District Judge he closed his business on the very day the

(1) 18 P. R. 1906; 114 P. L. R. 1906; 19 P. W. R. 1906.

payment was made to his brother. A year later the Official Receiver moved the Insolvency Court under s. 54 of the Provincial Insolvency Act to annul the payment on the ground that it had been fraudulently made to show preference to a relative creditor. After due enquiry the Insolvency Court came to the conclusion that Nathu Mal had been guilty of fraudulent preference in this connection and annulled the payment.

Thereupon Hira Nand preferred an appeal to the District Court. The learned District Judge came to the conclusion that the payment to Hira Nand, on the very day when the business came to an end, was obviously made with the intention to show preference to Hira Nand at the eleventh hour only a few days before the creditors applied for adjudication and Hira Nand's appeal was dismissed. He has now come up to this Court in second appeal, and at the hearing Mr. Mool Chand for the Official Receiver raised two preliminary objections. First, he urged that no appeal was competent, and secondly, that the question decided by the Courts below was one of fact.

I do not think it is necessary to go into the question as to whether the appeal was competent or not, as, in my opinion, the appeal must be dismissed on the second objection.

The decision as to whether fraudulent preference had been shown or not rested on what the intention of Nathu Mal was. It has been repeatedly held that in such cases intention is purely a question of fact, see Halsbury's Laws of England, Volume II, page 287, where it is pointed out that "the question whether a transaction is a fraudulent preference—whether the debtor had the intention to defeat the law and to prevent the due distribution of his assets—is one of fact for the Court or Jury, if there is one, who must judge not from one fact, however important, but from all the circumstances of the case." Again in *Har Parshad v. Bhagat Singh* (1), a Division Bench of this Court held "that the question as to whether a person made a transfer of his property with intent to defeat or delay his creditors is not one of law but merely of fact." Whether the appeal is competent or

not, therefore, it must fail, and I would therefore, dismiss this appeal with costs.

Jai Lal, J.—I agree.

R. L.

A. N. A.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 1302 OF 1927.

November 24, 1927.

Present:—Mr. Justice Harrison.

RAHMAT ALI SHAH AND ANOTHER—

JUDGMENT-DEBTORS—APPELLANTS

versus

RIKHI KESH—DECREE-HOLDER—

RESPONDENT.

Court Fees Act (VII of 1870), Sch. II, Art. 11—Civil Procedure Code (Act V of 1908), s. 144—Appeal from order on application for restitution—Court-fees.

An appeal from an order on an application under s. 144, Civil Procedure Code, for restitution of property taken in execution of a decree need not bear *ad valorem* Court-fee. It is liable to be stamped only as a miscellaneous appeal under Art. 11 of Sch. II of the Court Fees Act.

Sitalakshmi Achi v. Chokkalinga Pillai (4), *Kurugodigauda v. Ningangauda* (5) and *Hamidalli Kadamalli v. Ahmedalli Mhibuballi* (6), followed. *Jiwa Ram v. Nand Ram* (1), *Baijnath Das v. Balmukand* (2) and *Balmukanda Marwari v. Basantia Kumari Das* (3), dissented from.

Miscellaneous second appeal from an order of the District Judge, Amritsar, dated the 1st February, 1927, affirming that of the Subordinate Judge, Third Class, Amritsar, dated the 26th May, 1926.

Mr. Dev Raj Sawhney, for the Respondent.

JUDGMENT.—The first point to be decided is whether this appeal has been correctly stamped with Rs. 4 as a miscellaneous appeal. Counsel for the respondent contends that the application being one under s. 144 of the Code of Civil Procedure for restitution in consequence of the judgment of this Court having varied the judgment of the District Judge, which had actually been executed at the time, the stamp should be *ad valorem* and he relies upon *Jiwa Ram v. Nand Ram* (1), *Baijnath Das v. Balmukand* (2) and *Balmukanda Marwari v.*

(1) 66 Ind. Cas. 144; 44 A. 407; 20 A. L. J. 226; A. I. R. 1922 All. 223.

(2) 82 Ind. Cas. 321; 47 A. 98; 22 A. L. J. 881; L. R. 5 A. 773 Civ.; A. I. R. 1925 All. 137.

(1) 36 Ind. Cas. 594; 102 P. R. 1916; 85 P. L. R. 1917;

Basanta Kumari Dasi (3) while on the other side in *Sitalakshmi Achi v. Chokkalinga Pillai* (4), *Kurgodigauda v. Ningangauda* (5) and *Hamidalli Kadamalli v. Ahmedalli Mhibuballi* (6) the contrary view has been taken. In *Hamidalli Kadamalli v. Ahmedalli Mhibuballi* (6) the Full Bench decision of the Patna Court was considered and dissented from. The learned District Judge has followed that view and after considering all the authorities I find that I cannot agree with him. Applications under ss. 47 and 144 are classed together when referred to in s. 2 of the Code and are obviously kindred and similar applications though there is the real distinction that when a decree has actually been executed and the property has passed, the application is of the nature of an application to recover possession. It is in consequence of the decree passed by the High Court that the application is made under s. 144 and it is in a sense a mere accident that because the decree has been fully executed, the petitioner is prevented from coming to the Court under s. 47 and is compelled to take action under s. 144, Civil Procedure Code. It would be most inequitable that he should be penalised by being forced to stamp his application *ad valorem* and adopting the reasoning contained in *Hamidalli Kadamalli v. Ahmedalli Mhibuballi* (6), I find that the application has been duly stamped and I direct that the amount paid in excess in the District Court be refunded.

[Note.—The rest of the judgment is not material for the purposes of this report.—Ed.]

R. L.

Appeal dismissed.

- (3) 78 Ind. Cas. 200; 3 Pat. 371; (1924) Pat. 33; 5 P. L. T. 145; A. I. R. 1925 Pat. 1.
 (4) 38 Ind. Cas. 806; 40 M. 780; 5 L. W. 267.
 (5) 41 Ind. Cas. 238; 41 B. 625; 19 Bom. L. R. 638.
 (6) 62 Ind. Cas. 233; 45 B. 1137; 23 Bom. L. R. 480.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1416 OF 1927.

December 2, 1927.

Present :—Mr. Justice Zafar Ali.

THE INDIAN MERCHANTS BANK, LTD.,
 AMRITSAR (IN LIQUIDATION)
 THROUGH MADAN GOPAL, OFFICIAL
 LIQUIDATOR—APPELLANT

versus

ANUP CHAND—OBJECTOR—
 RESPONDENT.

Companies—Application for shares subject to condition precedent—Condition not fulfilled—Liability of applicant as contributory.

If an application for shares in a Company is made subject to a condition precedent, the applicant incurs no liability as a share-holder if the condition remains unfulfilled.

Piara Singh v. Peshawar Bank, Ltd. (1), followed.

Miscellaneous first appeal from an order of the Additional District Judge, Amritsar, dated the 28th of February, 1927.

Mr. Durga Das, for the Appellant.

Mr. Ram Chand Manchanda, for the Respondent.

JUDGMENT.—This is an appeal under the Indian Companies Act of 1913 against an order accepting an objection and relieving the objector of all liability as a share-holder of a Bank. The objector was L. Anup Chand, Advocate of Montgomery, who had made an application for 100 shares of the Indian Merchants Bank, Ltd., but the Bank went into liquidation before any shares had been allotted to him. He asserted that he was given, by the Managing Agent of the Bank, an assurance that a branch of the Bank would be opened at Montgomery or Pak Pattan and that he would be appointed a Director thereof if he would buy 100 shares and that he made his application for 100 shares on that assurance. He claimed that he did not become a share-holder because the condition subject to which the application for shares was made was not fulfilled. He was corroborated on this point by the Managing Agent and two witnesses before whom the agreement had been made. No attempt was made to rebut that evidence. The law is clear that if an application for shares is subject to a condition precedent the applicant incurs no liability if the conditions remains unfulfilled. In this connection the following may be cited from *Piara Singh v. Peshawar Bank, Ltd.* (1):—

(1) 28 Ind. Cas. 53; 54 P. R. 1915; 22 P. L. R. 1915; 235 P. W. R. 1915.

admit the correctness of the proposition of law, and there is ample authority in English Law in support of it, that if the condition is precedent and has not been performed and its performance has not been waived the applicant for shares will not be a contributory." The finding in this case that there was a condition precedent is based on good evidence and cannot be interfered with.

The argument that no oral evidence was admissible in proof of the alleged condition because it was stated that it had been reduced to writing and the writing was not called for nor produced, is also untenable. The writing was in the possession of the adverse party and from the nature of the case that party must have known that it will be required to produce it. As the said party denied the very existence of the condition it could not be expected that it would have produced the writing if called upon to do so.

The appeal fails and I dismiss it with costs.

B. L.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 586 of 1927.

December 3, 1927.

Present:—Mr. Justice Zafar Ali.
SHOP SAUDAGAR MAL-LACHMAN
DAS THROUGH LACHMAN DAS
—DEFENDANTS—APPELLANTS

versus

SHOP BAHADUR CHAND-HARI
CHAND THROUGH BHAGWAN DAS
AND RAM LABHAYA—PLAINTIFFS
—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Arts. 61, 115—
Actions on contracts—Limitation—"Compensation",
meaning of—Agreement to bear jointly cost of construction
of shop—Suit to recover unpaid share of cost—
Limitation.*

The parties having jointly acquired a site from Government for the purpose of building a shop entered into a contract by which the plaintiff undertook to build a shop on the site and the defendant agreed to pay him one-third of the cost of construction thereof. In a suit for recovery of the unpaid part of the one-third cost of the construction:

Held, that the suit was governed by Art. 115 of Sch. I of the Limitation Act, and not by Art. 61. [p. 494, col. 1.]

Article 115, Limitation Act, is a general provision applying to all actions *ex contractu* not specially provided for otherwise. The word "compensation" in that Article as well as in Art. 116 has the same

meaning as it has in s. 73 of the Contract Act and denotes a sum of money payable to a person on account of loss or damage caused to him by the breach of a contract. [*ibid.*]

Mahomed Ghasita v. Siraj-ud-din (1), followed.

Second appeal from a decree of the District Judge, Montgomery at Lahore, dated the 2nd of December, 1926, modifying that of the Subordinate Judge, Fourth Class, Montgomery, dated the 31st May, 1926.

Dewan Mehr Chand, for the Appellants.

Mr. J. L. Kapur, for the Respondents.

JUDGMENT.—The question of law involved in this second appeal is one of limitation.

The parties having jointly acquired a site from Government for the purpose of building a shop, entered into a contract between themselves by which the plaintiff undertook to build a shop on the site and the defendant agreed to pay him one-third of the cost of construction thereof. The plaintiff's case was that the defendant had paid him Rs. 400 but refused to pay the balance of the one-third of the cost. On this alleged unpaid balance he claimed interest at 1 per cent. per mensem. The defendant pleaded *inter alia* that the suit was barred by time and that no interest was payable. The Courts below overruled both these pleas.

As regards the plea of limitation they have held that the rule of limitation applicable to the suit was the one embodied in Art. 61 of the First Schedule to the Indian Limitation Act of 1908. Under that Article the period of limitation is three years but it is enhanced to six years by the Punjab Limitation Act. It is clear that the plaintiff made no attempt to establish that his suit was within time even if the period of limitation were three years. It is further clear that if the suit should not fall within the purview of Art. 61 the only other Article that applied was Art. 115. Now Art. 61 applies where "money is payable to the plaintiff for money paid for the defendant". In the present case it cannot be said that the plaintiff had paid any money to any person on behalf of or for the defendant. As it was the plaintiff who constructed the building he and nobody else was primarily liable to pay for the labour and materials used. The masons, etc., and the persons who supplied the materials could hold the plaintiff responsible for payment and there being no contract between them and the defendant the latter incurred no

liability to them. So he was not liable to pay any money to them which the plaintiff might have paid them for him. Article 61 was, therefore, not applicable at all. As held in *Mahomed Ghasita v. Siraj-uddin* (1) the Article that applied was Art. 115. As decided in that case: "Article 115 is a general provision applying to all actions *ex contractu* not specially provided for otherwise. The word 'compensation' in that Article as well as in Art. 116 has the same meaning as it has in s. 73 of the Indian Contract Act, and denotes a sum of money payable to a person on account of loss or damage caused to him by the breach of a contract."

The defendant was guilty of the breach of the alleged contract, inasmuch as he refused to pay what he had agreed to do and thus caused loss to the plaintiff who had laid out money on the strength of the defendant's promise to re-imburse him. The suit was barred by limitation as it was not instituted within three years from the date of breach. I, therefore, accept the appeal and reversing the judgment of the Courts below dismiss the plaintiffs' suit with costs throughout.

R. L.

Appeal accepted.

(1) 66 Ind. Cas. 490; 2 Lah. 376; A. I. R. 1922-Lah. 198 (F. B.).

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2956 OF 1926.

November 25, 1927.

Present:—Mr. Justice Zafar Ali,

KIRPA RAM—JUDGMENT-DEBTOR—

DEFENDANT—APPELLANT

versus

NAND LAL—PLAINTIFF—DECREE-HOLDER

AND Lala GANGA RAM AND OTHERS—

AUCTION-PURCHASERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90, s. 92—Application to set aside sale—Auction-purchaser, whether necessary party—Notice to auction-purchaser before setting aside sale, necessity, of—Addition of auction-purchaser after limitation, effect of.

The auction-purchaser is not a necessary party to an application for setting aside a sale under O. XXI, r. 90, Civil Procedure Code, although under O. XXI, r. 92 of the Code no final order affecting the

auction-purchaser can be passed unless notice of the application to set aside the sale is given to him. The proviso to the said rule does not fix any period for giving such notice to the auction-purchaser and there is no period of limitation for issuing such notice.

Bibi Zainab v. Paras Nath (3), *Ganesh Bab Naik v. Vithal Vaman Mahalya* (4), *Raj Chandra Das v. Kali Kanta Das* (5), *Abdur Rahman v. Har Narayan Das* (6), *Ghazanfar Husain v. Ram Ratan* (7) and *Iswardas Marwari v. Biseswar Lal Marwari* (8), followed.

Ajuddin Ahamed v. Khoda Bux Khondkar (1) and *Sumirta Kuer v. Damri Lal* (2), dissented from.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Gujranwala, dated the 25th November, 1926.

Lala Badri Das, R. B., for the Appellant.
Messrs. Jagan Nath Aggarwal, Tara Singh Narola and Shivcharan Das, for the Respondents.

JUDGMENT.—This is an appeal by a judgment-debtor under O. XLIII, r. 1 (j) of the Civil Procedure Code against an order refusing to set aside a sale. The refusal was based on two grounds, *viz.*, (1) that the judgment-debtor's application was not entertainable as he had failed to implead the auction-purchaser as a respondent, and (2) that he had failed to produce any evidence in proof of his objections. Both these grounds are untenable.

With regard to (1), the executing Court has relied on *Ajuddin Ahamed v. Khoda Bux Khondkar* (1) which was followed by a Judge of the Patna High Court in *Sumirta Kuer v. Damri Lal* (2). In the former case a Division Bench of the Calcutta High Court held that "under the present Code of Civil Procedure, the auction-purchaser is a necessary party to a proceeding for setting aside an auction-sale and that, therefore, a Court has no jurisdiction to hear an application for setting aside a sale under O. XXI, r. 90, Civil Procedure Code, to which one of the auction-purchasers is not added as a party until after the expiry of the period fixed by law for making him a party." This view was expressly dissented from in *Bibi Zainab v. Paras Nath* (3), and a contrary view was taken in *Ganesh Bab Naik v. Vithal Vaman Mahalya* (4), *Raj Chandra Das v. Kali Kanta Das* (5), *Abdur Rahman v. Har Narayan Das* (6),

(1) 50 Ind. Cas. 5.

(2) 62 Ind. Cas. 61; 2 P. L. T. 336.

(3) 75 Ind. Cas. 430; 2 Pat. 800; 4 P. L. T. 491; 1 Pat. L. R. 361; A. I. R. 1924 Pat. 37.

(4) 19 Ind. Cas. 475; 37 B. 387; 15 Bom. L. R. 244.

(5) 82 Ind. Cas. 776; A. I. R. 1923 Cal. 394.

(6) 68 Ind. Cas. 238; 9 O. L. J. 211; 4 U. P. L. R. (O.) 72; A. I. R. 1922 Oudh 129.

Ghazanfar Husain v. Ram Ratan (7) and *Iswardas Marwari v. Biseswar Lal Marwari* (8).

Now, the law which requires that the auction-purchaser should be heard before passing an order affecting him is contained in the proviso to cl. (2), r. 92 of O. XXI, Civil Procedure Code. That proviso runs thus:

"Provided that no order shall be made unless notice of the application has been given to all persons affected thereby."

It is clear that the requirements of the above proviso are fulfilled if no final order affecting the auction-purchaser is passed unless notice of the application to set aside the sale is given to him. This proviso does not fix any period for giving that notice to the auction-purchaser, and there is no provision in the Indian Limitation Act for such notice. As no order affecting the auction-purchaser had yet been made the application could not have been thrown out on the ground No (1).

As regards the second ground, the date fixed for evidence was the 22nd November, 1926. On that date eight out of the fifteen witnesses summoned by the judgment-debtor were in attendance but they were not examined and the case was adjourned to the following day for hearing arguments on the petition filed by the auction-purchaser. No witnesses, however, appeared the next day, but even if the judgment-debtor was responsible for their non-appearance on that date, he was entitled to have his remaining witnesses summoned and examined. It cannot be said that he failed to produce any evidence.

I, therefore, set aside the order of the executing Court confirming the sale and direct that the judgment-debtor's application be enquired into and disposed of according to law. The respondents to pay the judgment-debtor's costs in this Court.

E. L.

Order set aside.

A. N. A.

(7) 25 Ind. Cas. 907; 17 O. C. 306.

(8) 94 Ind. Cas. 31; (1926) Pat. 83; A. I. R. 1926 Pat 266; 7 P. L. T. 532.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 703 OF 1927.

September 30, 1927.

Present:—Mr. Justice Fforde.

ABDUL WAHID—ACCUSED—APPELLANT
versus

EMPEROR—RESPONDENT.

Arms Act (XI of 1878), ss. 19 (f), 20—Concealment of arms—Question of fact—Sentence—Mere suspicion of Police that accused was about to commit dacoity, whether can be taken into consideration.

In every case it is a question of fact whether the person found in possession of a concealed weapon is carrying the weapon in such a way as to indicate an intention to hide the article from the classes of persons referred to in s. 20 of the Arms Act. [p. 496, col. 1.]

The fact that a person is concealing a weapon in his loin cloth while he is on a Railway platform indicates an intention to conceal that weapon from, *inter alia*, Railway officials within the meaning of s. 20, Arms Act. [*ibid.*]

Section 20 of the Arms Act is not confined to cases where the import or export of arms is attempted. [*ibid.*]

Chet Singh v. Emperor (1), referred to.

In the absence of any aggravating circumstance a sentence of five years' rigorous imprisonment for an offence under s. 20, Arms Act, is too severe. [p. 496, col. 2.]

The mere fact that there was a suspicion in the mind of the Police that the accused was about to take part in a dacoity is not a circumstance which a Court can take into consideration in arriving at an appropriate punishment for the actual offence which has been proved. [*ibid.*]

Appeal from an order of the Magistrate First Class, Kasur, exercising enhanced powers under s. 30 of the Criminal Procedure Code, dated the 26th June, 1927.

Dr. Nand Lal, for the Appellant.

Mr. Des Raj Sawhney, Public Prosecutor, for the Respondent.

JUDGMENT.—The appellant has been convicted under the provisions of s. 20 of the Indian Arms Act of having in his possession a *chhavi* in such a manner as to indicate an intention that its possession may not be known to any public servant as defined in the Indian Penal Code or to any person employed upon a Railway or to the servant of a public carrier. I have not the slightest doubt that so far as the possession of the *chhavi* is concerned the Crown has abundantly established its case. The appellant was caught on the platform of the Railway Station with a *chhavi* blade concealed in his loin cloth. The only question is whether the circumstances of the case constitute an offence under s. 19 or under s. 20 of the Indian Arms Act.

Section 19 (f) makes it an offence to possess such a weapon and s. 20 makes it an offence to possess such a weapon in such a manner as to indicate an intention to conceal the possession of the weapon from, *inter alia*, Railway Officials. There is no doubt that carrying a *chhavi* concealed in a loin cloth indicates an intention to prevent the fact that the *chhavi* is in the possession of the accused being known to any one. The question is does the mere fact that a person has been found carrying a *chhavi* (in a way which is not unusual in this Province) when amongst Railway officials lead to the necessary inference that the concealment is for the purpose of preventing those officials knowing that he is carrying such a weapon. Dr. Nand Lal argues that to take this view would lead to certain anomalies, for instance, if a man were carrying a *chhavi* in the open country concealed in a loin cloth, that would not be an offence under s. 20 but if he continued his journey and arrived ultimately amongst Railway servants the offence would immediately come under s. 20. This raises questions which do not arise here. In every case it is a question of fact whether the person found in possession of a concealed weapon is carrying the weapon in such a way as to indicate an intention to hide the article from the classes of persons referred to in s. 20. I am only concerned with the facts disclosed by the evidence in the case before me and it seems to me that the fact that a person is concealing a weapon while he is on a Railway platform must indicate an intention to conceal that weapon from, *inter alia*, Railway officials who are about that platform. I am in complete agreement with the view adopted by Addison, J., in *Chet Singh v. Emperor* (1) that s. 20 is not confined, as has been held by Scott Smith, J., and Kensington, J., to cases where the import or export of arms is attempted. It seems reasonably clear from ss. 19 and 20 of the Indian Arms Act that the matter is not confined as held by those two learned Judges. In my judgment upon the circumstances of this case as proved the appellant has been rightly convicted under s. 20 of possessing a *chhavi* in such a manner as to indicate an intention that his possession may not

be known to any person employed on a Railway.

The next question which remains to be considered is whether the penalty of five years rigorous imprisonment is not too severe a punishment for the present offence. As Dr. Nand Lal has pointed out the appellant is a youngman of 24. There is no proof that he is a man of bad character, there is no evidence that he was engaged on any criminal undertaking at the time that he was arrested, and the learned trial Judge in imposing a penalty of five years rigorous imprisonment was probably influenced by the fact that there was a suspicion in the mind of the Police that the appellant was about to take part in a dacoity. Suspicion of this nature, however, is not a circumstance which a Court can take into consideration in arriving at an appropriate punishment for the actual offence which has been proved. The punishment for this offence, as far as the reported cases cited to me show, have varied from three months imprisonment to three years for a first offence. I think that in the absence of any aggravating circumstance having been proved the sentence imposed in the present case is far too severe, and I think that an appropriate sentence would be one of two years rigorous imprisonment.

I would accordingly accept the appeal to the extent of reducing the sentence to two years rigorous imprisonment, otherwise the appeal must stand dismissed.

G. A.

A. N. A.

Sentence reduced.

(1) 94 Ind. Cas. 401; 7 Lah. 65; A. I. R. 1928 Lah. 282; 27 Cr. L. 625; 27 P. L. R. 523.

MADRAS HIGH COURT.

CIVIL APPEAL No. 252 OF 1925.

October 12, 1927.

Present:—Justice Sir William Watkins
Phillips, Kt., and Mr. Justice Reilly.

**POCHIRAJU KANNAMMA—PLAINTIFF—
APPELLANT**

versus

MANNAVA MACHAMMA AND OTHERS

—DEFENDANTS NOS. 1 TO 3—RESPONDENTS.

Will—Construction—Absolute estate in favour of daughters, with provision for devolution of property not disposed of by them—Nature of estate conferred—'Santanam,' 'If there is issue,' meanings of.

A Will under which a Hindu devised his properties to his two daughters and to his sister's sons provided as follows:

"My daughters,.... and my sister's sons.... shall each enjoy....his or her respective portions of the property devised to them hereditarily and at their pleasure, with right of alienation by gift, sale or otherwise. If out of the said two daughters, to either there is no issue, her property shall after her death pass to the other to whom there is issue. If to neither of them there is issue, then the property remaining at the time of the death of the said two shall pass to the nephews of the testator."

Held, (1) that the Will conferred an absolute estate on the daughters with a provision for the devolution of whatever property may be left at their death, and that such an estate was not unknown to Hindu Law; [p. 498, col. 2.]

Saroda Sundari Dassi v. Kristo Jiban Pal (2) and *Haya Kumari Dasi v. Mohim Chandra Sarkar* (3), relied on.

Comiskey v. Bowring Hanbury (6), *Mulchand Jekisandas v. Bai Rukshmani* (7) and *Gulbaji Ajisigi & Co. v. Rustomji Kharsedji Banatvalla* (8), distinguished.

(2) that the expression "there is issue" meant issue living at the time of the daughter's death and not merely that the daughter should have had a child born to her; [p. 497, col. 2.]

Gurusami Pillai v. Sivakami Ammal (1), distinguished.

(3) that the reference to the word 'issue' being to the issue of a female, it did not include an adopted son. [p. 498, col. 2.]

Balasubramania Pillai v. Pitcha Pillai (4) and *Buddha Singh v. Lattu Singh* (5), distinguished.

The word '*santanam*' besides meaning child has a certain implication of succession or heirship. [*ibid.*]

Appeal against a decree of the Court of the Additional Subordinate Judge, Bapatla, dated the 30th September, 1924, in O. S. No. 4 of 1924, (O. S. No. 9 of 1922 on the file of the Sub-Court Bapatla).

Mr. Ch. Raghava Rao, for the Appellant.

Mr. B. Somayya, for the Respondents.

JUDGMENT.

Phillips, J.—The decision in this appeal depends entirely on the construction of the Will executed by one Pochiraju Ramachandrudu, father of the plaintiff and the 1st defendant. By this Will he devised certain properties to his two daughters, each to get one-half, and certain

other properties to his sister's two sons. There is then a clause in the Will as follows:

"My daughters,.....and my sister's sons shall each enjoy.....his or her respective portions of the property divided to them hereditarily and at their pleasure, with right of alienation by gift, sale or otherwise."

This clearly gives an absolute estate to each of the legatees but with respect to the daughters it is followed by a defeasance clause, namely,

"If out of the said two daughters, Machamma and Kannamma, to either there is no issue, her property shall after her death pass to the other to whom there is issue. If to neither of them there is issue, then the property remaining at the time of the death of the said two shall pass to the nephews of the testator."

The first question that arises for decision is whether the phrase "There is issue" means issue living at the time of the daughter's death or merely whether it means that the daughter should have had a child born to her. The contention for the respondent is that it has the latter meaning, and he relies upon a case decided by the Privy Council in *Gurusami Pillai v. Sivakami Ammal* (1). In that case it was held that the Tamil words which were translated as "have issue" and "have no issue", respectively could not be construed to mean "leave issue" but must be construed in their literal sense. In coming to this conclusion their Lordships observed:

"There is absolutely nothing on the face of the Will to suggest any secondary meaning."

In the present case the Telugu word used is *kaligina* which I have translated as "there is", a meaning which has been adopted also by the learned Subordinate Judge. The Telugu word used for issue is *santanam*. The words are capable of meaning both "having issue" and also "leaving issue" and would appear to be represented very well by the English words "is issue." There is, however, an indication in the Will that the words mean "leave issue" for the testator after providing for his two daughters provides definitely for the devolution of the property at their death and it would appear from the whole Will

(1) 18 M. 347; 22 I. A. 119; 5 M. L. J. 106; 6 Sar. P. C. J. 610; 6 Ind. Dec. (N. S.) 591 (P. C.).

that it was his intention that his daughters should first enjoy the property and that their children, or else his own nephews should succeed to the property on their death and it should not pass from them to their husbands' families. The word "*Santanam*" besides meaning child has a certain implication of succession or heirship. For these two reasons I must agree with the interpretation put upon these words by the Subordinate Judge and hold that they mean that the issue must be living at the time of the death of each daughter, respectively. The 1st defendant is the widow who had a child which died; whereas the plaintiff has a son and two daughters living. On the 1st defendant's death, therefore, her property would pass to the plaintiff and it is contended that in the consequence of this the plaintiff is entitled to restrain any alienation by the 1st defendant. In fact the contention for the plaintiff (appellant) is that the defeasance clause cuts down the absolute estate given to the daughters to a mere life-estate. To put this construction upon the Will would be to render the words giving absolute estate of no effect at all; but, if consistently with the intention of the testator, some effect can be given to those words, that interpretation must be adopted. We find that it is provided that if both of the daughters die leaving no issue, then the property remaining at the time of their death shall pass to the nephews. This pre-supposes that the daughters may alienate portions of the property during their lifetime, presumably under the absolute powers given by the earlier provisions in the Will. It is suggested that we must read this clause as a provision for alienation for justifiable necessity alone. As there is no mention of any such restriction, the words "remaining property" must be deemed to be the property after deducting the portions disposed by the daughters during their lifetime. This construction does not dispose of the whole difficulty for in the clause relating to the death of one of the two daughters the word "remaining" does not occur. But it is provided that her i. e., the deceased daughter's property shall pass to the other. Construing the word "her" in the light of the succeeding clause which talks of the "remaining property" "her" property must be deemed to be the property in her hands at the time of her death. This is the only

construction which will give effect to the provision for an absolute estate, which was clearly intended by the testator. The Will must be construed as giving an absolute estate to the daughters and providing for the devolution of whatever property may be left at their death. Such an estate is not unknown to Hindu Law as appears from the cases reported as *Saroda Sundari Dassi v. Kristo Jiban Pal* (2) and *Hara Kumari Dassi v. Mohim Chandra Sarkar* (3). The 1st defendant has, therefore, the power of alienating the property during her lifetime and the plaintiff cannot obtain the decree sought for.

The further question as to whether the word "issue" includes an adopted son has been raised; but a decision is not strictly necessary for this appeal. The word used in the Will is *Santanam* and although a similar word *Santhathi* has been held to include an adopted son *Vide, Balasubramania Pillai v. Pitcha Pillai* (4) and *Buddha Singh v. Lattu Singh* (5). In both these cases the issue was to a male heir. Where the issue is of a female it would be straining the meaning of the word to make it applicable to an adopted son, for an adoption is always made to the husband. I would hold that the word *Santanam* in this context does not refer to an adopted son. The cases cited by the appellant in support of the view that the daughters had merely a life-estate are *Comiskey v. Bowring Hanbury* (6), *Mulchand Jekisondas v. Bai Rukshmani* (7) and *Gulbaji Ajisigi & Co. v. Rustomji Kharsedji Banatvalla* (8), but in all those cases the estate was held to be so limited because there was a gift over which was inconsistent with the absolute estate previously provided for.

This appeal must accordingly be dismissed with costs.

Reilly, J.—I agree.

V. N. V.

Appeal dismissed.

A. N. A.

(2) 5 O. W. N. 300.

(3) 12 O. W. N. 412; 7 O. L. J. 540.

(4) 33 Ind. Cas. 552; (1916) 1 M. W. N. 306.

(5) 30 Ind. Cas. 529; 37 A. 604; 29 M. L. J. 434; 2 L. W. 897; 13 A. L. J. 1007; 18 M. L. T. 409; 17 Bom. L. R. 1022; 20 O. W. N. 1; 22 O. L. J. 481; (1915) M. W. N. 772; 42 I. A. 208 (P. C.).

(6) (1905) A. C. 84; 74 L. J. Ch. 263; 53 W. R. 402; 92 L. T. 241; 21 T. L. R. 252.

(7) 72 Ind. Cas. 282; 25 Bom. L. R. 189; A. I. R. 1923 Bom. 216.

(8) 95 Ind. Cas. 229; 49 B. 478; 27 Bom. L. R. 380; A. I. R. 1925 Bom. 282.

MADRAS HIGH COURT.SECOND CIVIL APPEALS NOS. 1780 AND 1781
OF 1925.

August 25, 1927.

Present :—Mr. Justice Beasley and
Mr. Justice Ananthakrishna Ayyar.
PATTATHIL SANKUNNI MANNADIAR
—DEFENDANT—APPELLANT

versus

PATTATHIL KRISHNA MANNADIAR
—PLAINTIFF—RESPONDENT.

Malabar Law—Karnavan, removal of, by decree of Court—Next senior male member, right of, to become karnavan without appointment—Karnavanship, how lost—Decree restricting powers of karnavan, whether binds successor—Construction of decree—Ambiguity—Reference to pleadings, permissibility of—Construction in accordance with law.

The right to the management of the *tarwad* affairs in the case of a *marumakkathayam tarwad* devolves on the senior most male member according to *Marumakkathayam Law*. When a *karnavan* is removed, there is no necessity for the Court to appoint the next in point of age as manager. The next senior in age becomes the *de jure* manager and *karnavan* and steps into the position *ipso facto*, without any sort of appointment by the Court. [p. 500, col. 2.]

Nemunnakudre v. Achmi Hengasu (1) and *Pazhavathil Mavilaputhia Veetil Chindan Nambiar v. Kunhi Raman Nambiar* (2), followed.

The only means by which rights of *karnavanship* could be lost to the senior most member are (1) by removal by decree of Court, (2) renunciation by act of party, and (3) by death. [p. 502, col. 1.]

Restrictions imposed by a decree of Court on a person who is the then *de jure karnavan* would *prima facie* cease to have operation on the death of the particular *karnavan* concerned, unless there be something specific in, or necessarily implied by, the decree to the contrary. [p. 502, col. 1.]

It is legitimate to refer to the pleadings in a case in order to construe the decree that has been passed in the suit more especially when the wordings of the decree are not very clear. [p. 500, col. 2.]

If the wordings of a decree be ambiguous, such construction should be put on the same as would make the decree in accordance with law rather than in conflict with it and when a decree is silent on a point, it could be supplemented by the law applicable to the case. [p. 502, col. 1.]

A, B, C and D were the senior most members of a *tarwad* in the order of seniority. In a suit for removal of A from *karnavanship* the plaintiffs prayed that B may be appointed as *karnavan* and if necessary D may be associated with him in the management. A decree was passed removing A from *karnavanship*, and appointing B as *karnavan* and associating D with him in the management. B died and D sued for a declaration that he was entitled to act as the *karnavan* in preference to C.

Held, that C, who was the senior most member on the death of B, was entitled to the *karnavanship* as he had neither renounced his right nor had been deprived by the Court of his right to *karnavanship*. [p. 501, col. 2.]

Second appeals against the decrees of the Court of the Additional Subordinate Judge, Calicut, in A. S. No. 5 of 1925 and A. S.

No. 6 of 1925 (A. S. No. 368 of 1924 and A. S. No. 369 of 1924 on the file of the District Court, North Malabar) respectively, preferred against those of the Court of the Additional District Munsif, Palghat, in O. S. No. 283 of 1923 and O. S. No. 284 of 1923 respectively.

Mr. T. R. Ramachandra Iyer, for the Appellant.

Mr. Sivarama Menon, for the Respondent.

JUDGMENT.—The question that arises for decision in these cases is which of the two—plaintiff or the defendant—is entitled to the management of the *tarwad* known as Kothukotte in Kannadi Amsom and Desom, and as Patthathil in Mathoor Amsom and Desom, of the Palghat Taluq. The Court of first instance decided the question in favour of the defendant whereas the lower Appellate Court has decided the point in favour of the plaintiff. The defendant accordingly has preferred these second appeals. To appreciate properly the point in dispute, it is necessary to mention that in 1904 the *karnavan* of the *tarwad* was Perakunni Mannadiar and the next senior Anandravan was Gopala Mannadiar. Original Suit No. 11 of 1904 was instituted by 18 junior members of the *tarwad* against Perakunni Mannadiar as the 1st defendant and Gopala Mannadiar as the 2nd defendant for the removal of the *karnavan* Perakunni Mannadiar, and also for the removal of the senior Anandravan Gopala Mannadiar on the ground that both of them were unfit to manage the *tarwad* affairs. The plaint proceeded to state that the 1st plaintiff therein (Ravunni Mannadiar) would be the person who would be entitled to management if defendants Nos. 1 and 2 were removed by Court, and there was a prayer that the 1st plaintiff, Ravunni Mannadiar, should be appointed as manager. The plaint proceeded further to state that if for any reason the Court should feel inclined to associate any other member of the *tarwad* with the 1st plaintiff in management, then the 1st plaintiff, Ravunni Mannadiar should be appointed manager in conjunction with the 3rd plaintiff. It must be mentioned that there was a 2nd plaintiff in that case—Sankunni Mannadiar who was senior to the 3rd plaintiff Krishna Mannadiar, but nothing was alleged in the proceedings in Suit No. 11 of 1904 about the 2nd plaintiff Sankunni Mannadiar. Issues were then framed about the removal of the 1st defendant and also about the

removal of the 2nd defendant in that suit. The seventh issue then framed ran as follows:—

"Whether the plaintiffs Nos. 1 and 3 are unfit to be appointed manager?"

The result of that litigation was that the 1st defendant Perakunni Mannadiar was removed from management, and the 2nd defendant Gopala Mannadiar having died during the pendency of the suit, no question arose about his removal. Having found that there was no reason for not granting the prayer in the plaint regarding the management of the *tarwad* affairs by the 1st plaintiff in conjunction with the 3rd plaintiff, the Court passed a decree to the following effect: "(1) that the 1st defendant be removed from management of the *tarwad* of the plaintiffs and defendants, (2) that the 1st and 3rd plaintiffs be appointed to the management." Now the 1st and 3rd plaintiffs in that suit continued to manage the properties of the *tarwad* till the 30th October, 1923, when the 1st plaintiff in the prior suit Ravunni Mannadiar died. The 3rd plaintiff in that suit Krishna Mannadiar has instituted O. S. Nos. 283 and 284 of 1923, out of which the present second appeals have arisen for a declaration that he is, in the circumstances that now exist, entitled to manage the affairs of the *tarwad* and for collection of rent due by the defendant to the *tarwad*. The defendant to the present suit Sankunni Mannadiar (who was the 2nd plaintiff in Suit No. 11 of 1904) contends that as the admitted senior most male member of the *tarwad* at present (excluding, of course, Perakunni Mannadiar the *karnavan* who was removed by virtue of the decree in the prior suit), he is in law entitled as the present *de jure* *karnavan* to manage the *tarwad* affairs. The main contention of the plaintiff in the present suit, Krishna Mannadiar, is that under the terms of the decree in Suit No. 11 of 1904 he and Ravunni Mannadiar were appointed co-managers and that on the death of Ravunni Mannadiar he is entitled to the sole management. He further contends that Sankunni Mannadiar should be taken to have been removed from management since his claims were not recognised and since his junior, the present plaintiff—was appointed as manager. As already remarked the Court of first instance upheld the defendant's contention, while the

learned Subordinate Judge has upheld the contention of the plaintiff.

Now before considering the effect of the decree in Suit No. 11 of 1904, it is better to state that the right to the management of the *tarwad* affairs in the case of a *Marumakkathayam tarwad* devolves on the senior most male member according to *Marumakkathayam Law*. When a *karnavan* is removed, it is now admitted, and there are decisions, expressly supporting the position, that there is no necessity for the Court to appoint the next in point of age as manager. When a *karnavan* is removed the next senior in age becomes the *de jure* manager and *karnavan*, and steps into the position *ipso facto*, without any sort of appointment by the Court, *Nemmanakudre v. Achmu Hengasu* (1) per Krishnan, J.; *Pazhavathil Mavilaputhia Veetil Chindan Nambiar v. Kunhi Raman Nambiar* (2). No doubt, in some decrees passed by Courts one finds occasionally statements to the effect that the previous *karnavan* is removed and the next senior is appointed as *karnavan* and manager. But as already remarked it is unnecessary to appoint the next senior to enable him to exercise the rights of the *karnavan* which he is under *Marumakkathayam Law* entitled to exercise the moment the previous *karnavan* is removed. Attention has been drawn to this point because a major portion of the arguments of the learned Counsel who appeared for the plaintiff-respondent in these cases was directed towards laying emphasis on the fact that the decree in Suit No. 11 of 1904 states that plaintiffs Nos. 1 and 3 in that suit were appointed to the management. If no appointment really be necessary in law to enable the next in seniority, to become a manager, the question arises as to what exactly is the construction to be placed on the terms of the decree that was passed in Suit No. 11 of 1904. It has been held that it is legitimate to refer to the pleadings in a case in order to construe the decree that has been passed in the suit more especially when the wordings of the decree are not very clear. Now referring to the plaint in Suit No. 11 of 1904, it is stated

(1) 53 Ind. Cas. 855; 43 M. 319 at p. 323; 37 M. L. J. 539; 11 L. W. 49; (1920) M. W. N. 117; 27 M. L. T. 83.

(2) 45 Ind. Cas. 26; 41 M. 577 at p. 581; 34 M. L. J. 400; (1918) M. W. N. 283 23 M. L. T. 316; 7 L. W. 543 (F. B.).

there "after the removal of defendants Nos. 1 and 2, plaintiffs are willing to have the 1st plaintiff alone appointed as manager of the *tarwad* or the 1st plaintiff in conjunction with the 3rd plaintiff therein." Absolutely nothing was stated against the 2nd plaintiff in that suit who is the defendant in the present suits. When we examine the proceedings in the prior suit, we think that it is clear that the questions before the Court then were: (1) consideration of the removal of defendants Nos. 1 and 2 in that suit and (2) consideration of the question whether the 1st plaintiff Ravunni Mannadiar should be allowed to manage the affairs solely as he would be entitled to it under the Malabar Law, unless the Court thought it proper to impose any restrictions on his power of management, or whether any other person should be associated with the 1st plaintiff in the *tarwad* management. The defendants having been removed (the 1st defendant by Court, the 2nd defendant by his death during the course of the suit) the question that was subsequently decided by the Court was that the interests of the *tarwad* required that the *de jure karnavan*, the 1st plaintiff Ravunni Mannadiar, should be restricted in his powers of management by having the 3rd plaintiff associated in his powers with him in the management. Absolutely no question of removing the 1st plaintiff having arisen in that suit, there could not be any question of removing the 2nd plaintiff therein. The question of associating another member with 1st plaintiff in his management was only with a view to restrict 1st plaintiff's rights, not to prejudice the next member's rights, much less to deprive once for all the next junior of his rights as *karnavan* when his turn should come. It is, therefore, impossible to uphold the contention of the learned Counsel for the respondent that the question of the 2nd plaintiff's right to be the *karnavan* was decided against him in that suit by necessary implication. *Karnavanship* is a very valued right among members of a Marumakkathayam *Tarwad*, and as already remarked the senior most male member is entitled to be the *de jure karnavan* with rights of management. The only means by which such rights of *karnavanship* could be lost to the senior most members are (1) by removal by decree of Court, (2) renunciation by act of party, and, (3) by death. The learned Counsel for the re-

spondent at one stage of his argument contended that in this case it must be taken that the 2nd defendant renounced his rights of *karnavanship* since he allowed his junior to be co-manager with the 1st plaintiff; at another stage he urged that on a proper construction of the decree in Suit No. 11 of 1904, it must be taken that the Court has adjudicated by necessary implication against his rights of *karnavanship*. We are unable to accept either of these contentions. In the absence of specific allegations against the 2nd plaintiff, and in the absence of any issue relating to him, it is rather difficult to hold that the Court adjudicated upon his rights in any way. On the other hand, the natural thing that is likely to have happened and which we find to be what really happened in Suit No. 11 of 1904 was that the 1st plaintiff, who was to be the *de jure karnavan* after the 1st and 2nd defendants were removed, instead of insisting on his rights to be the sole manager agreed to have his rights of management curtailed to some extent by associating the 3rd plaintiff with him in the management. The effect of this was that the 1st plaintiff's rights as *karnavan* were restricted, not that the next *karnavan* rights were in any way affected much less adjudicated against. On the death of the 1st plaintiff, these restrictions *ipso facto* ceased to have any operation, and the next *karnavan* is in no way affected by them. This is the view that has been taken by the District Munsif in these cases, and we are of opinion, that he is right. The learned Subordinate Judge at one portion of his judgment states that the decree should be construed according to its literal terms. If he means to lay down that one is not entitled to look into the pleadings to find out what was really meant by the decree, we should point out that he was wrong. It was not disputed before us that a decree—especially if it is ambiguous—should be construed in the light of the judgment that led to it. It is a matter of frequent occurrence in Malabar that members of a *tarwad* agree by means of *karars* to have the rights of the existing *karnavan* restricted in certain particulars either by compelling him to associate some other junior members with him in the management of the *tarwad* properties or by putting other restrictions on his power. It has been uniformly held in this Court

that the effect of such *karars* is only to limit the powers of the particular *karnavan* concerned, and that persons who were only junior members at the time would not be bound by such restrictions when they become, in their turn, *karnavans* of the *tarwad* unless by themselves being parties to the *karar* they have expressed themselves to be bound by such provisions even when they become *karnavans*. We need refer only to the two cases that were referred to in argument, namely, *Cheria Pangi Achan v. Unnalachan* (3) and *Achipre v. Achipre* (4). As remarked by Sadasiva Ayyar, J.: "The whole of a family *karar* in my opinion falls to the ground on the death of the *de jure karnavan* who consented to be bound by it (or his removal by decree of Court) as the next *de jure karnavan* is not bound by the restrictions imposed by the *karar* on his predecessor, except perhaps where he himself has agreed in that *karar* to be bound by those restrictions whenever he succeeded to the *stanom*." See also *Pazhavathil Mavilaputhia Veetil Chindan Nambiar v. Kunhi Raman Nambiar* (2). The same principles would, we think, apply to cases where restrictions were imposed by decree of Court on a person who was the *de jure karnavan* on the date of the decree. Such restrictions would *prima facie* cease to have operation on the death of the particular *karnavan* concerned, unless there be something specific in, or necessarily implied by, the decree to the contrary. Further it is well-recognised principle of law that if the wordings of a decree be ambiguous, such construction should be put on the same as would make the decree in accordance with law and that when a decree is silent on a point, it could be supplemented by the law applicable to the case: *Uttamram v. Kishordas* (5), *Amolak Ram v. Lachmi Narain* (6) and *Maharaja of Bharatpur v. Rani Kanno Dei* (7). As Sir John Edge, O. J., and Blair, J. say in *Amolak Ram v. Lachmi Narain* (6): "In construing a decree, the terms of which are ambiguous such construction must, if

(3) 38 Ind. Cas. 513; 32 M. L. J. 323; (1917) M. W. N. 185; 5 L. W. 392; 21 M. L. T. 329.

(4) 105 Ind. Cas. 101; (1927) M. W. N. 553; A. I. R. 1927 Mad. 887.

(5) 24 B. 149 at p. 153; 1 Bom. L. R. 638; 12 Ind. Dec. (N. s.) 637.

(6) 19 A. 174; A. W. N. (1897) 9; 9 Ind. Dec. (N. s.) 115.

(7) 23 A. 181 at p. 190; 28 I. A. 35; 5 C. W. N. 137; 3 Bom. L. R. 51; 7 Sar. P. C. J. 792 (P. C.).

possible, be adopted as will make the decree a decree in accordance with law." Their Lordships of the Privy Council while overruling that decision of the Allahabad High Court on some other point, expressed their approval of the above principle and specifically say as follows. "Their Lordships agree that all ambiguous documents should be construed rather to make them accord with law than to make them conflict with it." *Maharaja of Bharatpur v. Rani Kanno Dei* (7). Parsons, J., at p. 153 of 24 Bom. [Uttamram v. Kishordas (5)] states that "the decree may be supplemented by the law on the point upon which it is silent, but we cannot introduce into it a provision which would be contrary to law and *ultra vires* on the part of the Court pronouncing it." Further as observed by the Privy Council in *Hari Bakhsh v. Babu Lal* (8) "to understand and apply a decision of the Board or of any Court, it is necessary to see what were the facts of the case in which the decision was given, and what was the point which had to be decided." On a proper construction of the terms of the decree in Suit No. 11 of 1904 we are inclined to hold that the 3rd plaintiff in that suit (the present plaintiff before us) was only appointed to associate himself with the then *de jure karnavan* Ravunni Mannadiar the then 1st plaintiff, and that the 3rd plaintiff's appointment *ipso facto* ceased the moment Ravunni Mannadiar died. We are strengthened in our conclusion by reference to the judgment in Suit No. 11 of 1904; and having regard to the principles applicable to the case and the rights of members of a Marumakkathayam *tarwad* we have no hesitation in holding that the person at present entitled to the management of the *tarwad* in question is Sankunni Mannadiar (the appellant in these second appeals and defendant in these suits), and not Krishna Mannadiar the plaintiff-respondent. It, therefore, follows that the second appeals should be allowed and the District Munsif's decision restored. In the circumstances we direct that all the costs of the parties in both these cases, both here and in the Courts below, be paid from the *tarwad* funds.

V. N. V. & A. N. A.

Appeal allowed.

(8) 83 Ind. Cas. 418; 5 Lah. 92 at p. 102; 22 A. L. J. 254; 34 M. L. T. 70; A. I. R. 1924 P. C. 126; 28 C. W. N. 953; 20 L. W. 406; (1924) M. W. N. 650; 26 Bom. L. R. 1108; 47 M. L. J. 938; 51 I. A. 163; 1 Lah. Cas. 437; L. R. 5 A. (P. C.) 113; 10 O. & A. L. R. 1471; 1 O. W. N. 536 (P. C.).

MADRAS HIGH COURT.

APPEAL SUIT No. 398 OF 1925.

March 7, 1927.

Present:—Justice Sir C. V. Kumaraswami Sastri, Kt., and Mr. Justice Ourgenvén.

KANCHUMARTI VENKATA KRISHNAYYA GARU—CLAIMANT No. 1—

APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED

BY THE SUB-COLLECTOR OF GODAVARI—REFERRING OFFICER—

RESPONDENT.

Land Acquisition Act (I of 1894), ss. 18, 21—“Person interested”, meaning of—Application for reference by party in pending suit with respect to title to property—Right of party held entitled in appeal, to continue land acquisition proceedings—Agricultural land fit for building purposes, valuation of—Valuation of land—General principles—Prospective user and potentialities, whether to be considered.

Where during the pendency of a suit or appeal a person who has a decree in his favour and who is *prima facie* entitled to the property institutes or defends proceedings in respect of the property, the proceedings can be continued by the person who ultimately succeeds in the litigation. Any order passed in respect of the property would enure for the benefit of the successful litigant and he is the person who on the reversal of the judgment of the lower Court would be entitled to continue the proceedings. [p. 504, col. 1.]

In a litigation between two persons as to title to a property one of them was held entitled to it, and during the pendency of an appeal therefrom, the successful party applied in land acquisition proceedings with regard to the property, for reference to the Court under s. 18 of the Land Acquisition Act. In appeal the property was held to belong to the other party.

Held, that such other party was entitled to avail himself of the reference made at the instance of his opponent who was the person interested at the time in making the application for reference within the meaning of s. 18 (1), Land Acquisition Act. [p. 503, col. 2.]

The proper way to value lands is to ascertain what would be their market value if put to the most lucrative use having regard to their condition. In assessing compensation not only is the present purpose to which the land is applied to be taken into consideration, but any other more beneficial purpose to which in the course of events the land might within a reasonable period be applied should also be considered. The special adaptability of lands for building purposes is an element to be considered in fixing the compensation even though the lands are used for agricultural purposes at the time of acquisition. [p. 507, cols. 1 & 2.]

[Case-law considered.]

Appeal against a decree of the District Court, Godavari at Rajahmundry, in O. P. No. 158 of 1921.

Messrs. G. Lakshmanan and K. Kameswara Rao, for the Appellant.

The Government Pleader, for the Respondent.

JUDGMENT.

Kumaraswami Sastri, J.—This appeal arises out of the proceedings instituted for determining the amount of compensation to be awarded in respect of the acquisition by the Government of 50 acres 75 cents. of land situate in the town of Rajahmundry. The land was acquired for the construction of the Government Arts and Training Colleges at Rajahmundry. There were disputes as regards ownership of the land. Claimant No. 1 is the adopted son of K. V. Krishnayya who admittedly was the owner of the property and who was in possession. Claimant No. 2 is a reversioner who disputed the adoption. He succeeded in the Subordinate Judge's Court but in appeal the High Court upheld the adoption and claimant No. 1 was declared to be entitled to the estate. This judgment of the High Court was affirmed by their Lordships of the Privy Council* so that the person now entitled to the property is claimant No. 1.

The Government notified its intention to acquire the property on the 19th of July, 1921. On that day the 2nd claimant had obtained a decree in his favour in the Sub-Court and the appeal in the High Court was pending. The decree of the Subordinate Judge in favour of the 2nd claimant was on the 29th of April, 1921. It was reversed by the High Court on the 18th of October, 1922, and the judgment of the High Court was affirmed by their Lordships of the Privy Council on the 23rd of June, 1925. The order of the Land Acquisition Officer fixing the compensation was on the 6th of November, 1921, and the application for reference was made on the 8th of November, 1921.

A preliminary objection is taken by the learned Government Pleader that an appeal by the 1st claimant would not lie as he did not apply for a reference to the District Court under s. 18 of the Land Acquisition Act, the application having been made by the 2nd claimant. I do not think this objection is tenable. At the date of the award by the Land Acquisition Officer, the 2nd claimant was the person who was declared by the Subordinate Judge to be entitled to the property and who *prima facie* was the person entitled to apply. He was the person interested within the meaning of s. 18 (1) of the Land Acquisition Act

*See 89 Ind. Cas. 817—[Ed.]

I of 1894. I am of opinion that where during the pendency of a suit or appeal a person who had a decree in his favour and who was *prima facie* entitled to the property institutes or defends proceedings in respect of property sought to be acquired, the proceedings can be continued by the person who ultimately succeeds in the litigation. Any order passed in respect of the property would enure for the benefit of the successful litigant and he is the person who on the reversal of the judgment of the lower Court would be entitled to continue the proceedings.

As regards Survey No. 119/B-2 the suit by the 2nd claimant was dismissed by the Subordinate Judge and claimant No. 1 who ultimately succeeded was the person who was entitled to that item and it is clear from the record that there is no valid reference as regards that item. As regards the remaining items, I think the 1st claimant is entitled to appeal against the award.

Turning to the merits, the only question is whether the District Judge was right in treating the land sought to be acquired as agricultural land and fixing the compensation on that basis. The land sought to be acquired is situate within the Municipal limits of the town of Rajahmundry and it appears from the evidence and the plan produced that it is abutted on one side by the Gokavaram Road and on the other by another road. The District Judge in para. 5 of his judgment deals with the various sale-deeds produced. He is of opinion that one rupee a square yard may be taken as the value of building sites on the side of the Gokavaram Road in 1921 at the time of the proposed acquisition of the land in dispute. This finding is amply borne out by the evidence and the sale-deed produced by the witnesses. I do not think the District Judge was right in treating the land in question as agricultural land as the evidence, in my opinion, shows that the land should be treated as land fit and capable of being sold and used for building purposes. The land in dispute is within the Municipal limits of Rajahmundry town. The town is a growing one and according to the evidence there is demand for building sites.

The 1st witness for the Referring Officer is one Veerabhadrayya who in 1907 purchased about 9 acres of land under Exs. 1 and 2 near the land now sought to be acquired and adjoining the Gokavaram Road. It is

outside the toll gate. He reserved a portion of the land for himself and sold the other portion in small lots. He says that first he sold some sites at 4 annas a square yard, that prices were rising year after year, that those who bought from him were re-selling at a higher rate and that in 1915 he sold a site at one rupee a square yard. He says that five or six years ago he asked the 1st claimant to sell the land adjoining the Gokavaram Road and said that he would get good price if he instead of treating the land as garden lands sold it for building purposes. The evidence of this witness shows that the land now sought to be acquired is fit for building purposes and that so far as the plot purchased by him which adjoins the plot now in question is concerned, he was able to dispose of it for building purposes. The 2nd witness for the Referring Officer is the Municipal Secretary, Rajahmundry. He says that the Municipality in 1910 acquired about 70 acres which were sub-divided into 437 sites for building purposes and that all the sites were sold between 1913 and 1915 at prices ranging from 2 annas to 5 annas a yard. This land is situate within a furlong from the land now sought to be acquired. He says that 50 houses were built and that the remaining sites remain unbuilt upon. It is not clear from his evidence as to why the remaining sites have not been built upon. He says it is not for want of water that only 50 sites were built upon and that the remaining sites remain vacant. According to him the Municipality has laid out roads and dug out wells, and that no one would have to go more than 100 yards to obtain water, from one of the wells. All that appears from this witness's evidence is that though the Municipality managed to sell all the lands as building sites several sites have not been built upon. This is all the evidence on the side of the Referring Officer, and there is nothing in that evidence to show that the land in question can only be used as agricultural land and that there is no probability of its being disposed of as building site.

The witnesses for the claimants support the claimants' case that the land should be valued on the footing not purely of agricultural land but of land which is fit and which could be disposed of for building purposes. Both Veerabhadra Ayya who was examined on behalf of the Government and the claimants state that there is demand for the

land sought to be acquired for building purposes. Appa Rao claimants' second witness who is a lecturer in the Government College, Rajahmundry, and who has got a site in Veerabhadrapuram which is near the site sought to be acquired says that he purchased the site under Ex. B, dated the 13th of September, 1920, that the price was nearly one rupee per square yard, that the land sought to be acquired is near the Principal's bungalow and that only the Gokavaram Road divides the bungalow from Veerabhadrapuram. Claimants' 9th witness Darbha Venkataramayya says that he has purchased a site in Veerabhadrapuram under Ex. H, dated the 1st of May, 1918, after paying Rs. 300 for 200 square yards. He says that he knows the garden of the 1st claimant and that about two years ago he, the witness, offered on behalf of one Fazullah Sahib who is now dead Rs. 2 per square yard in respect of the site attached to the bungalow which belongs to the 1st claimant. Claimants' 10th witness Venkataramana Rao who is an Overseer in the Public Works Department states that the claimants' land which is sought to be acquired by the Government is fit for building if there is a scheme for the extension of the town, that the soil is gravely hard soil, that he requested the 1st claimant to sell a site on that land before he purchased the site under Ex. J in Veerabhadrapuram and that the claimant wanted Rs. 3 or Rs. 4, but that he, the witness, offered Rs. 2 per square yard. In cross-examination he states that the site which he wanted was a site adjoining the Gokavaram Road. The 2nd claimant who was examined as claimants' 15th witness states that the land sought to be acquired is fit for building purposes and that portion of the town on which the land is, is the only portion available for expansion by building houses.

The law as regards the compensation payable for lands acquired which have what is called special adaptability has been considered in several cases. In the matter of an arbitration between the Countess Mary Ossalinsky and the Mayor Aldermen, and citizens of the city of Manchester which is reported in *extenso* in the Appendix to "The Law of Compensation by Browne and Allan" page 659, Grove, J., puts the matter very clearly. The learned Judge observes :

"If the land has what I may call an adventitious value; that is something be-

yond its more agricultural or normal value--and that is a marketable value in this sense, that persons wishing, for a purpose for which the land is peculiarly applicable, to purchase that land, would give a higher price for that land--then the arbitrator has a fair right to take that into consideration, it is a matter, no doubt, contingent, but still it is a matter which is not to be ignored or put out of consideration by an arbitrator. Land may be agricultural land, but it may be so near a town that it is tolerably certain that in a few years it will be converted into building land, quite certain in a larger number of years, as far as we can speak of anything in the future being certain it will be converted into building ground. It is quite true that land might be rightly valued at more than its value as agricultural land if the land had any other capabilities for Railway, canal, or irrigating purposes, or for water works, or for anything else, and they are reasonable and fair capabilities, not far-fetched hypothetical capabilities but reasonably fair contingencies. Those are fair things to be considered by an arbitrator; not to give its full value as if the thing in prospect were actually accomplished but to give the enhanced value, what it would swell to a willing purchaser for in consequence of its having these additional advantages."

In *Queen v. Brown* (1) the land sought to be acquired was agricultural land which was fit for building purposes and Cockburn, C. J., observed that a Jury where the dispute is as to the value of the land sought to be acquired must in assessing the amount "have to consider the real value of the land, and may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote period it may be applied, just as an owner might do if he were bargaining with a purchaser in the market." In *In re Bullfa and Merthyr Dare Steam Collieries (1891) Limited and the Pontypridd Waterworks Co.* (2), Vaughan Williams, L. J., observed :—

"It seems to me, therefore, that the true rule is that, in assessing the compensation,

(1) (1867) 2 Q. B. 630; 36 L. J. Q. B. 322.

(2) (1902) 2 K. B. 135; 71 L. J. K. B. 613; 87 L. T. 291; 50 W. R. 627; 18 T. L. R. 604.

the Umpire may and ought to take into consideration every circumstance which is in existence as a fact at the moment when the notice to treat is given, and not only those circumstances, but also the probable user which might be made of the property. If, for instance, he has to assess the value of land which is used as agricultural land, he is entitled to take into consideration its adaptability for building land, because, that is a fact which is in existence at the time the notice to treat is given." The learned Judge, however, was of opinion that matters which are so remote or uncertain that they are incapable of being measured are not to be taken into consideration in assessing compensation. In *In re Lucas and Chesterfield Gas and Water Board* (3) the question as to compensation for special adaptability was considered by the Court of Appeal and Vaughan Williams, L. J., referred with approval to the observations of Grove, J., in *In re Countess Osselinsky and Manchester Corporation*. Fletcher Moulton, L. J., in dealing with the question of special adaptability in cases where lands are required by public bodies for uses which are different from the uses to which the lands are put while in private hands and which, therefore, do not necessarily influence the price which such lands command in the market observed: "The decided cases seem to me to have hit upon the correct solution of this problem. To my mind they lay down the principle that where the special value exists only for the particular purchaser, who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because, to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it. But when the special value exists also for other possible purchasers so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes." This case was approved and followed by the House of Lords in *Cedar Rapids Manufacturing Co.*

(3) (1909) 1 K. B. 16; 77 L. J. K. B. 1009; 99 L. T. 767; 72 J. P. 437; 6 L. G. R. 1106; 24 T. L. R. 858.

v. Lacoste (4). Lord Dunedin after referring to *In re Lucas and Chesterfield Gas and Water Board* (3) observed:—

"For the present purpose it may be sufficient to state two brief propositions:—

(1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker.

(2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined."

Turning to the Indian cases, in *Premchand Burrall v. Collector of Calcutta* (5) Sir Richard Garth, C. J., observed that where property is acquired under statutory powers, the compensation should be measured not, by estimating the value of the property according to its present uses and its present rental, but by ascertaining what it would be worth if laid out in the most lucrative and advantageous way in which the owner could dispose of it, e. g., for building purposes. In the matter of the *Land Acquisition Act, X of 1870, Munji Khetsey* (6) it was held by Farran, J., that in the case of land in the vicinity of a town where building is going on, the value of the land should be determined, not necessarily according to its present disposition, but laid out in the most lucrative and advantageous way which the owner can dispose of it. In *Daya Khushal v. Assistant Collector Surat* (7), Batchelor, J., after reviewing the authorities on the subject was of opinion that the special adaptability of the land should be taken into consideration in fixing the value. In *Fink v. Secretary of State for India* (8) the learned Judges observed: "The profit which might arise from the most advantageous disposition of land is, undoubtedly, one test for determining its market price." This principle of valuation was recognised in *Premchand Burrall v. Collector of Calcutta* (5) and in a recent unreported case*, *Hugh Mills Co. v. Secretary of State*, decided by Harrington and Brett, J.J., on the 18th June, 1903. In the case

(4) (1914) A. C. 569; 83 L. J. P. O. 162; 110 L. T. 873; 30 T. L. R. 293.

(5) 2 O. 103; 1 Ind. Jur. 267; 1 Ind. Dec. (N. S.) 363.

(6) 15 B. 279; 8 Ind. Dec. (N. S.) 189.

(7) 21 Ind. Cas. 320; 38 B. 37; 15 Bom. L. R. 845.

(8) 34 C. 599.

*Since reported as 8 Ind. Cas. 800—[Ed.]

of *Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.* (9) the Privy Council laid down the rule that a claimant is entitled to the market value of his land, including such speculative advance therein as had already taken place in consequence of improvements in the locality, but excluding any future speculative advance for a like cause. The probable use of land in the most advantageous way, in accordance with, or following the use already made of neighbouring lands, leads to speculative advance in prices, and regard should be had to such advance. The utility of land is certainly an element for consideration in estimating its value, that is the utility which may be calculated by a prudent businessman. This principle of valuation was accepted as sound in *Rajendra Nath Banerjee v. Secretary of State* (10). I may in this connection refer to *Hugli Mills Co. v. Secretary of State for India* (11), *Manmatha Nath Mullik v. Secretary of State for India* (12) and *Bhujabalappa v. Collector of Dharwar* (13). In *Rajah of Pittapuram v. Revenue Divisional Officer, Cocanada* (14), Sir John Wallis, C.J., was of opinion that the proper way to value lands which at the time of the acquisition were used for agricultural purposes is to ascertain what would be their market value if put to the most lucrative use having regard to their condition etc. In *Raja of Pittapur v. Revenue Divisional Officer, Cocanada* (15), Ramesam and Jackson, JJ., were of opinion that in ascertaining the market value of land the fact that it may be used for building purposes has to be remembered and that where the land is situate in great towns and cities, such an element makes a substantial difference. In *Thareesarkma v. Deputy Collector, Cochin* (16) Phillips and Venkatasubba Rao, JJ., deal with the question of compensation to be awarded in cases where agricultural land which is adaptable for building purposes is acquired. Venkatasubba Rao, J.,

refers to the authorities on the subject and is of opinion that in assessing compensation not only the present purpose to which the land is applied to be taken into consideration but also any other more beneficial purpose to which in the course of events the land might within a reasonable period be applied and that the special adaptability of agricultural lands for building purposes is an element to be considered in fixing the compensation. In estimating, however, the value with reference to the special adaptability of the property and to its future user, the Court should, as pointed out in *Rajendra Nath Banerjee v. Secretary of State* (10), estimate the future utility of the land by prudent business calculations and not by mere speculation and impractical imagination.

The facts proved in the present case are that the land sought to be acquired is land situate within the Municipality of Rajahmundry which is a large and growing town. There are several public offices and there it is growing in commercial importance. These facts are not disputed by the learned Government Pleader. As the town is on the Godavari river expansion on that side is not possible. The report of the latest census in 1921 shows that the population has increased 172 per cent. from 1871 to 1921, there being an increase over decade and Rajahmundry is said to be the principal trade centre for the Godavari delta and also for part of the agency. The land according to the evidence is fit for being built upon and the surrounding lands have been acquired by the Municipality, plotted out and sold as building sites for houses and have also been purchased by private individuals who have also sold plots for building purposes. The land is bounded on two sides by road and there is the future advantage of a road being opened up owing to the owner having lands abutting the Gokavaram Road to which he can be given a right of way. On the other hand there is the fact that there are building sites on the 70 acres of land acquired by the Municipality in 1912 which were divided into 437 sites and which were disposed of to various persons. It appears from the evidence of the Secretary to the Municipality (R. W. No. 2) that only 50 houses have been built. He thinks that the distance from the public buildings is the cause for the remaining sites not being built upon. It is argued that the site in question is on a

(9) 28 I. A. 121; 26 B. I.; 8 Sar. P. O. J. 1 (P. O.).

(10) 32 O. 343.

(11) 8 Ind. Cas. 800; 12 C. L. J. 489.

(12) 83 Ind. Cas. 442; 28 C. W. N. 461; A. I. R. 1924 Cal. 574.

(13) 1 Bom. L. R. 454.

(14) 51 Ind. Cas. 656; 42 M. 644; 36 M. L. J. 455.

(15) 86 Ind. Cas. 238; 21 L. W. 88; A. I. R. 1925 Mad. 818.

(16) 77 Ind. Cas. 347; 45 M. L. J. 339; 18 L. W. 356; (1923) M. W. N. 682; 33 M. L. T. 48; A. I. R. 1924 Mad. 252.

higher level and better adapted for building purposes and that as the Secretary says that the Municipality while promising to introduce a water supply scheme gave it up and dug only five wells may well account for more houses not having been built especially as the evidence of the witnesses called by the claimants shows that there is demand for building sites in Veerabhadrapuram which is adjacent. This may be so; but the fact that there are building sites available near the land is an element to be taken into consideration in fixing the value of the land sought to be acquired. There is also the fact that although one rupee a square yard was given for small plots of land, the same price could not be realised if the 50 acres were thrown open for sale at one time. It is suggested that it is open to the claimants to divide the land into convenient plots and offer the same for sale; but this would involve expenditure for the laying out of roads. It is also clear that it would take a few years before all the various plots could be sold.

On these facts the question is what is the compensation to be awarded. It is not possible in these cases to fix the price with any degree of accuracy especially where we are not dealing with the present use to which the land is put but with the prospective use and valuing it on the basis of special adaptability. In *Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.*, (9), their Lordships of the Privy Council observed:—

"It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others.....In such an enquiry as the present, relating to subjects abounding with uncertainties, and on which there is little experience, there is more than ordinary room for such guess-work; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at." I have gone through the evidence and followed it with reference to the plan produced in this case and having regard to the position of the land I think that so far as 15 acres are concerned, there is a fair and reasonable prospect of the land being taken up for building purposes within a period not so remote as to be negligible. So far as the land in the interior is concerned, I doubt very

much whether having regard to the slow rate of progress of buildings on the site I would be justified in fixing the same compensation for the land in the interior as for the land abutting the road.

I think that as regards 15 acres of the land sought to be acquired compensation should be awarded at 6 (six) annas a square yard and that as regards the remaining land Rs. 600 an acre would be a fair compensation. As I have not taken into consideration the existence of the buildings and trees in awarding 6 annas a square yard of 15 acres of the lands, I add Rs. 13,374-2-0 allowed by the District Judge. I see no reason to differ from him as to the value given on this head. In the result the award will be modified by allowing Rs. 69,624-10-0 instead of Rs. 38,030-10-0 allowed by the District Judge. Interest will be awarded at 6 per cent. from the date of possession on the excess decreed by us. I would, therefore, modify the award of the District Judge accordingly. The parties will pay and receive proportionate costs throughout.

Curgenvven, J.—This appeal is against the order of the District Judge of Godavari in O. P. No. 158 of 1921 which originated in a reference made by the Sub-Collector of Rajahmundry in a case under the Land Acquisition Act. The land acquired consists of Survey Nos. 119-B2 123 and 124 of Rajahmundry totalling 50.75 acres, and the purpose for which the acquisition was made to obtain a site for the Government Arts and Training Colleges.

Of the two claimants the appeal is preferred by the first and the learned Government Pleader raises the preliminary objection that an appeal by this claimant is incompetent. There was litigation regarding the property, the 1st claimant claiming as an adopted son and the second as a reversioner disputing the adoption. In the first Court the reversioner succeeded except as regards Survey No. 119-B2, and while that judgment was in force, on 8th November 1921, the reversioner applied for a reference to the District Court under s. 18 of the Land Acquisition Act. Subsequently the adopted son (1st claimant) won an appeal to the High Court and successfully resisted a further appeal to the Privy Council, so that the result was that he became entitled to all three survey numbers. Now under s. 18 (1) of the Land Acquisition Act an

application for a reference to the Court may be made by 'any person interested,' and under s. 21 the scope of the inquiry before the Court is to be restricted to a consideration of the interests of the persons affected by the objection. The 2nd claimant, who alone made the reference, was interested in Survey Nos. 123 and 124, because at that time he held a decree embracing them; but he was no longer interested in Survey No. 119-B2, because the decree had assigned it to the 1st claimant and thereafter he took no steps to challenge this decision. Thus the reference to the Court was good as regards Survey Nos. 123 and 124, but bad as regards Survey No. 119-B2. The 1st claimant, having under the appellate decrees since established his title to the two former numbers, may, I think, avail himself of the circumstance that a valid application for a reference was made by his predecessor-in-interest, the 2nd claimant, so that his appeal regarding these two numbers is sustainable. But it is unsustainable as regards Survey No. 119-B2, because there was no valid reference to the Court below.

Confining myself to Survey Nos. 123 and 124, therefore, I proceed to deal with the sole contention raised, that the compensation awarded is unduly low. The area involved is 49.24 acres, and a reference to the plan will show that the block acquired lies to the North-east, and upon the outskirts of Rajahmundry town, forming, with some numbers to the west, a wedge between two diverging roads, one leading to Gokavaram and the other to Rajangaram. The whole block, including Survey No. 119 has a frontage upon the latter road. The first question which arose for the District Judge, and which arises for us now, is whether the land is to be valued as agricultural land or as affording sites for buildings or partly as one and partly as the other. The learned District Judge has decided, after reviewing the evidence placed before him, that the only or the highest value which the property possesses is as agricultural land and as such he has confirmed the award of Rs. 400 per acre, except for three acres of garden, for which a lump sum of Rs. 4,000 has been given. The basis of the award will be correct unless the appellant is able to show that there exists a demand for building sites in that quarter, or that such a demand is likely to arise at some period not too remote to affect the pre-

sent value of the property. That, I think, is in substance the principle to be derived from the English and Indian decisions and applicable to the present circumstances. A summary of the more important of those decisions is to be found in the judgment of Venkatasubba Rao, J., in *Thareesarkma v. Deputy Collector, Cochin* (16) as well as in the judgment which my learned brother has just delivered. The principle which underlies them is now well-understood and the real difficulty lies in applying it.

The general considerations which suggest that the land may have a value as building site are that it lies adjacent to the town of Rajahmundry, the population of which, it is said, has been increasing, that certain portions of land not less remote have been acquired for building, and that it has a good road frontage. The evidence contains particulars of two building enterprises, one Mr. Virabhadrayya having sought to create a *peta* or suburb adjoining the Gokavaram Road, and the Municipality having taken measures to extend the town upon an area known as Denavaigunte; The history of Mr. Virabhadrayya's attempt is briefly this. In 1907 he bought 9 acres of land, comprising Survey Nos. 93, 94, 95-A and 117-A, for a sum of Rs. 2,637 or rather under Rs. 300 per acre. After making provision for internal communications, and reserving a portion for himself, divided the remaining area into 50 or 60 small house-sites, which he proceeded to sell at the rate of annas 4 per square yard, which is equivalent to Rs. 1,210 per acre. In this way he disposed of about 7 acres, but since the process occupied him some five or six years, it is apparent that the demand for sites was not very urgent. Meanwhile, however, and owing, no doubt, in part to the creation of a nucleus, the value of the site sold, in some of them, rose, so that by the sixth year some of his vendees were re-selling at one rupee per square yard. On 17th January, 1915, he himself sold a site of 400 square yards which he had originally reserved for himself, at this rate. In the same year he sold another site at annas 12 per square yard. A number of sale-deeds have been proved, particulars of which the District Judge has given in para. 5 of his order, and these show that sites in Virabhadrapuram have changed hands at prices the more recent of which approximate to one rupee per square

yard. The other project consisted in the acquisition by the Municipality in 1910 of an area of 70 acres, with a view to town extension. This area (Survey Nos. 401, 404 to 407) lies to the south of the land now under reference, and is rather more centrally situated. The District Court awarded a rate of Rs. 175 per acre, and this was raised by the High Court to Rs. 200. The Municipality laid out roads and constructed wells, and divided the block into 437 house-sites, and succeeded in selling them all at rates from 2 to 5 annas per square yard between the years 1913 and 1915. About 50 houses were built but the remaining 387 sites still lie vacant, and the Municipal Secretary (R. W. No. 2) does not think that any have been re-sold. It is clear, accordingly, that only a limited demand for sites on which to build houses existed in that locality, less than one-eighth of the provision made by the Municipality having been appropriated to that purpose; and it may be doubted whether those who acquired the sites have not, in general, lost money. The reason for this comparative failure is given by the Secretary as the distance from the colleges, schools, market and other institutions. There can be little doubt that the availability of these sites must exercise a depressing influence upon the value of the other land suitable for building but not more central.

Outside the two areas of Virabhadrapuram and Danavaigunta there is evidence of only one offer. The claimants' 10th witness, a P. W. D. Overseer says that he offered the 1st claimant Rs. 2 per square yard for a site not in the acquired land but in other neighbouring land fronting on the Gokavaram Road, and that the offer was refused. But this site was across the road from Virabhadrapuram *peta*, and, apart from that fact, a single offer for a small area does not furnish an index to the value of 50 acres.

Although owing to the presence of the Godavary river and of some other features the directions in which the town can expand are somewhat limited, the village plan shows that there are extensive areas of open land which, so far as can be seen, would afford sites for building. The experience furnished by the two projects discussed above shows that the occupation of this suburban area is likely to be slow. The sites in Virabhadrapuram which have changed hands for about one rupee per square yard cannot aggregate more than,

say, three or four acres, whereas the area we are now dealing with extends to 50 acres, capable of accommodating something like 500 families. I think that if the owner had at the date of the notification (19th July, 1921) followed the example of Mr. Veerabhadrayya and laid out his property for sale in building plots, the most that can be inferred in his favour is that purchasers would have been found immediately or within a limited time for not more than a certain acreage. With regard to the remainder of the land I am in some doubt whether, at the time of the acquisition, its market value as agricultural land can be supposed upon the evidence available, to have been affected by the local demand for having accommodation. In view, however, of its proximity to the town, and of the other advantages as building sites which it possesses, I do not feel justified in differing from my learned brother's opinion that a moderate enhancement upon its value as agricultural land should be allowed in order to give effect to this consideration. I agree to the rates which he proposes, and that the award should be enhanced into conformity with them.

V. N. V.

A. N. A.

Decree modified.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 358 OF 1926.

October 20, 1927.

Present:—Mr. Justice Reilly.

PANCHAPAKESA AYYAR—PLAINTIFF—
PETITIONER

versus

AYYASWAMI AYYAR AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Negotiable Instruments Act (XXVI of 1881), s. 46—Suit on pro-note—Plea that pro-note was executed and delivered merely as security, maintainability of.

In a suit on a promissory note executed by a subscriber to a chit fund to the stake-holder, it is open to the defendant under proviso (3) to s. 92 of the Evidence Act and s. 46 of the Negotiable Instruments Act to prove that the promissory note was executed and delivered only as security for the payment of future instalments to the chit fund.

Sundram Chetty v. Damodaram Chetty (1), followed.

Petition under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of Small Causes at Kumbakonam, in Small Cause Suit No. 1358 of 1925.

Mr. A. Sriranga Chariar, for the Petitioner.

Mr. K. S. Jayarama Iyer, for the Respondent.

JUDGMENT.—In my opinion it was open to the defendants under proviso (3) to s. 92 of the Evidence Act and s. 46 of the Negotiable Instruments Act to prove that the promissory note was executed and delivered only as security for the payment of future instalments to the chit fund. Compare *Sundram Chetty v. Damodaram Chetty* (1). There is evidence that the note was executed and delivered only as such security. The endorsement regarding the payment of Rs. 130 is not necessarily inconsistent with the defendant's case. I see no sufficient reason to interfere. This petition is dismissed with costs.

V. N. V.

A. N. A.

Petition dismissed.

(1) 84 Ind. Cas. 146; (1924) M. W. N. 529; A. I. R. 1924 Mad. 850.

MADRAS HIGH COURT.

APPEAL SUIT No. 287 OF 1923

February 19, 1927.

Present:—Justice Sir. O. V. Kumaraswami Sastri, Kt., and Mr. Justice Devadoss.

JAMMULA NARAYANAMURTHI AND

OTHERS—PLAINTIFFS—APPELLANTS

versus

NILAMBARA PRUDHIVISINGHI

SANTO AND OTHERS—DEFENDANTS NOS. 1, 2, 4 AND 5—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 67, 98—Mortgage—Covenant to pay—Provision for mortgagee remaining in possession if debt is not re-paid—No provision for sale on non-payment—Anomalous mortgage—Remedies of mortgagee.

A deed of mortgage under which possession was delivered to the mortgagee provided that the mortgagee was to pay out of the net income the interest and then the principal and that the mortgagor was to pay the amount in five years and in default the mortgagee was to remain in possession. The mortgagor, however, took possession in 1906, but defaulted to pay the mortgage amount. In a suit by the mortgagee for sale;

Held, (1) that the mortgage was an anomalous one in which the parties were bound by the terms of the document;

(2) that the plaintiff's remedy was to sue on the covenant to pay and for possession within the time prescribed by law;

(3) that the suit for sale was not maintainable.

Appeal against a decree of the District Court, Ganjam, in O. S. No. 33 of 1921.

FACTS.—A mortgage-deed of the year 1904 under which the mortgagee took possession of the land provided that the mortgagee shall cultivate the land or get it cultivated, credit the net income first towards interest and then pay towards principal and continued, "At the end of five years paying you all the balance under the deed, we shall take possession of our land. If we do not pay balance in full at that time, the mortgaged property shall remain in your possession in the aforesaid terms." The mortgagor, however, took possession in August, 1906, and did not pay the amount due on the mortgage. In November, 1921, the plaintiff-mortgagee brought a suit for recovery of the mortgage amount by sale of the properties.

The District Judge upheld the contention of the defendants that although there was a covenant to pay, there was no provision for sale of properties in case of default in payment and that the mortgage was not a combination of a simple and usufructuary mortgage but only an anomalous mortgage, in which the parties were bound by the terms of the contract of mortgage. The learned Judge held further that s. 67 of the Transfer of Property Act was inapplicable and that the plaintiff's remedy was to sue on the covenant within six years from the due date for possession. The suit was accordingly dismissed as being time-barred and the plaintiff appealed.

Mr. B. Jagannatha Doss, for the Appellants.

Mr. C. Sambasiva Rao, for the Respondents.

JUDGMENT.—The mortgages are anomalous mortgages. The document provides for the contingency to happen if payment is not made at the expiry of the period. It states that in default of payment the mortgagee is to be in possession till the mortgage is discharged.

We think the decree of the learned Judge is right and that plaintiff has no right to bring the property to sale, *Ram*.

mayya v. Guruva (1) has no application as under the terms of the document the mortgagee was to be in possession for interest only after the period fixed for sale. As regards the principal sum the document gave a right of suit.

The appeal fails and is dismissed with costs.

V. N. V.

Appeal dismissed.

(1) 14 M. 232; 5 Ind. Dec. (N. S.) 163.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 527 OF 1927.
(CRIMINAL REVISION PETITION No. 467
OF 1927.)

October 14, 1927.

Present:—Mr. Justice Devadoss.

In re BONTU APPALA NAIDU AND OTHERS

—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 247—
Summons case—Death of complainant pending inquiry
—Accused, right of, to acquittal.

Where the complainant in a summons case dies pending the inquiry before the Magistrate, the Magistrate should acquit the accused and should not proceed further with the inquiry.

The clause beginning with the words "unless for some reason he thinks" in s. 247, Criminal Procedure Code, does not apply to the case of a complainant who is dead.

Purna Chandra Moulik v. Dengar Chandra Pal (1), referred to.

Petition, under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate, Parvatipur Division, in C. A. No. 2 of 1927, preferred against the judgment of the Court of the Taluk Magistrates, Bobbili, in, C. C. No. 40 of 1926.

Mr. K. Kameswara Rao, for the Petitioners.

The Public Prosecutor (Mr. J. C. Adam), for the Crown.

ORDER.—In this revision petition a very interesting question is raised. The complainant died pending the enquiry into the case. The case before the Magistrate was a summons case, and the contention of

Mr. Kameswara Rao is when the Magistrate was told that the complainant was dead he should have dismissed the complaint under s. 247 of the Code of Criminal Procedure for the non-appearance of the complainant. The Magistrate adjourned the case in order to enable the complainant's son to come on the record and the learned Public Prosecutor contends the Magistrate's action is not *ultra vires* as the section deals with complainants who are alive and not with complainants who are dead. The relevant portion of s. 247, is "If the complainant is absent, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day."

The Magistrate adjourned the case in order to enable the complainant to appear and not for any other reason. If the complainant is dead he could not appear before the Magistrate and, therefore, the clause beginning with the words "unless for some reason he thinks" cannot apply to the case of the complainant who is dead. In this case the complainant being dead during the course of the enquiry, the Magistrate should have acquitted the accused and should not have proceeded with the enquiry. I may in this connection refer to *Purna Chandra Moulik v. Dengar Chandra Pal* (1). I, therefore, set aside the conviction and direct the fine if paid to be refunded to the accused.

V. N. V.

Petition allowed.

(1) 28 Ind. Cas. 658; 19 C. W. N. 334; 16 Cr. L. J. 322.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 71 OF 1926.

June 16, 1927.

Present:—Mr. Hallifax, A. J. C.

DAMODARDAS—DEFENDANT—APPELLANT
versus

RODBA AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Practice—Pleas of Law—Duty of Court to find and examine them—Mortgage—Oral agreement between mortgagor and mortgagee—Portion of property to be retained by mortgagee in full satisfaction—Mortgage, whether extinguished.

The Court must find and examine all pleas of law that may possibly apply to the facts for itself and must not wait for the parties even to suggest them, still less for the parties to plead them. [p. 513, col. 2.]

An oral agreement between a mortgagee and the mortgagor, whereby the mortgagee is to retain portion of the mortgaged property and return the other portion to the mortgagor and the mortgage is to be treated as extinguished results in the extinguishment of the mortgage lien, if the agreement is acted on by the parties. [p. 514, col. 1.]

Khiarajmal v. Daim (1), followed.

Second appeal against a decree of the District Judge, Wardha, dated the 10th November, 1925, in Civil Appeal No. 57 of 1925.

Mr. T. J. Kedar, for the Appellant.

Messrs. D. T. Mangalmurti and G. S. Lule, for the Respondents.

JUDGMENT.—The mortgage which the plaintiffs claimed to redeem was executed on the 8th of January, 1872, by Narayan Patel, who died in December, 1880. The mortgage was with possession and comprised a 2-anna share in the village of Saoda and a field of 32.30 acres bearing the number 54 and then described as *malik wahit*. In 1882 there was an agreement between the mortgagee and some, if not all, of the surviving members of the joint Hindu family of which the mortgagor had been the head, whereby the mortgagee was to retain the 2-anna share in the village and return the field to the other party and the mortgage was to be regarded as extinguished. This agreement was duly carried out.

The members of the family at that time were Ramji, aged 24 or 25, Govinda aged 16, Rodba aged 14, Ananda Bai, the mother of Ramji and Govinda, and Jhipri Bai the mother of Rodba, and they continued to live together as a joint Hindu family till 1890. The main evidence of the agreement extinguishing the mortgage is contained in

a copy of an application for mutation of names in respect of the share in the village made by Ramji on the 9th of February, 1882, (Ex. D-3) and a copy of the statements made by him and his mother Ananda Bai before the Tahsildar in the enquiry started by that application (Ex. D-1). In both Ramji's application and deposition the full details of the agreement are stated. In the course of the former he stated that he was his father's heir (*waris*), and in the latter that his father's heirs were himself and his mother Ananda Bai, who was present with him and affirmed this statement.

This has been accepted in the lower Appellate Court as an assertion that Ramji and Ananda Bai were the only heirs of Narayan, to the exclusion of his other two sons. That is, even at first sight, very improbable, and the inclusion of the widow Ananda Bai along with Ramji would alone be sufficient to show that it is impossible, and that they were both speaking as the representative of the joint family, though Ramji alone had the legal right to do so. The suggestion that Ramji's statement was even meant to be a denial of his brothers' rights in the inheritance, or rather in the joint family property, is preposterous, but even if it were possible, it would be disproved by his allowing them to enjoy their shares in the property with him for the next eighty years.

But even if Ramji's words can be taken as bearing the meaning put upon them, they are far from being the only evidence on the one question to be decided, which is whether his two younger brothers were or were not parties to the agreement of which he spoke. On this point the learned District Judge says that it was never the first defendant's case that Ramji was representing the joint family when he deposed before the Tahsildar, and that though he might have raised that plea he never did, and it was then too late to do so.

The Court must find and examine all pleas of law that may possibly apply to the facts for itself. It must not wait for the parties even to suggest them, still less for the parties to plead them, which they are expressly forbidden to do by the Civil Procedure Code. Refusal by a Judge to examine a question of law applicable to the facts because it was not "pleaded" earlier is his own condemnation; he ought to have seen it for himself earlier, but anyhow he

should hasten to repair the results of his own inadvertence when a party reminds him of it.

But the matter in issue is not whether Ramji meant to deny his brothers' rights in the joint family property (and admit a right in his mother which she had not got) when he deposed before the Tahsildar. The question is whether the agreement of which he then spoke, which had already been made, was an agreement made on his account only or on behalf of the whole joint family by him as the manager. The words of the application for mutation and of the deposition seem to me quite sufficient proof that the agreement mentioned was made by Ramji on behalf of the whole family.

But there is still more proof of this, Ramji and his two minor brothers remained joint for eight years after the agreement and all of them acted on it from the beginning. They took possession of the *malik wahit* field and became occupancy tenants of it and neither of the two brothers even thought of questioning the arrangement till Rodba was induced to execute the champertous sale on which the other plaintiffs sued in 1919. They both attained majority within six years after 1882, and Govinda lived till 1918 while Rodba is still alive and one of the plaintiffs.

On the question which has not been decided in the lower Appellate Court I find that when Ramji entered into the agreement of which he spoke in his deposition to the Tahsildar in 1882, he did so as the manager of the joint Hindu family of which he was a member and on behalf of the other two members of it. In accordance then with the judgment of the Privy Council in *Khierajmal v. Daim* (1) cited in the judgment of the lower Court, it must be held that the right of redemption is dead, having been extinguished at the latest in 1894, nearly thirty years before this suit was filed.

The decree of the lower Appellate Court will accordingly be set aside and in its place a decree will issue dismissing the suit and ordering the plaintiffs to pay the whole of the costs of the opposite party throughout the litigation. The Pleadings

fee in this appeal will be two hundred rupees.

G. R. D.
A. N. A.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 353 OF 1926.

September 1, 1927.

Present:—Mr. Macnair, A. J. C.

DOMAJI—PLAINTIFF—APPELLANT

versus

TULSIRAM—DEFENDANT—RESPONDENT.

Practice—Findings to be confined to pleadings and issues—Wajib-ul-arz—Interpretation—Manure on gowthan—Right of proprietary body.

Where there are definite pleadings and a definite issue on those pleadings is framed, the finding must be confined to matters raised in the issue, even though the parties produce evidence on matters which do not form part of the issues. [p. 515, col. 1.]

The clause in the *wajib-ul-arz* that any one may collect manure from waste land does not apply to a *gowthan*, a place where cattle are collected in the morning before they are taken to graze on the waste land or elsewhere. The manure (on the *gowthan*) belongs to the entire proprietary body and a managing co-sharer who collects it cannot refuse to account for the profits received therefrom. [*ibid.*]

Second appeal against a decree of the District Judge, Wardha, dated the 17th March, 1926, in Civil Appeal No. 106 of 1925.

Mr. D. T. Mangalmurti, for the Appellant.

Mr. T. J. Kedar, for the Respondent.

The following draft judgment was delivered on 4th August 1927.

JUDGMENT.—This appeal arises out of a suit for mesne profits. The plaintiff-appellant in this Court urges that three items of consent money and the value of certain manure should have been included in the profits. The learned Judge of first appeal states that he does not discuss the arguments relating to consent money as the plaintiff should have been aware of transfers and should have made a plea about the consent money from the outset. Now, this is a suit for accounts. The plaintiff in his plaint had merely to ask the defendant to render an account, and this is what he did. The defendant put in an account. Then the plaintiff on 2nd March, 1925, made objections. He stated: "The amount of *sewai* income given by the defendant is denied. Plaintiff files

(1) 32 C. 296; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.).

a schedule for the years in suit." The issue framed on this point was: "What was the *sewai* income during the years in suit?" Although I should prefer Judges to mention the items to which an issue referred, there could have been no doubt regarding the scope of this issue. Both parties have put in an account: presumably the plaintiff included all items admitted by the defendant; the issue referred to those sums which the plaintiff claimed and the defendant denied. In the course of evidence witnesses deposed to receipt of the entirely new items which form the subject of this appeal, and certain of these items were held to be proved by the first Court.

I agree with the lower Appellate Court that suits cannot be tried in this way. Where there are definite pleadings and a definite issue on those pleadings is framed, the finding must be confined to matters raised in the issue. It is of course open to the parties to ask that fresh pleadings should be allowed and additional issues struck. But if they, although represented by Counsel, produce evidence on matters which do not form part of the issues, this evidence should be disregarded. There was not even, in the lower Appellate Court, a prayer to allow to amend the pleadings. Such a prayer is made to me but I refuse to allow these items to be put in issue at this stage. The appeal, so far as regards the consent money, therefore, fails.

The other issue refers to the value of manure collected from the *gowthan*. I do not think the clause in the *wajib-ul-arz*, that any one may collect manure from waste land, can be applied to a *gowthan*. *Gowthan* is the place where cattle are collected in the morning before they are taken to graze on the waste land or elsewhere. Naturally much cow-dung is deposited on the limited space, and for the purpose of making rules regarding the right to the manure the *gowthan* is very different from the waste lands on which the cattle pasture. It would clearly be absurd to direct that the manure in the *gowthan* could be taken by any one who pleased; for it is admitted that this manure, which can be removed with ease, has considerable value.

But, apart from the question whether the plaintiff had a legal right to collect the manure, it is clear that he was allowed to collect it because of his position as

managing share-holder. He cannot refuse to account for the profits he received on the ground that, though he took the manure in his capacity of managing co-sharer, he had no legal right to do so.

The trial Judge held that the income from this source was Rs. 400 a year. This finding was challenged in appeal, but there is no finding by the lower Appellate Court. It appears proper that I should determine the issue of fact under s. 103, Civil Procedure Code. I do not lay great stress on the fact that the defendant has not given a complete account of the value of the manure received and the expenses incurred in collecting it. Such an account would be extremely troublesome to keep, and no inference can be drawn from the fact that it has not been kept. Similarly, it is difficult to place much reliance on the estimates given by the plaintiff's witnesses of the amount of manure which the defendant removes from the *gowthan* in a year. There is evidence which has been believed that the defendant keeps a servant or servants to collect manure. Tukaram (D. W. No. 3) admits that there are 10 or 15 *dalis* of manure which the defendant has taken from the *gowthan*. Later he says that there are two *gowthans* in the village. It appears to me that about 400 cattle should leave in the place where they stand in the morning much more than 15 or 20 carts per year. It is necessary to estimate the amount taken to the best of the Judge's ability. I think it may be held that the plaintiff has proved facts which lead to the inference that the defendant received at least 50 loads per year. The rate, Rs. 3 per load, is not disputed and as defendant has claimed no expenses, I do not allow the wages of a servant. I, therefore, consider that an addition of Rs. 150 should be made to the income of the village for each year. The calculations necessary will be shown to the parties before judgment is finally delivered.

FINAL JUDGMENT.—The calculations to which the draft judgment refers have now been made and are admitted by Mr. Mangalmurti to be correct. I have checked them and they appear correct; the sum by which the decretal amount had to be increased is 3-10th of Rs. 450 with some interest. The amount due from the defendant is Rs. 246 1. The decree will be amended accordingly. It does not seem desirable to make elaborate calculations regarding costs,

It appears fair to direct that costs in this Court should be borne as incurred; and that the order of the lower Appellate Court regarding costs should stand. I so direct.

G. R. D.

A. N. A.

Order accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 4-B OF 1925.
September 1, 1926.

Present :—Mr. Kinkhede, A. J. C.

WAMAN—DEFENDANT—APPELLANT
versus

VISHNU—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 144—Joint Hindu family—Alienation not as guardian but as manager—Art. 144, whether applicable—Sale without legal necessity—Pre-emption, whether can be avoided by minor—Sale for antecedent debts of manager, not father, for no legal necessity, whether valid.

Article 144 of the Limitation Act applies to a suit for setting aside an alienation of joint family property by the eldest managing member of the family though it does not apply to a suit to set aside an alienation of the property belonging to a minor by his guardian. [p. 516, col. 2.]

Asaram v. Ratansingh (1), followed.

A pre-emptor of property sold by the managing member of joint Hindu family takes the property pre-empted by him, subject to the right of the minor co-parceners to avoid the transaction on the ground of want of legal necessity. [*ibid.*]

The Hindu Law doctrine of antecedent debts applies only to father's antecedent debts. It does not apply to those incurred by a managing member other than the father. [*ibid.*]

Brij Narain Rai v. Mangla Prasad Rai (2), *Anantoo Kalwar v. Ram Prasad Tivari* (3), *Bhim Singh v. Ram Singh* (4) and *Gajadhar v. Jagannath* (5), followed.

Second appeal against a decree of the Additional District Judge, Akola, dated the 12th September, 1924, in Civil Appeal No. 75 of 1924.

Messrs. W. R. Puranik and A. D. Mande, for the Appellant.

Mr. V. N. Bapat, for the Respondent.

JUDGMENT.—The defendant-appellant raises four points in this second appeal—

- (1) Limitation under Art. 144.
- (2) Bar of *res judicata* by reason of decision in C. S. No. 195/1918 (Ex. D 2).
- (3) Legal necessity need not be proved by a successful pre-emptor.
- (4) No question of legal necessity arises where the sale is for antecedent debts.

I will dispose of these grounds *seriatim*.

(a) As to limitation the alienation here complained of is by the eldest managing member of a co-parcenary of the joint family property and not of the property belonging to the minor by his guardian. To such a case Art. 144 of the Limitation Act ought to apply. See *Asaram v. Ratan Singh* (1).

(b) The plea of bar of *res judicata* is a belated plea. No proper pleadings or facts constituting the bar of *res judicata* having been made or established in the trial Court, the lower Appellate Court was justified in refusing to entertain that plea at the stage of appeal.

(c) The plea that a pre-emptor need not prove legal necessity for the sale in favour of the vendee is novel and on the face of it unsound. The right of pre-emption is a right of substitution, so that the name of the original vendee has to be considered as deleted from the sale-deed and that of the pre-emptor substituted in his place with effect from the date of his fulfilling the obligation as to payment of the pre-emption price according to the terms of the decree. He must take the property subject to the right of the minor co-parcener to avoid the transaction on the ground of want of legal necessity.

(d) The fourth question raised is concluded by authority. The proof of antecedent debts which dispenses with the necessity of proving legal necessity for a sale must be father's antecedent debts and not those incurred by a managing member other than the father [*Brij Narain Rai v. Mangla Prasad Rai* (2), *Anantoo Kalwar v. Ram Prasad Tivari* (3), *Bhim Singh v. Ram Singh* (4) and *Gajadhar v. Jagannath* (5).]

A point not specifically covered by any of the grounds but which could be plausibly argued under ground No. 4 that the legal necessity need not be proved at least to the extent of Rs. 210 because that sum was paid towards the satisfaction of the father's antecedent debt is argued before me on the

- (1) 32 Ind. Cas. 242; 12 N. L. R. 12.
- (2) 77 Ind. Cas. 689; 46 A. 95; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 O. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; A. I. R. 1924 P. C. 50; 33 M. L. T. 457; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 O. L. J. 232 (P. C.).
- (3) 78 Ind. Cas. 619; 46 A. 295; 22 A. L. J. 182; A. I. R. 1924 All. 465; L. R. 5 A. 86 Civ.
- (4) 84 Ind. Cas. 13; 46 A. 301; 22 A. L. J. 180; A. I. R. 1924 All. 309; L. R. 5 A. 75 Civ.
- (5) 80 Ind. Cas. 684; 46 A. 775; 22 A. L. J. 601; A. I. R. 1924 All. 551; L. R. 5 A. 458 Civ. (F. B.).

strength of the evidence of D. W. No. 1 and Ex. D-1. The question as to the existence of this debt of the father and its satisfaction out of the consideration of the mortgage for Rs. 700 was specifically raised by the defendant in his written statement. The first Court found that the debt was borrowed by the father, but that the same was paid off in *Samat* 1967 (see para. 7 of the first Court's judgment). The lower Appellate Court accepts the entries in the account books of the Harankhed Shop as evidence of Ganoo's liability but draws the inference thereupon that the debt was long paid off by the plaintiffs' brother and the money that was paid off on *Kartik Badi* 11 of 1970 was due by the brothers on the bonds executed by them. (*Vide* para. 6 of the lower Appellate Court's judgment).

This finding is based on a misreading of the documentary evidence and must be set aside. A careful examination of the entries of Ganoo's *khataoni* from 1965-1967 *Samat* and *kird* page 2 and also of Tukaram's new *khata* at page 7 of the *khataoni* for the *Samat* year 1967 and the entries in the *rojnamas* clearly show that on *Poush Sudhi* 6 of 1967 Rs. 200 were paid towards the satisfaction of the old debt of Rs. 295 and for the balance of Rs. 149-4-0 which consisted of Rs. 125, the balance left due under the old bond and Rs. 24-4-0 on account of a fresh pro-note of Rs. 22-8-0 (executed in several of father's previous pro-note for Rs. 17-8-0) plus Re. 1-12-0 interest thereon, a fresh bond for Rs. 100 and a pro-note for Rs. 49-4-0 were executed on *Poush Sudhi* 8 and, therefore, credit was given towards the *khata*. This would show that the sum of Rs. 210 paid on *Kartik Badi* 11 of 1970 *Samat* was towards the satisfaction of the bond debt of Rs. 125 and pro-note of Rs. 17-8-0 in lieu of what the pro-note of Rs. 49-4-0 came to be executed in due course.

Thus the whole of the payment of Rs. 210 was on account of father's antecedent debts. This together with Rs. 90 on account of interest at Rs. 1 per cent. per mensem comes to Rs. 300 on the date of the sale-deed, dated 26th April, 1917. The defendant had thus a charge on the plaintiff's share for this amount on the date of the sale. If the plaintiff seeks to recover back possession of the $\frac{1}{3}$ rd share belonging to himself he must bear this burden and pay it before he can recover his alienated share from the vendee or his pre-emptor the de-

fendant. As the defendant has enjoyed the profits of the land I do not think I should ask the plaintiff to pay any interest to him on this sum.

I, therefore, modify the decree of the lower Appellate Court by directing that the defendant shall be entitled to recover Rs. 300 from the plaintiff as a charge on the $\frac{1}{3}$ rd share for the joint possession of which he has been granted a decree.

The appeal stands otherwise dismissed with costs. As the revision appeal is divided one I order each party to bear his own costs.

G. R. D.

A. N. A.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 45-B of 1925.

August 1, 1927.

Present:—Mr. Findlay, J. C., and Mr. Macnair, A. J. C.

October 21, 1927.

Present:—Mr. Prideaux, A. J. C.

VYANKATESH—DEFENDANT—

APPELLANT

versus

ANNASA LAD—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 28—Mortgage-deed—Land not intended to be mortgaged fraudulently included for getting deed registered in wrong district—Registration, whether valid as to personal covenants.

Where a mortgage-deed has been registered in a wrong district by fraudulently including land not intended to be mortgaged, the registration is wholly invalid and even personal covenants contained in the deed cannot be considered to be duly registered. [p. 522, col. 1.]

Dronamraju Rama Rao v. Kissapragada Vedayya (1), dissented from.

First appeal against a decree of the Sub-Judge, First Class, Buldana, in Civil Suit No. 50 of 1924.

ORDER OF REFERENCE TO A BENCH.

Prideaux, A. J. C.—(November 24, 1926).—It seems to me that this case should be heard by a Bench as a difficult question of law is involved and I am not quite in agreement with the decision in *Dronamraju Rama Rao v. Kissapragada Vedayya* (1).

(1) 73 Ind. Cas. 188; 46 M. 435; (1923) M. W. N. 166; 44 M. L. J. 373; 32 M. L. T. 222; 17 L. W. 695; A. I. R. 1923 Mad. 447.

The question is whether a mortgage-deed invalid because registration was procured by fraud is not also invalid for all purposes as far as registration is concerned, i. e., would the registration extend limitation from 3 to 6 years. Forwarded to the Judicial Commissioner.

Findlay, J. C.—(24th November 1926).—The question will be decided by a Bench consisting of Judicial Commissioner and third Additional Judicial Commissioner.

OPINION.

Findlay, J. C. and Macnair, A. J. C.—(August 1, 1927).—The question which has been referred for the decision of this Bench is this:—

"Where a mortgage-deed has been fraudulently registered in a wrong district by including land not intended to be mortgaged, is the registration good so far as a personal covenant contained in the deed is concerned?"

The decision of this question affects the period of limitation for a suit for compensation for the breach of the personal covenant.

The question has been considered at length in *Dronamraju Rama Rao v. Kissapragada Vedayya* (1). The learned Judges who decided that case have answered it in the affirmative. The respondent's Counsel adopts the arguments on which they relied, and we have, therefore, to consider whether, in our opinion, those arguments are convincing.

In *Harendra Lal Roy Chowdhury v. Hari Dasi Debi* (2) their Lordships of the Privy Council state:—

"An entry, intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the Registration Law, and no registration obtained by means thereof is valid."

In *Biswanath Prasad v. Chandra Narayan Chowdhury* (3) this opinion was quoted with approval. Phillips, J., in *Dronamraju Rama Rao v. Kissapragada Vedayya* (1) cites and remarks:—

"The principle which I take to underlie this decision is that no person shall be allowed to take advantage of his own fraud. If that principle be applied to the

(2) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.).

(3) 63 Ind. Cas. 770; 48 C. 509; 48 I. A. 127 (P. C.).

present case, the object attained by the fraud was the registration of the mortgage-deed as such, for had the document been merely a covenant to re-pay, the Peddapur Sub-Registrar would have had jurisdiction under s. 29 of the Registration Act (Act XVI of 1908); for under that section parties are at liberty to choose their own place of registration. In so far then as the document evidenced a mere covenant to re-pay there was no fraud upon the Registration Law, and to hold that such registration was invalid would be to extend the principle above mentioned so as to deprive a party of a right which he had not obtained by fraud as well as of the advantage gained by his fraud."

Devadoss, J., states:—

"The Registration Act does not prohibit the use of a document as a registered one if the provisions of s. 28 of the Act are contravened. If a document is otherwise properly registered there can be no objection to the use of it as a registered one."

We respectfully state our opinion that the learned Judges of the Madras High Court have not kept in mind the fact that a document can only be registered as a whole. The document presented for registration was of the nature described in s. 17 (1) (b) of the Indian Registration Act. The inclusion of a covenant to re-pay does not alter this fact. Even if the document recorded two entirely distinct contracts, only one of which created a title of the value of Rs. 100 or upwards in immoveable property, the document as a whole would still be one of those mentioned in s. 17 (1) (b). Section 28 of the Registration Act, therefore, refers to such a document. Section 29 of that Act begins: "Every document other than a document referred to in s. 28..." and has no application to documents to which s. 28 refers.

It follows that the Sub-Registrar to whom the document was presented has no power to register the document. It must be presumed that, but for the false representation that the document related to some property within his jurisdiction, he would have refused to register it. If the parties had been able and willing to cancel the part of the document which affected immoveable property the amended document might then have been registered; but this would not have been registration of the document which was before the

learned Judges. Registration was, then, obtained by means of fraud and is invalid.

The learned Judges of the Madras High Court draw an inference in favour of their view from the action of the Privy Council in the case reported as *Biswanath Prasad v. Chandra Narayan Chowdhury* (3). Their Lordships in that case remitted the case to the Calcutta High Court for a decision whether the plaintiff had a valid alternative claim for a personal judgment for the mortgage debt. It is inferred that, in their opinion, the personal debt was secured by a registered instrument: for the argument before their Lordships was that the payment of interest in 1903 would save limitation for the suit brought in 1908. In our opinion, if any inference can be drawn from their Lordships' action, it can at most be that their Lordships did not think fit at that stage of the case to decide the question we are now considering.

We are then of opinion that no registration of the deed including a personal covenant could have been effected but for the fraud of the parties, and that no contract contained in the deed can be considered to be validly registered.

Mr. Y. G. Deshpande, for the Appellant.

Sir B. K. Bose, Messrs. W. A. Forbes and M. B. Niyogi, for the Respondent.

JUDGMENT.

Prideaux, A. J. C.—(October 21, 1927).—One Madho Vyankatesh executed a mortgage-deed dated 28th September, 1873, for Rs. 1,200 and another mortgage-deed dated 16th July 1881, for Rs. 400 in favour of the firm of Gopalsa Krishnasa, the plaintiff's predecessors-in-interest. On these documents the present plaintiff brought Civil Suit No. 293 of 1910 and Civil Suit No. 166 of 1910 against Tulsabai, the widow of the deceased Madho. He obtained two decrees which were afterwards made absolute. It is contended that as Tulsabai could not discharge the decrees and was in need of money for pilgrimage she executed the mortgage-deed, dated 8th October, 1907, now sued on. She re-mortgaged the property covered by the first two deeds and mortgaged the rest of her husband's immoveable property. She has failed to discharge her last debt. She has adopted defendant No. 1 as a son, and it is contended that as the mortgage was on account of the father's debts and for legal necessity, it is binding on the minor defendant No. 1, who

at the time of the adoption was made liable to pay the father's debts to the extent of the assets of his father. Defendant No. 2 Ambadas Laxmon is in possession of a site at Chikhli mortgaged by the document sued on, while defendant No. 3 is joined for being in possession of certain fields mortgaged.

The case proceeded *ex parte* against defendants Nos. 2 and 3. For the first defendant the two mortgages of 1873 and 1881 were admitted. He pleaded ignorance of the two mortgage decrees and denied the execution of the mortgage-deed in suit and contended that, even if its execution is proved, the document is not binding on him owing to the plaintiff having practised fraud on the registration department in getting the document executed at Chikhli. The rest of the property is not in the Chikhli registration circle and the only portion of the property in that circle was the site which did not belong to the mortgagor. It was further contended that there was no legal necessity for the mortgage and that it was not a prudent act on the part of Tulsabai to mortgage the whole property when the former decrees were only against a part of the property. It was stated that the suit for personal claim or against the assets of the deceased Madhorao is barred by time.

The plaintiff denied all adverse allegations, and the case was tried on the following issues:—

1. (a) Did Madhorao execute the two mortgage-deeds, dated 28th September, 1873, and 16th July, 1881, and did the present plaintiff obtain two mortgage decrees on those mortgage deeds alleged by the plaintiff?
- (b) Did the present plaintiff get those two mortgage deeds to his share by partition with his brother as alleged by the plaintiff?
2. (a) Did Tulsabai execute the mortgage-deed in suit in favour of the plaintiff?
- (b) If so, was the document taken from her by the plaintiff under fraud and deceit as alleged by defendant No. 1 in para. 4 of his written statement?
- (c) Whether it was a prudent act on the part of the lady to execute the present mortgage-deed, instead of paying off the two decrees?

- (d) Did Tulsabai require Rs. 300 for pilgrimage and cultivation of the field and was it a legal necessity and so the other debt?
- (e) Did the plaintiff make enquiry about the legal necessity at the time of mortgage-deed in suit?
3. (a) Did the mortgage site at Ohikhli belong to defendant No. 1's adoptive mother Tulsabai at the time of the execution of the mortgage-deed in suit?
- (b) If not, is it a fraud on registration and whether the mortgage-deed is invalid?
4. (a) In case the mortgage deed is held invalid, is the present suit within time by virtue of acknowledgment as alleged by the plaintiff, or it requires to be written on stamp paper?
- (b) Whether it is binding on the minor defendant No. 1?
5. To what relief is the plaintiff entitled and against whom?"

The lower Court finds that the two deeds of the last century are proved and also that the plaintiff sued on them and obtained decrees. It is also found that Tulsabai executed the mortgage-deed in suit in favour of the plaintiff, and that the deed was properly attested, but the Court finds that the site at Ohikhli did not belong to Tulsabai at the time of the mortgage, and belonged to the writer of that document Ambadas Laxman and still belongs to him, it being simply inserted in the mortgage-deed to enable that document to be registered at Ohikhli. It is also found that it was a fraud on the registration department, and the document is invalid as far as it affects immoveable property. It was not a prudent act on the part of Tulsabai to mortgage additional 7 fields of the value of Rs. 6,500 for the debt due on the two mortgage-deeds, nor was the condition of foreclosure a prudent one. As regards the Rs. 300, it was found that the plaintiff did not make enquiry about the loan and is not binding on defendant No. 1. Dealing with the question whether the registration is valid, so far as the personal decree was concerned, the Judge finds that it is, and enables the mortgagee to sue for his money within 6 years as provided by Art. 16 of the Limitation Act. There was a personal covenant for re-payment of the money, and there was a mention in the deed

of adoption as regards the plaintiff's two decrees, and Tulsabai made the 1st defendant liable for the money. Tulsabai was found to be the *de jure* guardian of the person and property of the minor at the time, and as such she could have acknowledged the plaintiff's debt on the two decrees on 22nd March, 1920, i.e., within 6 years from the date of the suit. Acknowledgment of the debt was held to be for the benefit of the minor. The suit for personal claim was found to be within time. Deducting the sum of Rs. 300 and its *damdupat*, Rs. 5,800 was found due on the mortgage in suit and that sum was decreed against defendant No. 1 to the extent of the ancestral assets of his deceased father Madho.

Against that decree the present appeal has been filed by the 1st defendant. The plaintiff has filed cross-objections, but these have not been argued and, therefore, need not be discussed.

I found it necessary to ask for a decision by a Bench of this Court on the following question:—

"Where a mortgage deed has been fraudulently registered in a wrong district by including land not intended to be mortgaged, is the registration good so far as a personal covenant contained in the deed is concerned?"

The finding of the Bench is that no contract contained in the deed can be considered to be validly registered.

The appellant here follows the reasoning given by the lower Court for its findings that the site at Ohikhli did not belong to Tulsabai but to Ambadas, and that the insertion of the site in the mortgage-deed was not meant to affect that property but was merely made to allow the document to be registered at Ohikhli; and it is contended that under the circumstances no personal decree can be passed and the whole suit must be dismissed.

For the respondent it is contended that unless it can be shown that deliberate fraud has been committed on the Registrar, the document registered must be presumed to be correct [*Gangamoyi Debi v. Troiluckhya Nath Chowdhry* (4)]: to start with, there is a presumption that the registration is correct and that it is necessary to prove that the mortgagee

(4) 33 C. 537; 3 C. L. J. 349; 10 C. W. N. 522; 8 Bom. L. R. 375; 1 M. L. T. 131; 16 M. L. J. 161; 33 I. A. 60 (P. C.).

was a party to the fraud before the registration can be held to be ineffective, months before the execution of the mortgage-deed. This is a most improbable story. Tulsabai had a house at Amdapur. She was living at Chikhli with her brother Dajiba. There was absolutely no necessity for her to invest in this site. She did not buy a house with it; and it is not denied that from the date of the mortgage to the date Ambadas was examined in Court that site remained in his possession. He says Tulsabai let him have it, but why should she then pay Rs. 75 for it? It is admitted that Ambadas' latrine has been on the site for some 5 years. This person is a distant connection of Tulsabai and is indebted to the family to which the plaintiff belongs. I have no doubt that the lower Court's finding as to the ownership of the Chikhli site at the time of the mortgage in suit is correct. It is obvious that the plaintiff was vitally interested in obtaining the mortgage-deed as the sale of the field comprised in his two decrees would not have satisfied his debt. Dajiba, the brother of Tulsabai, seems to have been on the side of the plaintiff, and as Tulsabai was ill at the time and was an old lady of about 80, it is obvious that she could be induced to accept anything that Dajiba proposed. It was clearly not to her interest to execute this fresh mortgage: she lost greatly by doing so. She mortgaged far more than there was any need to. Her age made the journey to Amdapur, within whose registration circle the rest of the property was situated, difficult and dangerous. At that place resided the next reversioner of the property by name Pandurang, and it would be difficult to conceal from him the object of the old lady's visit, and there is little doubt that he would have strenuously opposed the execution of the mortgage. To register at Chikhli would mean that some property in that registration circle must be inserted in the document. Hence the inclusion of the Chikhli site. This site was bought by Ambadas Laxman, the writer of the mortgage-deed, for Rs. 75 on 13th March, 1912. Ambadas' story is that he sold it to Tulsabai some 8

months before the execution of the mortgage-deed. This is a most improbable story. Tulsabai had a house at Amdapur. She was living at Chikhli with her brother Dajiba. There was absolutely no necessity for her to invest in this site. She did not buy a house with it; and it is not denied that from the date of the mortgage to the date Ambadas was examined in Court that site remained in his possession. He says Tulsabai let him have it, but why should she then pay Rs. 75 for it? It is admitted that Ambadas' latrine has been on the site for some 5 years. This person is a distant connection of Tulsabai and is indebted to the family to which the plaintiff belongs. He was the very person necessary to join in a conspiracy of this nature to enable the document to be executed at Chikhli. The oral sale in favour of Tulsabai has not been established. The fact that, though he had the correct area of the site in his own sale-deed, it was not correctly given in the mortgage-deed also points to there being no intention of letting that document operate on the site. The boundaries in the deed of sale by which Ambadas purchased and in the mortgage-deed also do not agree. It would be unlikely that a man who is said to have purchased a site to put his second son on it should an year afterwards dispose of it, except under pressing circumstances. Dajiba, who is said to have been present at the time of the oral sale, denies that that took place; and Krishnarao (D. W. No. 3), Secretary of the Sanitation Committee at Chikhli, states that the site belongs to Ambadas. Further, possession not being transferred under the oral sale, that sale would be invalid. The plaintiff's own statement shows that there was some discussion about the ownership of the site before it was included in the document and it is significant that in the present case the plaintiff should have instructed his Pleader that, in case it be proved that the Chikhli site did not belong to Tulsabai, a personal decree against defendant No. 1 was to be asked for. The plaintiff says that Tulsabai told him on enquiry that the site belonged to her and was purchased from Ambadas and that Ambadas having confirmed that statement he was satisfied as to Tulsabai's ownership. It is perfectly clear that the inclusion of the Chikhli site, which did not belong to the mortgagor but to Ambadas,

(5) 92 Ind. Cas. 1034; 4 Pat. 394; A. I. R. 1925 Pat. 787; 7 P. L. T. 507.

(6) 99 Ind. Cas. 782; 5 Pat. 646; A. I. R. 1926 Pat. 582; 7 P. L. T. 821.

(7) 82 Ind. Cas. 243; 46 A. 754; A. I. R. 1924 All. 897; L. R. 5 A. 509 Oiv.

(8) 48 Ind. Cas. 200; 41 A. 22; 16 A. L. J. 871.

in the mortgage-deed was to allow registration to take place at Chikhli.

It is contended that even if this is so, there is nothing to show that the plaintiff was aware of this fact or that he knew that the site was Ambadas', or to show that as far as he was concerned there was any fraud. Now, fraud is difficult to prove by means of direct evidence. It can usually only be established by the circumstances surrounding the case. The site is about 100 yards from the plaintiff's house. Any real enquiry would have shown him that the site did not belong to Tulsabai. The site was of little value and more than sufficient immoveable property had been mortgaged to satisfy the plaintiff's claim. In these circumstances it is likely that a site said to be worth Rs. 75 would have been included in the document, except for the purpose of giving the Chikhli Registrar Jurisdiction? It seems to me inconceivable that the plaintiff was not a party to the insertion of this site in the mortgage-deed. Everything points to his being a party in the fraud on the Registrar. This being so, that registration is invalid.

Now, the mortgage was executed on 8th October, 1914, and the covenant was that re-payment was to be made in November, 1915. There is no proof of any acknowledgment between 1915 and 1918 to extend limitation. The suit was filed on 2nd May, 1924, i. e., more than 6 years after the agreed date of re-payment. No personal decree can, therefore, be passed in the suit. The result is that the whole suit must stand dismissed. I set aside the decree of the lower Court and dismiss the plaintiff's suit with costs. The plaintiff will pay the appellant's costs.

The cross-objections also stand dismissed. The plaintiff will bear the costs of the cross-objections.

A. N. A.

Suit dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 204 OF 1926.

August 24, 1927.

Present:—Mr. Hallifax, A. J. C.
DHARMU AND OTHERS—DEFENDANTS
—APPELLANTS

versus

DALSINGH—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 28, applicability of,

to tenancy rights in Central Provinces—C. P. Tenancy Act (I of 1920), s. 104 (4).

Section 28 of the Limitation Act is not inapplicable to the right in a tenancy in the Central Provinces. *Banau v. Ranjitsingh* (1), not followed.

Mr. J. Sen, for the Appellants.

JUDGMENT.—Mr. J. Sen has been heard for the appellants. Their contention is that s. 28, Limitation Act, does not apply to the right in a tenancy, although s. 104 (4), Tenancy Act, 1920, says in so many words that it does. That is at first sight preposterous, but in support of it I have been referred to the reasons stated by one of the Judges of this Court in *Banau v. Ranjitsingh* (1). The basis of the whole of the reasoning which is given at considerable length appears to be in the statement that "the Legislature have deliberately abstained from extending the provisions of s. 28, Limitation Act, to the tenancy lands in the Central Provinces."

The statement seems to have been made without reference to s. 104 (4), Tenancy Act, 1920, of which there appears to be no mention in the judgment. The appeal is dismissed without notice to the respondent.

A. N. A.

Appeal dismissed.

(1) 89 Ind. Cas. 752; A. I. R. 1926 Nag. 99.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 630 OF 1926.

October 28, 1927

Present:—Mr. Kinkhede, A. J. C.
RUSHI AND OTHERS—DEFENDANTS—
APPELLANTS

versus

RUSHI—PLAINTIFF—RESPONDENT.

Customary right and customary easement, distinction between—Customary right, proof of—Continued use for 20 years—Presumption of acquisition by grant—Sufficiency of user, whether question of law—Civil Procedure Code (Act V of 1908), s. 100—Custom resulting in loss of right of enjoyment of property, validity of—License to excavate earth for making pots, whether irrevocable.

There is a distinction between a customary right and a customary easement; for the acquisition of the former no particular period of enjoyment need be proved. [p. 523, col. 1]

In order to establish a customary right to do on the land of another acts, which, in the absence of any custom, would be acts of trespass, the enjoyment must have been so acquiesced in, by the owner, as to give rise to the inference, that originally by

agreement or otherwise, the usage had become a Customary Law of the place in respect of the persons and things which it concerned. [p. 523, col. 2.]

Whether from the proved or continued user over 20 years, such an acquiescence on the part of the owner, as would give rise to a presumed grant, could be inferred is a question of law on which a second appeal would lie. [*ibid.*]

A user for a period of 20 years is sufficiently long to enable the Court, in the absence of a protest from the person concerned, to draw the legal inference that the exercise of the right must have had a lawful origin in a grant. [*ibid.*]

A custom may be good even though its exercise may have the effect of depriving the owner of the soil, of the whole use and enjoyment of his property. [p. 524, col. 1.]

Mohidin v. Shivlingappa (2), followed.

Bikoo Mahton v. Narayan Sahu (1), referred to.

The right to excavate the earth and carry it away for the purpose of making pots is a license coupled with a grant and is in the nature of a benefit to arise out of land or an interest in land, and as such is irrevocable at the option of the owner of the land. [p. 524, cols. 1 & 2.]

Appeal against the decree of the District Judge, Bhandara, dated the 30th August, 1926, in Civil Appeal No. 16 of 1926, reversing that of the Subordinate Judge, Second Class, Sakoli, dated the 20th January, 1926.

Mr. D. T. Mangalmurti, for the Appellants.

Mr. M. R. Indurkar, for the Respondent.

JUDGMENT.—A portion measuring 75 acres of the plaintiff's absolute occupancy holding has been recorded, at the recent Settlement of the village in which it is situated, as *gair mumkin* land, because the defendants, who form the community of *Kumbhars* of the village, make use of the earth of that portion for making pots. The lower Appellate Court has decreed the plaintiff's claim on the ground that the customary right to appropriate the earth of the said portion is not proved to be reasonable even though the length of the period of the enjoyment as found by that Court is 20 years. The learned District Judge is right in holding that the right claimed by the defendants is not in the nature of an *easement* acquired by custom. The defendants-appellants accept this finding as correct, but contend that on the very findings arrived at by the Court, it should have been held that from the length of continued user for 20 years a lawful grant of the right could be presumed in the circumstances of the case.

There is a distinction between a customary right and a customary easement. For the acquisition of a customary right no particular period of enjoyment need be

proved. What the defendants pleaded was a local custom which entitled them to commit on plaintiff's land acts which, if there had been no such custom, would be acts of trespass. In order to establish a customary right to do such acts on the property of another, the enjoyment must have been so acquiesced in by the owner as would give rise to the inference that originally by agreement or otherwise, the usage (of which the repeated and open enjoyment is only a proof) had become a Customary Law of the place in respect of the persons and things which it concerned. Whether, from the proved or continued user for 20 years, such an acquiescence on the part of the owner, as would give rise to a presumed grant, could be inferred would be a question of law on which it is open to this Court to entertain a second appeal. I think that the period of 20 years is sufficiently long to enable this Court to draw the legal inference that the exercise of the right to appropriate and carry away the earth for making pots must have had a lawful origin in a grant; otherwise, the owner would not have kept quiet over it; surely he would have protested against such user. In a case decided by the Patna High Court in *Bikoo Mahton v. Narayan Sahu* (1) the right of the inhabitants of a village to take earth from a piece of waste land to repair their houses after inundations was affirmed as being not unreasonable. In *Mohidin v. Shivlingappa* (2) where the plaintiff sued for an injunction to restrain the defendants from exercising the customary right, which they, as members of a certain section of the Muhammadan community, had been for many years in the habit of exercising, by burying their dead near the *Darga* in plaintiff's land, it was held that such a right was recognized as a local custom, especially as it was confined to a limited class of persons and a limited area of land. The following observations occurring at page 671* of that report sufficiently meet the learned District Judge's objection against the custom pleaded in the present case being regarded as reasonable:—

"Next we have to consider the second objection and say whether this custom of

(1) 72 Ind. Cas. 431; A. I. R. 1924 Pat. 303.

(2) 23 B. 666; 1 Bom. L. R. 170; 12 Ind. Dec. (N. S.) 415.

burial can be disallowed as unreasonable. We hesitate to arrive at such a conclusion. Amongst all races that bury their dead, this right of burial in a particular locality is one that is most dearly prized, and although the plaintiff's land may be rendered practically useless, if these tombs are multiplied exceedingly, the contingency seems too distant to justify the Courts in summarily putting an end to the right. In *Hall v. Nottingham* (3) the possibility that the custom there set up might have the effect of taking away from the owner of the freehold the whole use and enjoyment of his property, was not thought a sufficient ground for disallowing it. If a custom which allows all lawful games to be played on another person's land at all times of the year is not an unreasonable custom, it seems impossible to hold that the limited custom established by the defendants is bad. The criterion of 'reasonableness' by which the case of *Lutchmeput Singh v. Sadaulla Nashyo* (4) was decided, may have been a good one as regards the alleged right of an indefinite number of persons to fish in the Bhils of a private owner; but it cannot be extended as a matter of law to all customs; for, as shown in *Hall v. Nottingham* (3), a custom may be good though its exercise may have the effect of depriving the owner of the soil of the whole use and enjoyment of his property. Here the defendants are entitled to claim for a limited class the right of burial in one corner of a field near a *Darga*. The mere possibility that after many years the number of tombs may have increased so much as to deprive the owner of the use of his field, or of a large portion of it, seems too remote to enable us to describe as unreasonable the custom in dispute."

I entirely concur in these observations and say that the custom pleaded is not unreasonable for the reasons given above by the Bombay High Court and that it is a valid custom which must be upheld in the interest of the whole village community.

It is also argued, and I think rightly, that the user which is proved in this case is not in the nature of a mere license but is a license coupled with a grant. The right to excavate the earth and to carry it away for the purpose of making pots would, in

my opinion, be in the nature of a benefit to arise out of land or amount to an interest in land, and as such it would make the license irrevocable at the option of the owner of the land.

For these reasons I reverse the decree of the lower Appellate Court and restore that of the first Court and dismiss the suit with costs to be paid by the plaintiff in all three Courts.

G. R. D.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 134-B 1929.

September 21, 1927.

Present:—Mr. Hallifax, A. J. C.
RAMPRATAP KHANDREWAL—

APPLICANT

versus

GOVIND BARI—NON-APPLICANT.

Contract Act (IX of 1872), s. 73—Contract for sale of goods—Payment of advance—Breach by buyer—Buyer's right to refund of advance less damages caused to seller.

The plaintiff sued the defendant for recovery of Rs. 100 paid by him to the latter on a contract to sell cotton. It was found that the plaintiff and not the defendant broke the contract, and that the defendant was put to a loss of Rs. 40. The plaintiff's suit was, however, dismissed:

Held, that the plaintiff was entitled to a decree for Rs. 60.

Lachmi Narayan v. Damodardas (1), followed.

Application for revision of an order of the Judge, Small Cause Court, Ellichpur, dated the 10th August, 1926, in Small Cause Suit No. 333 of 1926.

Mr. P. C. Dutt, for the Applicant.

Mr. G. V. Deshmukh, for the Non-Applicant.

ORDER.—Mr. P. C. Dutt has been heard for the plaintiff, who applies for revision, and, Mr. G. V. Deshmukh for the defendant. The plaintiff alleged that he paid Rs. 100 to the defendant on a contract to sell him cotton which the defendant broke and thereby caused him a loss of Rs. 100. It was held and is now admitted, that the plaintiff broke the contract, thereby causing the defendant a loss of Rs. 40 and the plaintiff's suit was dismissed. But that dismissal gives the defendant not Rs. 40 but Rs. 140 as damages. The matter is simple and obvious enough and further was explained fully in *Lachmi Narayan v. Damodardas* (1) but is still almost always left out of

(3) (1876) 1 Ex. D. 1; 45 L. J. Ex. 50; 33 L. T. 697; 24 W. R. 58.

(4) 9 C. 698; 12 C. L. R. 382; 5 Shome L. R. 27; 4 Ind. Dec. (N. S.) 1115.

(1) 81 Ind. Cas. 232; 20 N. L. R. 192; A. I. R. 1925 Nag. 109.

sight. The decree should have been for the payment to the plaintiff of Rs. 60 with such order as to the payment of costs as was appropriate. As it happens an order that each party shall pay its own costs in the lower Court comes to much the same thing, and as the plaintiff did not raise the question of the earnest-money in his petition for revision and the defendant admitted his liability to re-pay it as soon as he understood the matter, which was not at once, it seems fair that each party should pay its own costs in this Court also. The decree of the lower Court will accordingly be set aside and in its place a decree will issue ordering the defendant to pay sixty rupees to the plaintiff, and further ordering that each of them shall pay his own costs in both Courts.

G. R. D.

Decree set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 45-B OF 1927.

December 13, 1927.

Present:—Mr. Prideaux, A. J. C. and

Mr. Kinkhede, A. J. C.

NARAIN DAS BHAGWANDAS & Co.

—PLAINTIFF—APPELLANT

versus

KALYANJI MAWAJI & Co.—DEFENDANT

—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3, Sch. II, para. 20—Arbitration without intervention of Court during pendency of suit—Award—Adjustment of suit—Declaratory suit—Award embodying executable orders—Decree in terms of such award, legality of.

Where a reference to arbitration is made during the pendency of a suit without the intervention of the Court the award made by the arbitrators can be given effect to as if it was an adjustment, by common consent, of the matter in dispute in the pending suit. Paragraph 20 of Sch. II of the Civil Procedure Code cannot override the general power given to parties under O. XXIII, r. 3, Civil Procedure Code, to adjust their dispute by a lawful compromise at any time after the institution of the suit. [p. 526, col. 1]

In a suit for a mere declaration it is open to the parties by adjustment or compromise to go beyond the scope of the suit and the Court is competent to pass a decree in terms of the award even though it requires one of the parties to pay a sum of money to

the other and to embody such a direction in the operative portion of the decree. [p. 526, col. 2.]

Mehdi Ali Khan v. Ghansham Singh (2) and *Hemanta Kumari Debi v. Midnapore Zemindari Co.* (3), referred to.

Appeal against a decree of the Second Additional District Judge, Akola, dated the 23rd August, 1927, in Civil Suit No. 12 of 1927.

Mr. A. V. Khare, for the Appellant.

Mr. M. B. Niyogi, for the Respondent.

JUDGMENT.—The present appellant instituted Suit No. 12 of 1927 in the Court of the Second Additional District Judge, Akola, against the present respondent for a declaration that the accounts between them were settled, and that his liability thereunder did not extend beyond a certain amount. During the pendency of the suit, the parties thought fit to refer the matters in dispute between them to the arbitration of a private arbitrator. This they did without the knowledge and consent or intervention of the Court. The reference and the arbitration proceedings and even the award were made, completed and declared and even partly given effect to before the date fixed for the hearing of the suit which was 16th August, 1927. The result was that when the plaintiff-appellant's suit came on for hearing, on that date, the defendant-respondent produced the award and, by a formal application made to the Court, prayed that the same be filed and a decree in terms thereof be passed in his favour. The Court took down statements and heard the parties and recording the terms of the award passed a decree in terms thereof.

This appeal is against the decree so passed in terms of the award on the basis of the defendant's application. The reference to the arbitrator not having been made through the intervention of the Court, it is contended that the Court was not competent to pass any decree on the basis of the award. The only provision under which it could have been filed and made the rule of the Court was, we think, para. 20 of Sch. II, Civil Procedure Code. The application made by the defendant-respondent on 16th August, 1927, could have been treated as one so made, but the Court failed to notice the particular provisions under which it could be entertained and to register it as a suit. However, this omission does not invalidate the decree as we will presently show.

As pointed out by this Court in *Namdar-khan v. Nanhoo* (1), if in a pending suit the parties go to a private arbitrator without the consent of the Court, the award cannot be enforced as an award, but there is nothing to prevent the Court from giving effect to the award, as if it was an adjustment by common consent. We are of opinion that the power given by para. 20 of Sch. II, Civil Procedure Code, cannot override the general power given to parties under O. XXIII, r. 3, Civil Procedure Code, to adjust their disputes by a lawful compromise at any time after the institution of the suit.

It is, however, contended before us that the terms of the adjustment or compromise go beyond the scope of the suit which merely seeks a declaration and, therefore, it could not have been proper for the Court below to pass a decree incorporating the direction of the award to the plaintiff to pay a definite sum of Rs. 9,000 to defendant, in the absence of a suit by the defendant to enforce the award. We do not think this contention can prevail in view of the principle held applicable to such cases by their Lordships of the Privy Council in *Mehdi Ali Khan v. Ghansham Singh* (2). There, as also here, the suit was one for a declaration, and, the defendant, who was the appellant before their Lordships of the Privy Council, was anxious, like the plaintiff-appellant in this appeal, to get out of the adjustment which was brought about during the pendency of the suit by the good offices of some third person who presumably filled the character of private arbitrators, like Shoji Jewandas of this case, to whom the parties to the litigation referred their differences for arbitration.

We may also note here that, the terms of the award of the arbitrator, or of the adjustment arrived at, by agreement between the parties acting for themselves, or, settled for them by a third party chosen by them, "are such as to be susceptible in every detail to an effective order in the nature of specific performance against any party to the compromise who seeks to escape from his obligations thereunder" as remarked by their Lordships of the Privy Council. It was, therefore, fully

competent to the lower Court not only to record the entire compromise but also to pass a decree in accordance therewith. It is pertinent to note that the appellant has actually given effect to the award by making the immediate part payment of Rs. 3,700 and odd to the respondent which the award directed him to make and thus, so accepted its binding character, as to be precluded from seeking "to escape from his obligations thereunder."

It is, however, argued before us that the adjustment of the subject-matter of the present suit would not necessarily embrace an operative direction to pay a sum of Rs. 9,000 to the defendant, as, to pass a decree incorporating such an operative direction would be to travel beyond the scope of the suit; because, if the strict letter of O. XXIII, r. 3, Civil Procedure Code, were followed, the operative part of the decree must be properly confined to the actual subject-matter of the existing litigation. The argument practically comes to this that, the direction to pay to defendant the amount in which the plaintiff is found indebted to him, though embodied in the decree, must be excluded only from the operative part of the decree, as the subject-matter of the suit as laid can admit of only a declaration as to the extent of such indebtedness being given. No doubt there is the authority of *Hemanta Kumari Deb v. Midnapore Zemindari Co.* (3) to support this contention, but we think that the latest pronouncement of their Lordships of the Privy Council in *Mehdi Ali Khan v. Ghansham Singh* (2) is a more direct authority, applicable even to declaratory suits, which justifies the inclusion of such direction even in the operative part of the decree, than the former one.

The appeal fails and is dismissed with costs.

G. R. D.

Appeal dismissed.

(3) 53 Ind. Cas. 534; 47 C. 485 at p. 495; 37 M. L. J. 525; 17 A. L. J. 1117; 24 O. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 46 I. A. 240; 22 Bom. L. R. 488; 31 O. L. J. 298 (P. C.).

(1) 95 Ind. Cas. 89; 23 N. L. R. 100; A. I. R. 1928 Nag. 405.

(2) 104 Ind. Cas. 375; 53 M. L. J. 345 at p. 350; A. I. R. 1927 Pat. P. O. 204; 46 O. L. J. 209; 4 O. W. N. 837; (1927) M. W. N. 723; 29 Bom. L. R. 1376; 39 M. L. T. 300; 32 O. W. N. 93 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 58 of 1926.

November 4, 1927.

Present:—Mr. Findlay, J. C.

RAOJI—DEFENDANT—APPELLANT

versus

Musammatt GANGABAI—PLAINTIFF—

RESPONDENT.

C. P. Land Revenue Act (II of 1917), s. 187 (2)—Lambardar—Invalid appointment—Power to file suit till appointment is cancelled—Co-sharers—Partition, proof of—Question of fact.

A person appointed as a *lambardar* must be presumed to have all the ordinary powers of a *lambardar* under s. 188 of the C. P. Land Revenue Act and is, therefore, entitled to sue for the recovery of the rents of the village until the appointment is cancelled. The mere fact that the appointment of a *lambardar* may be found to be invalid when questioned in the Civil or Revenue Court by the real proprietor of the village will not disentitle the appointed *lambardar* from carrying on his duties as such. [p. 527, cols. 1 & 2.]

The proof of whether there has been a partition or not between co-owners in a village is a very different matter from the question of whether there has or has not been a disruption of a joint family. [p. 527, col. 2.]

Appeal against the decree of the District Judge, Bhandara, dated the 2nd November, 1925, in Civil Appeal No. 56 of 1925.

Mr. R. N. Padhay, for the Appellant.

Mr. P. A. Pandit, for the Respondent.

JUDGMENT.—The plaintiff-respondent's suit was dismissed in the first Court as the result of a perfunctory and careless judgment, in which neither the oral nor the documentary evidence was considered in a careful or accurate manner. The plaintiff, Musammatt Girjabai, appealed to the Court of the District Judge who decreed the plaintiff's claim in a reversing judgment in which the facts of the case are very fully stated.

There are, in reality, only two questions involved in the present second appeal and, on neither of these, has the appeal any chance of success. The first point urged is that the plaintiff, although technically appointed *lambardar* of *patti* No. 1 is not, in reality, such, inasmuch as the two widows of Piraji are, in reality, the owners of their deceased husband's share, and the present plaintiff is not, in reality, an owner but is, at the best, a mere reversioner. It is perfectly true that, under s. 187, sub s. (2) of the C. P. Land Revenue Act, 1917, a proprietor must be appointed *lambardar* and it may be that the appointment of the present plaintiff-respondent as *lambardar* will be found to be invalid when questioned in due course

of law in the Civil or the Revenue Court, as the case may be, by the real proprietor of the share, but it does not seem to me that, as between the present appellant and the plaintiff-respondent, this question arises at all, in view of the admitted fact that, rightly or wrongly, Musammatt Girjabai has been appointed *lambardar* as well as of the proved and admitted fact that the plaintiff is at present in possession of Piraji's share. Until the plaintiff's appointment as *lambardar* is upset, she must be presumed to have all the ordinary powers of the *lambardar* under s. 188 of the Land Revenue Act and it follows *ipso facto* therefrom that she was entitled to sue in the present suit. I am in full agreement with the finding of the learned District Judge on this point and there is clearly no substance in the position taken up on behalf of the appellant in this connection.

The second allegation offered on behalf of the defendant-appellant is that the lower Appellate Court's finding that the alleged partition has not been proved is a wrong one. This is a mere attempt to induce this Court to interfere on second appeal with a perfectly legitimate finding of fact which has been arrived at by the lower Appellate Court. The proof of whether there has been a partition or not as between co-owners in a village is a very different matter from the question of whether there has or has not been a disruption of a joint Hindu family: cf. *Red Prasad v. Nakchhed Prasad* (1), but, even if it were open to this Court to interfere with the finding of fact in question, I can see no sufficient reason for doing so. I have been asked to lay special weight on the entries in the *khasras* (Exs. D-8 and D-9) which are, in reality, the only piece of evidence which would go to show that the fields in suit were expressly held by Ganpati. The *khasras* are, no doubt, prepared on the spot by the *Patwari* and, from one point of view, they might, therefore, be looked on as a most valuable piece of evidence, but, from another point of view, it would be equally possible to premise that they in this connection form a species of record which interested parties might induce *Patwaris* to make erroneous or incorrect entries in. The fact remains, however, that the *jamabandis*

for the same year contained divergent entries which are not reconcilable with the entries in D-8 and D-9. What the village papers' evidence as a whole does suggest is that Raoji began to cultivate certain areas of *banjar* land and from time to time obtained leases therefor from Ganpati and paid him rent, but these facts are an wholly insufficient basis on which to hold that the partition has been established. Even if we assume that Dhondba is now manager on behalf of Ganpati, the omission to examine the latter on behalf of the present appellant is a significant one and still further it is almost absurd to suppose that the appellant can have known or had reason to believe that lists of partition were available which he could have arranged to produce in evidence. I further concur with the remarks of the lower Appellate Court in para. 3 of its judgment as regards the oral evidence on the question of partition. Very obviously there was insufficient material on record on which the District Judge could, with any certainty of fairness, have held that the partition had been proved.

There is no reason to interfere and the appeal is, therefore, dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

G. R. D.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 30 OF 1927.

October 21, 1927.

Present :—Mr. Hallifax, A. J. C.HONIA MALI—PLAINTIFF—APPELLANT
versus

CHINDHIA AND ANOTHER—DEFENDANTS

—RESPONDENTS.

Hindu Law—Partition between step-brothers—Mother, whether entitled to share—Effect of partition on prior debts.

In a partition between two step-brothers, the mother of one of them is entitled to a share equal to that of her son, i. e., to one-third of the property liable to be partitioned.

Padman Singh v. Subransi (1), followed.

Payments made towards debts reduce the divisible assets by so much and debts due before partition remain jointly due after it.

Second appeal against a decree of the Additional District Judge, Betul, in Civil Appeal No. 22 of 1926, dated the 29th September, 1926.

Mr. P. C. Dutta, for the Appellant.

Mr. K. M. Dharmadhikari, for the Respondent.

JUDGMENT.—There is a clear finding in the judgments of both the Courts below that in or about the year 1902 the plaintiff Honia was given some part of the family property as his share of it and he left the family home. This finding is attacked only on the ground that in his plaint, filed on the 6th April, 1925, his age is stated to be thirty so that in 1902 he could not have been more than seven, which would make the finding impossible.

But the same plaint states Ohindhia's age to be thirty-five and Ohindhia is admittedly younger than Honia, and is the son of a woman whom her father did not marry till after the death of Honia's mother. The contention is worse than idle, being based on nothing but an admittedly incorrect statement made by the plaintiff himself. The finding is also inevitable on the evidence and it does not appear even that Honia was treated unfairly as what was left with his father and step-brother was burdened with debt, from which he was relieved.

The claim is still for a half of the estate, in the face of the obviously correct decision that Ohindhia's mother is entitled to an equal share with each of her sons, which is also stated to be the correct view of the law in the judgment of this Court in *Padman Singh v. Subransi* (1). If he were entitled to any share at all Honia could get only one-third. There has been considerable discussion and argument on the question of Honia's liability to contribute to debts already paid or still due. Neither question arose in the case. Payments made reduce the divisible assets by so much and debts due before partition remain jointly due after it.

The appeal will be dismissed and the appellant Honia will be ordered to pay the whole of the costs of both parties in all three Courts. The Pleader's fee in this Court will be thirty rupees.

G. R. D.

Appeal dismissed.

(1) 94 Ind. Cas. 791; 22 N. L. R. 28; A. I. R. 1926 Nag. 291.

PATNA HIGH COURT.

CRIMINAL REVISION No. 722 OF 1927.

November 25, 1927.

Present:—Justice Sir Jwala Prasad, Kt.,
and Mr. Justice Ross.P. K. SEN—ACCUSED—PETITIONER
versus

EMPEROR—OPPOSITE PARTY.

Criminal trial—Prosecution coming to Court with incomplete case—Re-trial, legality of.

The prosecution is not entitled to ask for a re-trial where it comes to Court with an incomplete case which so far as it goes confirms the defence of the accused.

Criminal revision from an order of the Sessions Judge, Patna, dated the 5th August, 1927.

Messrs. P. K. Sen and D. N. Das, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

Ross, J.—The petitioner was convicted by the Magistrate of Patna City on a charge under s. 406 of the Indian Penal Code. He appealed to the learned Sessions Judge who set aside the conviction, but ordered a re-trial, and the present application is directed against that order of re-trial.

The charge was in respect of a cheque for Rs. 200 issued by one Masud Ahmad in favour of a firm Bhanamal-Gulzarimal in January, 1927. It appears that the petitioner had entered into a contract with Masud Ahmad to build an overbridge for a consideration of Rs. 600, and in connection with that contract this cheque was issued to him. The case for the prosecution is that he was to supply iron girders for the overbridge from Bhanamal-Gulzarimal and did not supply them.

According to the evidence of the *Munshi* of Masud Ahmad the amount of the cheque given to the accused was part of the sum of Rs. 600. That was the sum for which he entered into the contract. If that is so, then the money was at the disposal of the petitioner to be used by him, at his discretion, in the work that he had to do, within a reasonable time. The other view is that as the cheque, although it was a bearer cheque, was drawn in favour of Bhanamal-Gulzarimal, Masud Ahmad had to look to that firm for the supply of his materials. He says in his evidence that it was agreed between the accused and himself that he should pay the price of the iron girders and

the tee irons to Bhanamal-Gulzarimal who would supply the materials. The supply of the materials, therefore, lay with Bhanamal-Gulzarimal as soon as they were paid the money. Now, it was admitted by their manager in his examination that the accused paid Rs. 200 to them. It appears that they would not take the cheque itself, because there had been difficulty over an earlier cheque and consequently the petitioner had to cash the cheque and then pay them the money. The same witness says that the petitioner took delivery of certain goods from the firm either iron or cement. He could not say positively which without referring to his books.

Masud Ahmad in his evidence admitted that in January some sheet iron was delivered at his Kadam Kuan house but he did not know where the *Munshi* purchased it from.

These two points of uncertainty are the ground of the order of re-trial. The prosecution had notice from the fact that the cheque had been issued in favour of this firm, that the firm's manager would be an important witness and they ought to have made a thorough investigation of the firm's books before the trial began and Masud Ahmad's books ought also to have been investigated. If they came into Court with an incomplete case which, so far as it went, confirmed the defence of the petitioner, then it can hardly be said that they are entitled to a re-trial.

In the evidence as it stood there were good grounds for an acquittal, and this does not seem to me a proper case in which an opportunity should be given to the prosecution to fill up gaps in the evidence by a re-trial.

I would, therefore, allow this application, set aside the order of re-trial and direct that the petitioner be released from bail.

Jwala Prasad, J.—I agree.

B. K. P.

A. N. A.

*Application allowed.***PATNA HIGH COURT.**

CRIMINAL REVISION No. 645 OF 1927.

November 25, 1927.

Present:—Mr. Justice Macpherson.TULSI MAHTO AND OTHERS—ACCUSED—
PETITIONERS
versus

EMPEROR—OPPOSITE PARTY.

Criminal trial—Burden of proof—Duty of prosecution—Criminal Procedure Code (Act V of 1898).

s. 439—Acquittal of persons not before High Court, legality of.

An area of 1100 *bighas* of land was attached and the petitioners along with certain boys were charged with having cut *ghalasi* within that area. It was established in evidence that prior to the date of the occurrence the petitioners had obtained delivery of possession, of a portion of the attached area extending to 345 *bighas*. The Courts below assumed that unless the accused proved that they cut from within the area of the 345 *bighas* they must be held to have committed theft and convicted the accused. The boys were released after admonition under s. 562A of the Criminal Procedure Code:

Held, (1) that the conviction was wrong inasmuch as the burden of proving that the area from which the *ghalasi* was cut was not within the area of 345 *bighas* in the possession of the petitioners was on the prosecution and the prosecution had failed to discharge that burden;

(2) that the High Court had jurisdiction, in the circumstances, to set aside the conviction of the boys also even though they were not before the High Court.

Criminal revision from an order of the Sub-Divisional Magistrate, Muzaffarpur, dated the 23rd July, 1927, affirming that of the Sub-Deputy Magistrate, Hajipur, dated the 31st May, 1927.

Mr. Rai T. N. Sahay, for the Petitioners.

The Government Advocate, for the Opposite Party.

JUDGMENT.—This Rule has been issued to consider the propriety of the conviction and sentence on these eight petitioners who with nine others were convicted by the Sub-Deputy Magistrate of Hajipur of offences under ss. 379 and 143 of the Indian Penal Code. The petitioners were sentenced to fine under s. 379, no separate sentence was passed under s. 143. The other nine accused being boys were released after admonition under s. 562A of the Code of Criminal Procedure. The finding of the trial Court was that the prosecution witnesses had established that "the seventeen accused cut *khatha* (*ghalasi*) from within 1100 *bighas* of attached land in Raghupur Diara near pillars Nos. 16 and 17 on the pretence that it was their decreed land." The District Magistrate dismissed the appeal of the petitioners.

There can be no doubt that an area of 1100 *bighas* was attached and that the petitioners and the boys with them cut *ghalasi* within that area. But it has also been established in the evidence that prior to the date of occurrence the petitioners obtained delivery of possession of a portion of the attached area extending to about 345 *bighas*. The Courts below have assumed

that unless the petitioners proved that they cut from within the area of 345 *bighas* they must be considered to have committed theft. But it is for the prosecution to establish all the ingredients of the offence punishable under s. 379. Neither party has shown where the 345 *bighas* lay. The Crown has not shown that the petitioners were not cutting within that area of which they had obtained delivery of possession. In the circumstances the prosecution has, *prima facie*, failed to establish that the petitioners were removing the moveable property of other persons dishonestly out of the possession of the latter—it is quite possible that they were taking their own property without any dishonesty. The learned Government Advocate contends that it was for the petitioners to prove that they had cut from within the area released to them. For the reasons I have already given I am unable to accede to the contention. As the assembly of which they were members is not shown to have been unlawful, the conviction under s. 143 also is unsound. Accordingly no offence has been established against these petitioners and the Rule must be made absolute. Their conviction and sentences are set aside and the fines, if paid, will be refunded. The nine boys who were convicted along with the petitioners are not before this Court but this Court has jurisdiction in the circumstances to set aside their convictions and as on the foregoing findings no offence has been established against them, their conviction and the order in respect of them under s. 562A are set aside.

B. K. P.

A. N. A.

Convictions set aside.

PATNA HIGH COURT.

CRIMINAL REVISION No. 41 OF 1927.

February 10, 1927.

Present:—Mr. Justice Adami and
Mr. Justice Scroope.

BIGAN SINGH—ACCUSED—PETITIONER
versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 353, 537—Failure to examine witnesses in accused's presence—Illegality—Waiver, effect of.

Failure to examine the witnesses in the presence of the accused vitiates a trial except in cases mentioned in s. 533 of the Criminal Procedure Code. It is not a mere irregularity which can be cured under s. 537 of the Code or by waiver on the part of the accused's Pleader. [p. 531, col. 2.]

Criminal revision against an order of the Sessions Judge, Muzaffarpur, dated the 8th January, 1927, modifying that of the Sub-Divisional Magistrate, Sitamarhi, dated the 4th December, 1926.

Mr. H. L. Nandkeolyar (with him Mr. D. L. Nandkeolyar), for the Petitioner.

Mr. C. M. Agarwala, Assistant Government Advocate, for the Crown.

JUDGMENT.

Scroope, J.—The petitioner has been convicted under s. 211/109 of the Indian Penal Code for abetting one Ramawtar Singh in bringing a false case against Matna Kabari of Madhkaul and was sentenced to 18 months' rigorous imprisonment by the Sub-Divisional Magistrate of Sitamarhi. His sentence was reduced on appeal to nine months by the Sessions Judge of Muzaffarpur. He has now filed a revisional petition in this Court and the first contention taken on his behalf by the learned Counsel arises in the following way.

Two separate complaints were lodged in this case against the petitioner and Ramawtar Singh who has been tried and convicted under the substantive section. It appears that the latter's case was taken up first and on the 13th September, 1913, witnesses were examined in that case. The next date was the 23rd September and on that date we find the following order—

"The case against Ramawtar should have proceeded jointly with the case against Bigan. The evidence against the accused is exactly the same as that against Ramawtar. Bigan is present. The evidence against Ramawtar is read out in Hindi to the prosecution witnesses who admit that it is correct. Bigan has heard all the evidence. His *Mukhtear* who appears also for Ramawtar raises no objection and files a petition for one cross-examination. Charge under s. 211/109 framed against Bigan."

Thus there was no compliance with the provisions of s. 353 of the Criminal Procedure Code which requires that with certain exceptions which are not in question, the evidence should be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his Pleader. Admittedly there was no order of the Court dispensing with his personal attendance for the purpose of this trial and in fact it appears that on the 13th September when the examination-in-

chief of the prosecution witnesses in Ramawtar's case was taken he was not present at all in Court but was giving evidence in the Sessions Court. Then on the subsequent day the evidence in Ramawtar's case was read over to him as described above. The contention then that the trial is bad on this account must succeed.

The learned Assistant Government Advocate urges that the irregularity is one that is cured by s. 537 of the Criminal Procedure Code as it does not fall within the irregularities described in s. 530. In my opinion the irregularity is of the class referred to by their Lordships of the Privy Council in *Subrahmanya Ayyar v. King-Emperor* (1) where the view expressed is that the disobedience to an express provision as to a mode of trial is more than an irregularity. When the Code enacts positively that evidence should be taken in a certain way it cannot be said that a contravention of this express provision comes within the description of error, omission or irregularity and I do not think that the waiver of any objection by his *Mukhtear* on this score improves the case for the prosecution. To accept the view that such waiver can get over disregard of an express provision of the Code would open the door to all kinds of irregularity and defects in procedure. The trial must be held to be bad on this account and the application must succeed and the conviction and sentence of the petitioner must be set aside.

As regards the question of re-trial there is an absence of direct evidence connecting the petitioner with the filing of the criminal case. The petitioner's case throughout has been that he sent Aklu and not Nathuni to realise money from Ramawtar whereas Ramawtar's case is that Nathuni was sent. Had there been a conspiracy between them as found by the lower Courts, I think this evidence would have been identical on this question. The circumstances, of course, are gravely suspicious against the petitioner, but taking all the facts and circumstances into consideration and that the petitioner has already served a certain amount of imprisonment, I do not think that it is a fit case in which to direct a re-trial.

Adami, J.—I agree.

A. N. A.

Rule made absolute.

(1) 25 M. 61; 5 O. W. N. 886; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 8 Sar. P. O. J. 160; 2 Weir 271 (P. O.).

PATNA HIGH COURT.

CIVIL REVISION No. 296 OF 1927.

November 24, 1927.

Present:—Mr. Justice Kulwant Sahay.**RAMDAS SAHU AND OTHERS—**

PETITIONERS

versus

JUDAGI LOHAR AND OTHERS

—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), Sch. II, para. 10—Award—Signature of all arbitrators, necessity of.

An award which is not signed by all the arbitrators is invalid and cannot be accepted by the Court. [p. 532, col. 2.]

The writing of the award is not a mere ministerial act. [*ibid.*]

Ramesh Chandra Dhar v. Karunamoyi Dutt (1) and *Khudiram Mahto v. Chandi Charan Mahto* (2), relied on.

Ram Narain Ram v. Pati Ram Tewary (3), distinguished.

Dandekar v. Dandekars (4), dissented from.

Civil revision from an order of the Officiating Subordinate Judge, Third Court, Patna, dated the 26th of April, 1927.

Messrs. *Janak Kishore* and *Kedar Nath Varma*, for the Petitioners.

Mr. *B. C. Sinha*, for the Opposite Party.

JUDGMENT.—The petitioners instituted the suit out of which the present application arises for a declaration of their title in respect of one-third share of certain joint family properties which they alleged to have purchased under a deed of sale, dated the 9th of May, 1925, executed by the defendant No. 8 Bandhu Lohar and for partition. The defence was that Bandhu Lohar was not a member of the family and had no right to execute the conveyance and that the plaintiffs acquired no title under the deed of sale.

The matter in dispute between the parties was referred to the arbitration of five arbitrators, *viz.*, Tapesar Singh, Wazir Alum, Bhiku Mian, Harprasad Singh and Alamat Ali. On the 14th of February, 1927, an award was filed in Court which was dated the 10th of February, and was signed by three of the arbitrators, but was not signed by Alamat Ali, and it purported to be signed by Harprasad Singh by the pen of Tapesar Singh. Objections were taken to the award by the petitioners. One of the objections was that the award was invalid inasmuch as it had not been signed by all the arbitrators. The other objections were that the reference was bad inasmuch as the guardian *ad litem* of one of the minor defendants had not signed the application for

reference and that the award was invalid on account of the misconduct of the arbitrators who had antedated the award and it was not made on the date on which it purported to have been made.

The learned Subordinate Judge has found that the guardian *ad litem* did join in the reference although he did not sign the application for reference. He has also found that there was no misconduct on the part of the arbitrators and that the award filed was the award unanimously made by all the arbitrators. As regards the question relating to the validity of the award on account of the absence of the signatures of two of the arbitrators, the learned Subordinate Judge was of opinion that all the arbitrators agreed in making the award and had come to the decision which was ultimately embodied in the written document, but that Alamat Ali had to go away before the award was written as he had to attend his office, and as regards Harprasad Singh, it was found that his signature was made by Tapesar Singh at his request. Now para. 10 of the Second Schedule to the Civil Procedure Code provides that where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court. There is a distinct statutory provision that the award must be signed by the persons who made it. The learned Subordinate Judge was of opinion that the writing out of the award was a ministerial act and, if all the arbitrators agreed in the decision of the points referred to them and the formal award was written out in the absence of one or other of the arbitrators and it was not signed by some of them that did not invalidate the award. In my opinion the writing out of the award cannot be treated to be a ministerial act. The award embodies the decision to which the arbitrators came and the writing of the decision in a case cannot be treated to be a ministerial act. Even if the writing out of the award be a ministerial act, it does not become an award until it is signed by the arbitrators. It was open to them to change their mind upon further consideration when the written award was placed before them for signature. The provisions of para. 10 of the Second Schedule are based on sound judicial principles. Instances are not wanting where Judges have changed their minds when judgments dictated by them are placed before them for signature.

In *Ramesh Chandra Dhar v. Karunamoyi*

Dutt (1) one of the dissenting arbitrators who did not agree to the award had not signed the award and the award was filed in Court without the signature of the dissenting arbitrator, even then it was held that the award was invalid because it did not bear the signature of that arbitrator. This decision was referred to in this Court in *Khudiram Mahto v. Chandi Charan Mahto* (2) and apparently accepted as correct. Reference is made on behalf of the opposite party to the decision in *Ram Narain Ram v. Pati Ram Tewary* (3) where it was held that when the parties have agreed to abide by the decision of the majority of the arbitrators, an award cannot be set aside on the ground that it has not been signed by the minority. In that case no reference was made to the provisions of para. 10 of the Second Schedule to the Civil Procedure Code. But even assuming that the point of law was correctly decided in that case, it can be clearly distinguished from the facts of the present case, inasmuch as in that case there was a provision in the application for reference to arbitration that the award should be the award of the majority of the arbitrators and the want of signatures of the arbitrators who did not agree with the decision of the majority could not be held to invalidate the award which was made by majority and which by agreement of the parties, was to be considered to be the award of the arbitrators. In *Dandekar v. Dandekars* (4) three out of the seven arbitrators did not sign the award and their Lordships observed that the omission to take the signatures of the minority of the arbitrators to the document which formed the record of their award would not be fatal to the award. No reference appears to have been made in this judgment to the provisions of s. 516 of Act X of 1877 which was the Civil Procedure Code then in force which provided as para. 10 of the Second Schedule to the present Civil Procedure Code provides, that the award must be signed by all the persons, and with very great respect to the learned Judges, I am unable to agree to the proposition that the want of signatures of some of the arbitrators from the award does not invalidate the award. I am of opinion that this defect is

(1) 33 C. 498.

(2) 35 Ind. Cas. 358; 1 P. L. J. 306; 2 P. L. W. 377.

(3) 34 Ind. Cas. 103; 1 P. L. J. 90; 2 P. L. W. 411.

(4) 6 B. 663; 3 Ind. Dec. (N. S.) 896.

fatal to the award and the award cannot be accepted and a decree cannot be passed in accordance therewith.

The order of the learned Subordinate Judge must, therefore, be set aside and the case remanded to him for hearing according to law.

B. K. P.

Case remanded.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1143 OF 1925.

December 15, 1927.

Present:—Mr. Justice Kulwant Sahay and
Mr. Justice Macpherson.

JOHARMAL-MATHURADAS FIRM—

DEFENDANT—APPELLANT

versus

HIRA LAL-SHEWCHAND ROY—

PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 19, Sch. I, Arts. 85, 115—'Mutual, open and current account', meaning of—Acknowledgment of liability, essentials of—Letter expressing willingness to pay if anything is found due on settlement of accounts, whether saves limitation.

A mutual, open and current account between the parties is such as consists in reciprocity of dealings between them and not merely of items on one side though made up of debits and credits. In such an account each party should be able to say that he has an account against the other. [p. 534, col. 2; p. 535, col. 1.]

Although a shifting balance is a test of mutuality its absence is not a conclusive proof against mutuality. [p. 535, col. 1.]

Fyzabad Bank, Ltd. v. Ramdyal Marwari (1), followed.

A statement contained in a letter that, if upon a comparison of accounts any amount is found due by the writer of the letter, he is prepared to pay it is a sufficient acknowledgment of liability under s. 19 of the Limitation Act. [p. 536, col. 1.]

Arumuga Chettiar v. Ramanadan (3) and *Maniram Seth v. Seth Rupchand* (2), followed.

Andiappa Chetty v. Devarajulu Naidoo (4), referred to.

Second appeal from a decision of the District Judge, Manbhum Sambalpur, dated the 12th May, 1925, reversing that of the Munsif, Parulia, dated the 31st March, 1924.

Mr. A. K. Roy, for the Appellant.

Messrs. N. C. Sinha and S. C. Mazumdar, for the Respondent.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the defendant against the decision of the District Judge of Manbhum Sambalpur whereby he reversed the deci-

sion of the Munsif of Purulia and made a decree for a sum of money in favour of the plaintiff.

The plaintiff is a firm carrying on the business of commission agents at Balrampur in the District of Manbhum; and the defendant is a firm carrying on business at Sambalpur. The plaintiff claims a sum of money on account of brokerage, interest and other expenses in relation to certain transactions entered into under an agreement between him and the defendant firm by which the plaintiff was to buy and sell shellac at Balrampur for the defendant according to the latter's instructions.

The subject-matter of the suit relates to four transactions, the particulars whereof are set out in the judgment of the learned District Judge.

The plaintiff firm purchased shellac at Balrampur under instructions from the defendant and sold them on different dates. In the first transaction there was a profit; but in the remaining three transactions there was a loss, and according to the plaintiff he is entitled to a sum of Rs. 2,136-8 from the defendant on account of these transactions.

The only point taken in this appeal which requires our consideration is the question of limitation, the defence being that the suit was barred by limitation. The plaintiff contended that the suit was governed by Art. 85 of the First Schedule to the Indian Limitation Act; whereas the defendant's contention was that it was governed by Art. 115. The plaintiff further contended that, even if the suit was governed by Art. 115, the bar of limitation was saved on account of certain acknowledgments made by the defendant contained in certain letters produced in the suit. The learned District Judge held that the letters produced by the plaintiff did amount to acknowledgment within the provisions of s. 19 of the Indian Limitation Act, and the bar of limitation, therefore, did not apply. In this view of the case he did not think it necessary to decide the question whether the suit was governed by Art. 85 or by Art. 115 of the First Schedule to the Indian Limitation Act.

It is contended on behalf of the appellant that the learned Judge was wrong in holding that there was an acknowledgment within the meaning of s. 19 of the Indian Limitation Act in the present suit. On the other hand, it is contended on behalf of

the respondent that the learned Judge was right in holding that there was an acknowledgment which saved limitation, and it is further contended that Art. 85 applied to the present suit, and that the question of acknowledgment did not, therefore, arise. In my opinion the contention of the learned Advocate for the respondent is correct. In the first place I am of opinion that Art. 85 of the Indian Limitation Act applies to the present suit. This Article provides for a suit for a balance due on a mutual, open and current account where there have been reciprocal demands between parties and the period of limitation is three years from the close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account. The question is whether there was a mutual, open and current account between parties where there have been reciprocal demands between them.

The first transaction forming the subject-matter of the suit consisted of the purchase of 75 maunds of shellac on the 29th December, 1919, which was sold by the plaintiff on account of the defendant on the 25th January, 1920. The second item consisted of the purchase by the plaintiff of 100 maunds of shellac on the 19th January, 1920, and the third a purchase of 125 maunds of shellac on the 21st January, 1920. Both these quantities of shellac were sold by the plaintiff on account of the defendant on the 25th of February, 1920. The last item consisted of the purchase of 75 maunds of shellac on the 16th March, 1920, which was sold on the 25th April, 1920. If, therefore, the transaction between the parties amounted to a mutual, open and current account, then the period of limitation began to run from the close of the year 1920. The suit was instituted on the 3rd April, 1923, and was, therefore, within three years.

It is contended, however, on behalf of the appellant that the transactions between the parties did not amount to a mutual, open and current account. The question as to what constitutes a mutual, open and current account was considered by me in *Fyzabad Bank, Ltd. v. Ramdyal Marwari* (1) and there I held that a mutual, open and current account between the parties is such as consists in reciprocity of dealings between them and not merely of items on one side though made up of debits and credits. In such an account each

(1) 74 Ind. Cas. 831; 4 P. L. T. 571; A. I. R. 1924 Pat. 107.

party should be able to say to the other: "I have an account against you." Although a shifting balance is a test of mutuality its absence is not a conclusive proof against mutuality. These observations apply to the facts of the present case.

In the first transaction there was a profit amounting to Rs. 3,187-8 and there was, therefore, a balance in favour of the defendant against the plaintiff on account of that transaction. The subsequent transactions resulted in a loss and the balance on account of those transactions was in favour of the plaintiff. There was thus a reciprocity of demands between the parties and the account was not made up of items on one side. The defendant was in a position to say to the plaintiff at one time that he had an account against him. The parties were dealing under an agreement under which the plaintiff was acting under instructions from the defendant and was purchasing and selling shellac on account of the defendant, sometimes the transactions resulting in profits and at other times in loss. At one time the accounts stood in favour of the defendant, at another time in favour of the plaintiff, and the last item in this account which was a mutual, open and current account was entered on the 25th April, 1920, and was, therefore, within three years of the date of the suit.

Article 115 of the First Schedule to the Indian Limitation Act deals with cases relating to compensation for breach of any contract, express or implied, not in writing registered and not specially provided for in the Act. This Article, to my mind, has no application to the facts of the present case. It is clear, therefore, that the suit was not barred by limitation. In this view of the case it is not necessary to consider as to whether there was an acknowledgment within the meaning of s. 19 of the Indian Limitation Act. I am, however, of opinion that the view taken by the learned District Judge was correct and the letters relied upon by the plaintiff do amount to an acknowledgment.

The first letter, Ex. 4 (u), dated the 25th May, 1920, runs thus:

"Best compliments to brother Hiralalji Seochand Rai of Balrampur from Joharmalji Mathuradas of Sambalpur. You have written to me that you have drawn a *hundi* for Rs. 1,675 on me so my man will go to you within five or six days and on looking into your account he will settle your account.

Please take note of it. Please write to me in reply and let me know the market rates."

The second letter, Ex. 4 (k), dated the 4th June, 1920, runs thus:

"Best compliment of Joharmalji Mathuradas of Sambalpur to beloved brother Hiralalji Seochand of Balrampur. Why have you written in this way? I write to you that within five or seven days my man will come to you. By looking into your account he will settle your account. You should also see your account carefully if there be any mistake in the same. On seeing if there be any mistake or not the account will then be settled. You should take everything into consideration. Kindly write letters informing me of the market rate."

The word "settle" in these two letters is a translation of the vernacular word "*chookti*" which means "clear" or "satisfy."

The learned District Judge has interpreted these letters as an expression of willingness to pay what might be found to be really due on an examination of the accounts. He was of opinion that the defendant's readiness to settle the account after verification was an unequivocal acknowledgment of his indebtedness to the plaintiff. I am of opinion that the learned Judge was correct in his interpretation of those letters.

Various cases have been cited before us; but the true interpretation to be placed upon a document cannot be determined on a reference to the interpretations placed upon other documents, unless the words used are the same. There are numerous authorities in the books relating to acknowledgments having the effect of saving limitation; and what will have to be considered is, whether the letters under consideration contained either an express promise to pay or a clear acknowledgment of the debt which would imply a promise to pay, because, if a debt is acknowledged, it carries with it the legal liability to pay that debt. In *Maniram Seth v. Seth Rupchand* (2) it was held by the Privy Council that an acknowledgment of liability, should the balance turn out to be against the person making it, is a sufficient acknowledgment under s. 19 of the Indian Limitation Act, and an unconditional acknowledgment implies a promise to pay

(2) 33 C. 1047; 4 C. L. J. 94; 8 Bom. J. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130; 33 I. A. 165 (P. C.).

it. In *Arumuga Chettiar v. Ramanadan* (3) it was held that a statement contained in a letter that if upon a comparison of accounts any amount is found due by the writer of the letter he is prepared to pay it is a sufficient acknowledgment of liability under s. 19 of the Indian Limitation Act. I am of opinion that the letters do contain an admission of liability and do amount to an acknowledgment.

It is, however, contended on behalf of the appellant on the authority of *Andiappa Chetty v. Devarajulu Naidoo* (4) that where there is an acknowledgment of liability in respect of a right and it is sought to use such acknowledgment for starting a fresh period of limitation, the right acknowledged must be of the same description as the right which is the subject of the suit, and that in the present case the right acknowledged was only the right to the taking of an account and not to the existence of a debt. I am of opinion that this contention has no substance. The right acknowledged was the existence of a debt which might be found on the taking of an account and not the right to the taking of an account. Indeed there was no liability upon the defendant to render any account: the account was to be rendered by the plaintiff and there was no acknowledgment of any liability by the defendant to render an account.

The other cases cited on behalf of the appellant are not of any help in the decision of the present case inasmuch as they turn on the terms of the acknowledgment made in those cases which are not similar to the terms in this case. I am of opinion, therefore, that, even if the case was governed by Art. 115 and not by Art. 85 of the First Schedule to the Indian Limitation Act, the suit was not barred by limitation.

This appeal is dismissed with costs.

Macpherson, J.—I agree.

B. K. P.

Appeal dismissed.

(3) 59 Ind. Cas. 898; 12 L. W. 352.

(4) 12 Ind. Cas. 378; 36 M. 68; 10 M. L. T. 251; (1911) 2 M. W. N. 225; 21 M. L. J. 1024.

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 105 of 1927.

December 12, 1927.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Justice Sir B. K. Mullick, Kt.

EMPEROR—PETITIONER

versus

PRABHU UPADHAYA—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 439—Application for enhancement of sentence, when to be made—Expiry of sentence, whether ground for refusing interference.

In all cases where the sentence is considered by the prosecution to be inadequate, the District Magistrate or the Sessions Judge, as the case may be, should be moved by the Police at the earliest possible moment after the trial and where possible, before the accused has served his sentence, although the fact that the sentence has expired before such action is taken is, in itself, no reason for refusing to interfere. [p. 537, col. 1.]

Reference made by the District Magistrate, Shahabad, dated the 7th November, 1927, recommending that a sentence passed on the 15th August, 1927, by the Sub-Divisional Magistrate, Bhabhua, should be enhanced.

The Government Advocate and Mr. Manohar Lal, for the Assistant Government Advocate, for the Crown.

JUDGMENT.

Miller, C. J.—Prabhu Upadhaya was tried on the 15th August last before the Sub-Divisional Magistrate of Bhabhua for the offence of receiving stolen cattle knowing or having reason to believe that they were stolen and was convicted and sentenced under s. 411 of the Indian Penal Code to 45 days' rigorous imprisonment. The evidence shows that at about mid-night on the 2nd February last two *chaukidars* whilst going round the village on duty saw four bullocks being taken into Prabhu's house. Suspecting that they had been stolen one of the *chaukidars* kept watch on the house whilst the other went to fetch the Police from the *Thana*. When the Police arrived later they found the bullocks in Prabhu's house and these were subsequently identified by Alam Shah as those stolen from him on the previous night. The accused's case was that one Khedan Ahir brought them to his house and tethered them there and that he did not know they were stolen. The Magistrate found that although the accused may not have been a thief

himself nevertheless in the absence of any satisfactory explanation of how the four bullocks came into his house which he must have had reason to believe were stolen he must suffer the criminal liability but having regard to his age and infirmity—he was suffering from cataract—he took a lenient view and sentenced him to 45 days' rigorous imprisonment as stated.

The case has been referred to this Court by the District Magistrate with a recommendation that the sentence should be increased under s. 438 of the Code of Criminal Procedure. It appears that the Police brought the matter to the notice of the District Magistrate on the 17th October with a view to enhancement of the sentence and on the 7th November the District Magistrate referred the case to this Court as stated. It will be noticed that the accused had served his sentence and had been released from prison some five or six weeks before the case was referred to this Court by the District Magistrate in November. From enquiries it appears that the result of the trial was made known to the Superintendent of Police before the end of August but no steps were taken to move the District Magistrate in the matter before the middle of October after the accused had been released from prison. In all cases where the sentence is considered by the prosecution to be inadequate the District Magistrate or the Sessions Judge, as the case may be, should be moved by the Police at the earliest possible moment after the trial and certainly, where possible, before the accused has served his sentence. I am fully aware that there are many cases where a very short sentence is imposed in which it is impossible to move the higher Court before the sentence has expired, and the fact that the sentence has expired before such action is taken is, in itself, no reason for refusing to interfere. At the same time where the accused has been released after being imprisoned for six weeks or more and no action is taken during that time to move for an enhancement of sentence he may reasonably expect that no further action will be taken and that he has expiated his crime, and it is an additional hardship upon him if he should find afterwards that he has to go back to prison again for a further term. It would appear that

there was regrettable delay in this case in the office of the Superintendent of Police in failing to bring the matter to the notice of the District Magistrate between the end of August and the middle of October which delay has not been accounted for. It may, however, be capable of explanation and I do not consider it necessary to add any further comment.

I do not think that in the present case we should allow this delay to influence our judgment if we thought that the sentence inflicted was altogether inadequate to the particular circumstances of the case and it must be admitted that the offence was a serious one. At the same time the Sub-Divisional Magistrate took into account the age and infirmity of the accused and in passing sentence has exercised his discretion in the matter. Had he not been influenced by these considerations, we should have felt bound to increase the sentence; but having regard to all the circumstances of the case we consider that the sentence should not be enhanced.

Mullick, J.—Having regard to the fact that the explanation of the trying Magistrate has not been taken and having regard to the other circumstances of this case, I agree that the Reference should not be accepted.

B. K. P.

A. N. A.

Reference not accepted.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 30 OF 1927.
November 30, 1927.

Present:—Mr. Justice Kulwant Sahay
and Mr. Justice Macpherson.

RAMKHELAWAN SINGH AND OTHERS—

APPELLANTS

versus

DIPLAL MAHTON AND OTHERS—
RESPONDENTS.

Patna High Court Rules, Ch. VII, r. 2—Letters Patent Appeal filed without vakalatnama by oversight—Extension of time.

A Letters Patent Appeal was presented without a vakalatnama on the last day of limitation. The vakalatnama was presented the next day and it appeared that the same was executed on the previous day and that the stamp was also purchased the same day but it was not annexed to the memorandum of appeal by pure oversight.

Held, that in the circumstances time might be extended under r. 2, Ch. VII of the Patna High Court Rules.

Mr. Jyotirmoy Ghosh, for the Appellant.

ORDER.—The appeal was presented without a *vakalatnama*. The *vakalatnama* was, however, filed subsequently on the 8th November, the appeal having been presented on the last date of limitation, namely, on the 28th October. It is now stated by the learned Vakil that he had the *vakalatnama* on the 28th October, but it was not annexed to the memorandum of appeal by pure oversight. It appears from the endorsement on the *vakalatnama* that it was executed on the 28th October and that the stamp was also purchased on the 28th October.

In the circumstances, under r. 2; Chap. VII, page 63 of the High Court Rules, time is extended up to the 8th November and the appeal will be registered.

B. K. P.

Order accordingly.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 849
OF 1925.

December 6, 1927.

Present:—Sir Dawson Miller, Kt., Chief
Justice, and Justice Sir B. K. Mullick, Kt.
KUMAN DASS—PLAINTIFF—APPELLANT

versus

TILAKDHARI SINGH—DEFENDANT—
RESPONDENT.

*Landlord and tenant—Lease for fixed term—
Provision for payment of enhanced rent if tenant
remains in possession after expiry of term, whether
penal.*

A provision in a *kabuliyat* for a specified term that if the tenant should remain in possession of the land after the expiry of the term without taking a fresh *patta*, he should pay an enhanced rate of rent is not penal. [p. 539, col. 1.]

Such a clause is not introduced to compel the performance of any act stipulated for but merely gives an option to the lessee which he may accept or reject as he chooses. [*ibid.*]

Kuman Das v. Kachali Mandal, (1), followed.

Appeal from a decision of the Officiating Subordinate Judge, Purnea, dated the 12th May, 1925, confirming that of the Munsif, Purnea, dated the 16th August, 1924.

Messrs. Hasan Imam and Sambhu Saran, for the Appellant.

Mr. N. N. Sinha, for the Respondent.

JUDGMENT.

Miller, C. J.—The plaintiff in this case sued the defendant as his tenant to recover

rent in respect of a holding measuring 16 *bighas* 18 *khatas* 15 *dhurs* at the rate of Rs. 15 per *bigha*. The defence set up amongst others was that the rent was payable under contract entered into by the tenant in the year 1902 and expiring in the year 1910, that the original rent under that agreement was Rs. 15 for the whole holding for the term with a stipulation that on the expiry of the term in 1910 if the tenant should remain in possession the rent should be increased to Rs. 15 per *bigha*, and that this clause in the contract was by way of penalty and ought not to be enforced. It is further contended amongst other things that the bargain was unconscionable and that the defendant had been compelled to submit to these terms owing to undue influence on the part of the plaintiff.

It is unnecessary to deal with all the points that were raised in the lower Courts and which were decided against the defendant but the Munsif and the Officiating Subordinate Judge on appeal found that the stipulation of payment of higher rent was penal and, therefore, could not be enforced and agreed with the Munsif in decreeing the suit for Rs. 15 a year plus cesses as provided during the term under the original agreement.

The question which arises before us in this appeal is whether such a stipulation was penal or not. In my opinion the clause was not introduced into the lease by way of penalty. The material clause in the lease which we have had translated somewhat literally reads as follows: "After the expiry of the term I shall give up the land and I shall remove from possession and it will be open to the landlord without notice to settle the land with any one he likes." That clause is the usual one introduced into such leases but it is quite unnecessary. At the end of the term the tenant, unless he has acquired an occupancy right, which is not the case here, will be bound to give up the land and if he remains in possession he will be a trespasser and may be ejected by the landlord. It then proceeds: "Should under any circumstances the land remain in my possession without taking a fresh *patta* either a portion or of the whole, then I shall pay at the rate of Rs. 15 per *bigha* per annum for the entire land aforesaid whatever it may be." The words translated 'whatever it may be' are '*jo hoga*'. It seems to me that a clause of that sort cannot be construed as a penal clause. The term

came to an end by efflux of time in the year 1910 and the tenant was bound then to give up the land to the landlord. If he did not do so, he would be a trespasser. But under the terms of the lease he is given an opportunity to remain on the land as a tenant on payment of a rental of Rs. 15 per *bigha*. Such a clause is certainly not a penalty. It is not introduced into the lease to compel the performance of an act stipulated in the contract. It is merely an option given to the lessee which he may accept or reject as he chooses. The same question has arisen in this Court on more than one occasion and has been determined in the sense in which I have just indicated. Those cases do not seem to have been reported, but they are: Second Appeal No. 1135 of 1917, decided by Jwala Prasad, J., Second Appeal No. 992 of 1917, decided by the same Judge; Second Appeals Nos. 397 and 398 of 1919, decided by Adami, J., and whose decision on appeal was affirmed under the Letters Patent; Second Appeal No. 737 of 1919, decided by Adami and Bucknill, JJ.; and a recent case decided this year in Second Appeal No. 1602 of 1924 [*Kuman Das v. Kachali Mandal* (1)] by Mr. Justice Wort. In those cases the Court took the view in somewhat similar circumstances that a clause of this sort was not a penalty and could be strictly enforced.

It was further contended that the bargain itself was oppressive and unconscionable and obtained by undue influence on the part of the landlord. It may be that the stipulation is a hard one looked at from one point of view; but it is merely an option given to that tenant to retain the land in his possession if he likes at an increased rental which after all is a much better bargain to him than if no such stipulation were contained in the contract. The landlord could in that case legally eject him if he refused to go. It cannot, therefore, to my mind be said that there was anything unconscionable or oppressive about such a bargain. Moreover, it is found as a fact by the lower Appellate Court as follows: "There is absolutely no evidence worthy of credit to prove that the defendant was compelled to submit to the terms appearing in the *kabuliyat* or that any undue influence was exercised or could be exercised by the plaintiff in connection with it. The defendant himself does not even speak of

any compulsion or undue influence." In these circumstances, I am of opinion that the learned Subordinate Judge of the lower Appellate Court is wrong in arriving at the conclusion that this stipulation in the contract was a penal one and that he ought to have passed a decree for rent at the rate claimed, namely, Rs. 15 a *bigha*.

The appeal will be allowed and in lieu of the decree passed there will be a decree for the amount claimed, namely, Rs. 1,084-6-0 which is the rent at Rs. 15 per *bigha* for the years in suit together with cesses. The decretal amount will carry interest from the date of the suit at six per cent. per annum until realisation. The appellant is entitled to his costs here and in both the Courts below.

Mullick, J.—I agree.

B. K. P.

A. N. A.

Appeal allowed.

PATNA HIGH COURT.

CIVIL REVISION No. 323 OF 1927.

November 24, 1927.

Present:—Mr. Justice Ross.

KULDIP MAHTON—PETITIONER

versus

Musammat PATIA AND OTHERS—

OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. I, r. 10, cl. (2)—Addition of party—Rent suit against recorded tenants—Purchasers of holding, whether can be added as parties against plaintiff's will.

In a suit for rent against the recorded tenants, purchasers of the holding should not be added as parties against the will of the plaintiff inasmuch as the addition of such parties would involve the determination of a complicated question of recognition which is not appropriate for decision in a rent suit. A Court has no power to add such parties in a rent suit under O. I, r. 10, Civil Procedure Code. [p. 540, col. 1.]

Civil revision from an order of the Munsif, First Court, Patna, dated the 15th June, 1927.

Mr. Izhar Hossain, for the Petitioner.

Mr. Rajeswari Prasad, for the Opposite Party.

JUDGMENT.—The opposite parties Nos. 3 and 4 applied before the Munsif to be added as defendants in a rent suit brought by the petitioner against the recorded tenants on the ground that they had purchased the holding. The petitioner objected to having these defendants forced upon him, but the learned Munsif was of opinion that as the opposite parties Nos. 3 and 4 were entered in the *khatian* as

being in possession they should be made defendants and an issue on the point of their recognition should be tried. The learned Vakil for the petitioner relies upon two decisions of this Court, namely, *Satyadeva Sahay v. Jhamel Kuer* (1) and *Gananath Satpathy v. Harihar Pandhi* (2). It is argued on the other side that there is no question of jurisdiction involved, and reliance is placed on the decision in a similar case in *Sarju Mahton v. Bibi Bersatan* (3). Order I, r. 10, cl. (2) gives the Court power to add as plaintiff or defendant any person who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, and that there is no jurisdiction to add a party in any other case. Now the question at issue was a simple question of rent and the recorded tenants were sued. The addition of the opposite parties Nos. 3 and 4 involves the determination of a complicated question of recognition which is not appropriate for decision in a rent suit. In my opinion, the addition of the opposite parties Nos. 3 and 4 was not the addition of any such party as the Munsif was empowered to add under O. I, r. 10 and his order was without jurisdiction.

The application must be allowed, and the order of the Munsif set aside. The petitioner is entitled to costs; hearing-fee one gold mohur.

A. N. A.

Application allowed.

(1) 97 Ind. Cas. 612; 7 P. L. T. 602; A. I. R. 1926 Pat. 519.

(2) 48 Ind. Cas. 359; (1918) Pat. 289; 5 P. L. W. 232.

(3) 103 Ind. Cas. 544; 8 P. L. T. 305; A. I. R. 1927 Pat. 242.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 532 OF 1924.

December 1, 1927.

Present :—Justice Sir Jwala Prasad, Kt., and Mr. Justice Ross.

THE GREAT INDIAN PENINSULAR RAILWAY COMPANY—DEFENDANT—

APPELLANT

versus

MESSRS. GOPI RAM-GOURI SHANKAR—

PLAINTIFFS—RESPONDENTS.

Railways Act (IX of 1890), s. 77—Non-delivery,

whether constitutes 'loss'—Notice, whether necessary.

Non-delivery does not constitute loss within the meaning of s. 77 of the Railways Act and when non-delivery without more is pleaded no notice under s. 77 is required though it may turn out that the suit will fail for want of notice if it be established by the Railway Company that it is in fact a case of loss. If the Railway Company plead want of notice they must show that this case of non-delivery was a case of loss. [p. 542, col. 1.]

East Indian Ry. Co. v. Kali Charan-Ram Prasad (1), *Puran Das v. East Indian Ry. Co.* (4), *East Indian Ry. Co. v. Jagpat Singh* (5) and *Great Indian Peninsular Ry. Co. v. Jesraj Patwari* (6), followed.

Agent of the B. N. Ry. Co. v. Hamir Mull-Chagan Mull (2), *Great Indian Peninsular Ry. Co. v. Jitan Ram* (3) and *Assam Bengal Ry. Co. v. Radhika Mohan Nath* (9), dissented from.

Appeal from the decision of the Subordinate Judge, Gaya, dated the 13th February, 1924, confirming that of the Munsif, Gaya, dated the 12th July, 1922.

Messrs. N. C. Sinha, N. C. Ghosh and B. B. Ghosh, for the Appellant.

Messrs. Siveshwar Dayal and B. K. Prasad, for the Respondents.

JUDGMENT.

Ross, J.—The respondents brought this suit for compensation for non-delivery of one out of four bales of cloth consigned to the Great Indian Peninsular Railway Company at Bombay for delivery to them at Gaya on the East Indian Railway. The defence was that the goods were lost in transit and that the defendant Companies were protected by Risk Note B; and, further, that the suit was bad for want of notice under s. 77 of the Indian Railways Act within six months from the date of delivery of the goods to the defendants.

The Courts below dismissed the suit as against the East Indian Railway and gave the plaintiffs a decree for part of their claim as against the Great Indian Peninsular Railway, holding, *inter alia*, that, as this was a case of non-delivery where no loss was proved, s. 77 had no application. The case was remanded for a finding on the question of the service of notice under s. 77 and it has been found by the learned Subordinate Judge that there is no proof of service of notice beyond the allegation in the plaint which not having been traversed in the written statement, must be accepted, namely, that notice was given to the agents of the defendant Companies on the 8th of December, 1921. The goods were consigned on the 11th of April, 1921, and three bales were delivered on

the 19th of May, 1921. The suit was brought on the 11th of March, 1922. Consequently if notice was required under s. 77, the notice was out of time; but if no notice was required then the suit was properly instituted within the period limited by law.

The question for decision, therefore, is whether in a suit for non-delivery notice has to be given under s. 77 of the Act. In *East Indian Ry. Co. v. Kali Charan Ram Prasad* (1) it was held by my brother Jwala Prasad that s. 77 requires notice only in a case of a claim for compensation for loss, destruction or deterioration of goods and does not apply to a suit based upon compensation on account of non-delivery of goods, as apart from loss, destruction or deterioration of the same. But in *Agent of the B. N. Ry. Co. v. Hamir Mull-Chagan-Mull* (2) it was held by a Division Bench of this Court that non-delivery constitutes loss within the meaning of s. 77 and, therefore, service of notice under that section is essential in a suit for compensation for non-delivery. This decision has been followed in other cases.

The learned Advocate for the respondents contends, however, that this decision rests ultimately upon the view taken in *Great Indian Peninsular Ry. Co. v. Jitan Ram* (3) to the effect that 'loss' means loss to the owner and that as that view is no longer tenable since the decision of the Full Bench in *Puran Das v. East Indian Ry. Co.* (4) the ground of the decision that notice is necessary in cases of non-delivery has gone. In an elaborate judgment in *East Indian Ry. Co. v. Jagpat Singh* (5) Page, J., held that the term "loss" as used in the Risk Note and in the Chap. VII, of the Railways Act does not mean pecuniary loss to the owner of the goods, but means loss of goods by the Railway Company while in transit. And it has recently been decided by the Calcutta High Court in *Great Indian Peninsular Ry. Co. v.*

Jesraj Patwari (6) by Ranken, C. J., and Mitter, J. that in suits for damages for non-delivery of a part of a consignment delivered under Risk Note B, there is a necessity of proving that there has been in fact a "loss" of the part concerned and the initial burden of proving that is on the Railway Company. In *Puran Das v. East Indian Ry. Co.* (4) Das and Adami, JJ., agreed with the view of Mr. Justice Page and as this view differed from the decision in *Great Indian Peninsular Ry. Co. v. Jitan Ram* (3), they referred the case to a Full Bench. It was found by the Full Bench that on the pleadings the reference did not arise; but reliance is placed upon the judgment of my brother Jwala Prasad and on certain observations in the judgment of the learned Chief Justice. This decision of the Full Bench has since been considered along with other decisions of the Court in two cases by two Division Benches of this Court; and in *Nagendra Nath Sen v. B. & N. W. Ry. Co.* (7) it was held that in a suit based on non-delivery the Railway Company must prove loss before they can claim the benefit of the Risk Note; and in *Tarachand Marwari v. Bengal Nagpur Ry. Co.* (8) that decision was followed; and it must be taken that since the decision of the Full Bench, the view in this Court has been that non-delivery does not constitute loss and, therefore, the decision in *Great Indian Peninsular Ry. Co. v. Jitan Ram* (3), is not conclusive of the present question. Now on the language of s. 77 a notice is only required in cases of claims for refund of an overcharge or for compensation for loss, destruction or deterioration. If non-delivery is not co-extensive with loss, it would seem to follow that notice is not required in a suit based on non-delivery; and obviously non-delivery includes much more than loss which is only one of several possible cases. Non-delivery may be due to misdelivery or to wilful detention by the Railway Company as well as to loss. As was pointed out by Page, J. in the case cited above, the true view would seem to be that the goods may or may not be lost and that proof of non-delivery is by no means a conclusive evidence as to whether or not loss has occurred. "Indeed I

(1) 69 Ind. Cas. 103; 3 P. L. T. 215; (1922) Pat. 145; A. I. R. 1922 Pat. 106.

(2) 90 Ind. Cas. 374; 5 Pat. 106; 6 P. L. T. 565; A. I. R. 1925 Pat. 727; (1926) Pat. 114.

(3) 72 Ind. Cas. 440; 2 Pat. 442; (1923) Pat. 82; 4 P. L. T. 173; 1 Pat. L. R. 169; A. I. R. 1923 Pat. 285.

(4) 102 Ind. Cas. 673; 8 P. L. T. 415; A. I. R. 1927 Pat. 231; 6 Pat. 718.

(5) 79 Ind. Cas. 126; 23 C. W. N. 1001; 51 C. 615; A. I. R. 1924 Cal. 725.

(6) 106 Ind. Cas. 252; 32 C. W. N. 76; 46 C. L. J. 423.

(7) 105 Ind. Cas. 540.

(8) 107 Ind. Cas. 158.

go further and beg leave to state that on such evidence alone an inference could not reasonably be drawn that the goods had been lost". It would seem to follow from this decision as well as from the language of the section itself that when non-delivery without more is pleaded no notice under s. 77 is required though it may turn out that the suit will fail for want of notice if it be established by the Railway Company that it is in fact a case of loss. A different view was taken by the Calcutta High Court in *Assam Bengal Ry. Co., v. Radhika Mohan Nath* (9) where it was held that in a suit based on non-delivery notice under s. 77 is required, though there the question whether notice would be necessary where the goods were wrongfully detained was left open. That decision seems to have proceeded on an interpretation of "loss" which is inconsistent with the later decisions. In effect the question of notice seems to come back to the prior question of loss. If the Railway Company plead want of notice they must show that this case of non-delivery was a case of loss. The position, therefore, on the merits and on the technical question of notice is precisely the same, viz., the defendant company must plead and prove loss before it can rely either on the Risk Note or on want of notice.

The appeal is dismissed with costs including the costs of the first hearing and of the remand.

Jwala Prasad, J.—I agree.

B. K. P.

Appeal dismissed.

A. N. A.

(9) 72 Ind. Cas. 714; 28 O. W. N. 438; A. I. R. 1923 Cal. 397.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1049 OF 1924.
December 8, 1927.

Present:—Mr. Justice Kulwant Sahay and
Mr. Justice Macpherson.

Sheikh ABDUL BAQI—DEFENDANT—

APPELLANT

versus

SHEO PRAKASH SINGH AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Easements—Right of owner to make use of surface water—Adjoining owner, whether entitled to flow of surplus water.

Every land owner has a natural right to collect and retain upon his own land the surface water not

flowing in a defined channel and to put it to such use as he may desire, and although he has a right to discharge the surplus water on to an adjoining owner's land, the latter cannot compel him to do so unless he has acquired a right to such surplus water by contract or by prescription. [p. 544, col. 2.]

Sarban v. Phudo Sahu (1), followed.

Second appeal from a decision of the Subordinate Judge, First Court, Gaya, dated the 24th June, 1924, confirming that of the Officiating Munsif, Third Court, Gaya, dated the 15th January, 1924.

Messrs. Syed Noorul Hassan and A. H. Fakhr-ud-Din, for the Appellant.

Messrs. Kailaspati, Sarjoo Prasad, K. N. Varma and Ahmad Reza, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the defendant against the decree of the Subordinate Judge of Gaya confirming the decree of the Munsif and decreeing the plaintiffs' suit. The plaintiffs and the defendant are the co-owners of *Mauza Bagahi* in *Mahal Deokali*, *Touzi* No. 4100, in the District of Gaya. *Mauza Bagahi* was partitioned several years ago. According to the defendant the partition took place about fourteen years ago. By this partition the village was formed into three *takhtas*: one of 9 annas forming the *istamrari mukarrari* interest of the plaintiffs Nos. 1—10 and of the defendant, another of 1 anna belonging to the plaintiffs Nos. 11—13, and the third of 6 annas belonging to the defendant exclusively. There are several *ahars* in this village. The southern most *ahars* is the *Parao ahars*. To the north of it is *Genda ahar* which the plaintiffs allege is not an *ahar* but is known as *Kita Genda*, whereas the defendant alleges that it is an *ahar*. To the north of it is the *Ganghar ahar*. To the north-east of *Ganghar* is *Jharhi ahar* to the north-west of *Ganghar* is *Dangra ahar*. The *Parao*, *Genda*, *Ganghar* and *Dangra ahars* are in the 6 annas *takhta* of the defendant, and the *Jharhi ahar* is in the 9 annas *takhta* belonging to the plaintiffs Nos. 1—10 and the defendant. To the south of the village *Bagahi* is *Mauza Khutha*.

The plaintiffs' case is that the system of irrigation in the village since time immemorial has been that water from the southern village, *Mauza Khutha*, came by means of a defined channel into the *Parao ahar*; that after irrigating the lands to the north of *Parao ahar* the excess water used to flow into the *Ganghar ahar* and from

Ganghar *ahar* the water used to come to the Jharhi *ahar* from which the lands in the 9 annas *takhta* used to be irrigated. The plaintiffs complain that the defendant has raised the embankment of the Genda *ahar* and has placed Dhongas on the western *pind* of Genda *ahar*, with the result that the flow of water into the Jharhi *ahar* has been stopped and the defendant has been irrigating his lands to the west of Genda and Parao *ahars* which used never to be irrigated by the water from these *ahars*. The plaintiffs, therefore, ask for a declaration that on adjudication of the plaintiffs' title it be held that the defendant had no right to raise the height of the *pind* bearing No. 754 in Genda *ahar* and had no right to put a *dhonga* on the western *pind*, that the original height of the northern *pind* of Genda *ahar* was only $1\frac{1}{2}$ feet and that the defendant had wrongfully raised it to 5 feet; that it might be determined and declared that the plaintiffs were entitled to cut the *pind* No. 754 and to take water into the Ganghar *ahar* and thence into the Jharhi *ahar* and the Dangra *ahar*; that it might be declared that the defendants had no right to take water towards the west of the *pind*, in khasra No. 788 and they had no right to place the *dhonga* in the said *pind* No. 788; and they prayed that an order may be made to demolish the *pind* of the Genda *ahar* No. 754 and to reduce it to its original height of $1\frac{1}{2}$ feet and to remove the *dhonga* from the *pind* No. 788, and that a permanent injunction might be issued restraining the defendant from ever raising the height of the *pind* 754 to more than $1\frac{1}{2}$ feet or placing a *dhonga* in *pind* No. 788.

The defence of the defendant was that the surface water of Mauza Khutha used to come into the Parao *ahar* and the lands of the defendant (used to be irrigated thereby, thereafter the Genda *ahar* used to be filled with water from the Parao *ahar* and the water from the Genda *ahar* used to irrigate some lands of the defendant, thereafter the water of the Genda *ahar* used to go into the Ganghar *ahar* and thence into the Jharhi *ahar* and from it the lands of defendant as well as the plaintiffs in the 9-annas *takhta* used to be irrigated, after that the water of the Ganghar *ahar* used to go into the Dangra *ahar* and from it the lands of the defendant and some lands of the 9-annas *takhta* used to be irrigated, that the flow of water from Khutha into Parao *ahar* had been stopped on account of

obstructions raised by the proprietors of Khutha, and that as the flow of water from Khutha into Parao *ahar* had been stopped, the Parao *ahar* is now filled by rain water and there is no sufficient quantity of water in the Parao *ahar* to flow into the Ganghar and the Jharehi *ahars*. The defendant stated that the height of the *pind* No. 754 has always been 5 or 6 feet, and that he has the right to take water from the Genda *ahar* to irrigate his lands towards the west of the *pind* No. 788. He also raised certain objections as regards limitation and as regards the suit being bad for non-joinder of the proprietors of Mauza Khutha, and he asserted that he had the right to discharge the excess water from his *ahars* into the Jharhi *ahar*, but that the plaintiffs had no right to compel him to do so and they were not entitled to take water from the Parao or the Ganghar *ahars* into the Jharhi *ahar* as a matter of right.

Various issues were raised, and the learned Munsif decided them all in favour of the plaintiffs. He found that there was never any *dhonga* from before in the western *pind* of the Genda *ahar*, and, that water from Parao *ahar* or Genda *ahar* never irrigated the lands lying to the west thereof, that the *dhonga* and the passages for taking the water were new and recently made by the defendant, that Genda was only a *kita* and not an *ahar*, that the height of the Genda *pind* was only 3 feet and that the defendant had wrongfully raised it to 5 feet, that the flow of the surface water of village Khutha had not been stopped and that it was still flowing into the Parao *ahar*, that the plaintiffs had established their right to take the water from the Parao *ahar* into the Jharhi and the Dangra *ahars* and that the defendant had no right to stop the same. He accordingly made a decree in favour of the plaintiffs directing that the height of the northern *pind* of *kita* Genda be reduced to its original height of 3 feet, that the *dhonga* or Karha or any other water passage in the western *pind* of Genda or Parao *ahars* will be closed, and that the defendant be perpetually restrained from irrigating his lands to the west of Genda and Parao from the water of the Parao or Genda *ahars* and from increasing the height of the *pinds* of *kita* Genda above 3 feet.

Against this decree the defendant went in appeal before the Subordinate Judge. The points urged by him before the Subordinate Judge are set out in detail in his

judgment. One of the points taken before him by the defendant was that the plaintiffs had acquired no right to compel the defendant to let the excess or surplus water of his upper land flow over his land into the plaintiffs' *ahar* and that the plaintiffs had no right to reduce the northern *pind* of Genda or to prevent him from taking the water to the west of the Genda and Parao *ahars*. The learned Subordinate Judge has found that water from Khutha flows through a defined channel into the Parao *ahar*. He has also found that the defendant has no right to take water from *kita* Genda westward through the Dhonga and that the original height of the northern *pind* in *kita* Genda was 3 feet and that the defendant had no right to raise it to 5 feet. As regards the right of the plaintiffs to take the water into the Jharhi and the Dangra *ahars*, the learned Subordinate Judge has come to no finding. He observes as follows:—

"I think that when the plaintiff is entitled to the surplus water of *kita* Genda overflowing the *pind* of *kita* Genda to the north, the plaintiffs have a right to insist that the defendant should not increase the height of that *pind*."

He takes it for granted that the plaintiffs are entitled to take the surplus water of *kita* Genda. It is true that the learned Munsif came to the finding that the plaintiffs had acquired such right. Although the Munsif found that the plaintiffs had failed to prove any contract or prescriptive right by evidence, yet he was of opinion that it was to be presumed from the acts of the parties that the father of the defendant contracted or agreed to allow the excess surplus water to pass to Ganghar *ahar* through the newly constructed Parao *ahar* which he found had been constructed by the defendant's father, and that the system of irrigation has always been as alleged by the plaintiffs in the plaint. The Munsif, therefore, proceeded upon the assumption that the plaintiffs had acquired the right under a contract. This finding of the Munsif was challenged by the defendant in appeal before the Subordinate Judge but the learned Judge has come to absolutely no finding upon the point. As was observed by Dawson Miller, C. J., in *Sarban v. Phudo Sahu* (1), every land owner has a

natural right to collect and retain upon his own land the surface water not flowing in a defined channel and to put it to such use as he may desire. He may also allow it to flow away in the usual course of nature upon the lower lands of his neighbour and cannot be bound to prevent it from so doing. There is no defined channel from the Parao *ahar* to the Ganghar *ahar* or from the Ganghar to the Jharhi or the Dangra *ahars*, and it is for the plaintiffs to prove how they have acquired the right to compel the defendant to discharge the water from the Parao *ahar* into the Ganghar *ahar* and from there into the Parao and the Dangra *ahars*. So long as the water remains on the defendant's land, he has every right to make whatever use of it he thinks proper, and even if he had never taken the water from these *ahars* to irrigate his land lying to the west of the Genda *ahars* or Genda *kita* and the Parao *ahar*, there is nothing in law to prevent him from doing so, unless and until the plaintiffs establish that they have acquired a right to compel the defendant not to do so. It is contended on behalf of the appellant that he has every right to convert his waste lands and *bheeth* lands into paddy lands, and there is no reason why he should not improve his estate if by so doing he does not infringe the right of any other person. I am of opinion that the learned Subordinate Judge has failed to consider the very material issue as to whether the plaintiffs have acquired either by contract or by prescription any right to compel the defendant to discharge his water into the Jharhi and the Dangra *ahars* as although the defendant may have a right to discharge his excess water on to the plaintiffs' land, the plaintiffs cannot compel him to do so unless they prove that they have acquired such right.

The decree of the learned Subordinate Judge, therefore, must be set aside and the appeal must be remanded to him for rehearing and disposal according to law. Costs will abide the result.

Macpherson, J.—I agree.

B. K. P.

Decree set aside.

(1) 69 Ind. Cas. 947; (1922) Pat. 305; 4 U. P. L. R. (Pat.) 105; 4 L. T. 81; A. I. R. 1923 Pat. 65; 2 Pat. 110.

ODDH CHIEF COURT. **FULL BENCH.**

SECOND CIVIL APPEAL No. 40 of 1927.

November 1, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, Mr. Justice Raza and Mr. Justice Pullan.

On difference of opinion between
 Mr. Justice Misra and Mr. Justice Hasan.
GANESH SINGH AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

BHIKHAM SINGH AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Award—Direction by arbitrators that plaintiff should execute mortgage in favour of defendant for a certain sum and declaring cancellation of gift—Award, whether vague or indefinite—Civil Procedure Code (Act V of 1908), Sch. II, para. 16 (2)—Trial Court, setting aside award and deciding case on merits—Appellate Court passing decree in accordance with award—Second appeal, maintainability of.

A suit for cancellation of a deed of gift and for recovery of possession of the property conveyed was referred to arbitration and the arbitrators gave an award as follows: "We decide the case in this way that by declaring the deed of gift cancelled and non-existent we award Rs. 680 due to the defendant from plaintiff for which the plaintiff shall execute within one month a deed of possessory mortgage in favour of the defendant. In the event of default the defendant shall be entitled to obtain execution of the possessory mortgage from the plaintiff through Court".

Held, by the Full Bench, that the portion of the award by which the arbitrators directed that the defendant should remain in possession of the property transferred until the plaintiff paid Rs. 680, was not objectionable either under the provisions of para. 12 or para. 14 of the Second Schedule, Civil Procedure Code, and that it could not be set aside on any of the grounds mentioned in para. 15. [p. 551, col. 2.]

Per Hasan and Misra, JJ.—The provision in cl. (2) of para. 16 of Sch. II of the Code of Civil Procedure applies only where a decree has been passed by the trial Court in accordance with the terms of the award. Where, however, the Court of first instance sets aside the award and passes a decree on the merits and the lower Appellate Court sets aside that decree and passes a decree in accordance with the award, a second appeal is maintainable. [p. 546, col. 2; p. 550, col. 2.]

Shyama Charan Pramanik v. Prolhad Durwan (1) and Chintamani Aditya v. Haladhar Maiti (2), relied on.

Per Misra, J.—The arbitrators are Judges of law as well of facts and their error in law will not vitiate the award. [p. 548, col. 1.]

Ghulam Khan v. Muhammad Hassan (3) and Knox v. Symonds (4), referred to.

An award cannot be set aside merely upon the ground that the decree passed by the arbitrators is not one which would have ordinarily been passed by the Court in which that suit was instituted. [p. 548, col. 2.]

Second appeal against the decree of the Additional Subordinate Judge, Hardoi, dated the 22nd November, 1926, reversing that of the Munsif, Hardoi, dated the 15th July, 1926.

The case came on for hearing before Misra and Hasan, JJ., who delivered the following dissenting judgments.

JUDGMENT.

Misra, J.—(October 14, 1927).—This is an appeal arising out of a suit brought by the plaintiffs-respondents to recover possession over a share amounting to 10 *biswansis* of Thok Purab, Mahal Puri, situate in village Mahui Puri, District Hardoi.

The plaintiffs alleged that a deed of gift in respect of this share had been executed by plaintiff No. 1 in favour of defendant No. 1 on the 8th January, 1925. The plaintiffs are own brothers; and defendant No. 2 is the father of defendant No. 1. The plaintiffs wished to avoid this deed of gift on two grounds: firstly, that as plaintiffs Nos. 1 and 2 constituted a joint Hindu family, plaintiff No. 1 alone had no power to make a gift thereof; secondly, that the deed of gift had been obtained by undue influence, misrepresentation and fraud practised by defendant No. 2 in the name of his son, defendant No. 1. As stated above, the plaintiffs in their suit claimed possession by avoidance of the deed of gift.

The suit was contested by defendants on the ground that plaintiffs Nos. 1 and 2 did not constitute a joint Hindu family but were separate from each other and plaintiff No. 1 was, therefore, competent to execute the deed of gift in respect of the property in suit. It was also urged in defence that the deed of gift had been executed by plaintiff No. 1 out of his free-will and consent and that no misrepresentation, undue influence or fraud had been practised upon him. It was further alleged that the defendants had helped plaintiff No. 1 with a sum of about Rs. 700 in order that he might be able to defend himself when he had been prosecuted in a criminal case in the Sessions Court, Hardoi, in which he was ultimately convicted and fined Rs. 200. It was also alleged that over and above this sum of Rs. 700 they had paid to plaintiff No. 1 Rs. 200 for payment of the fine which had been inflicted upon him. It was further alleged that they had also paid Rs. 400 to the different creditors of plaintiff No. 1.

The following issues were framed in the case:

1. Was the property in suit the joint family property of the plaintiffs at the time when Ex. I (the deed of gift) was executed?

2. Were the plaintiffs Nos. 1 and 2 separate from each other and was the property in suit the separate property of the plaintiff No. 1, as alleged?

3. Was Ex. I (the deed of gift) executed under fraud and misrepresentation as alleged?

4. Did the defendants pay off any sum of money on behalf of plaintiff No. 1 and also to the plaintiff No. 1 himself? If so, how much and to what effect?

5. To what relief are the plaintiffs entitled?

On the date fixed for evidence the parties applied to the Court that the entire case be referred to arbitration of five persons named in the application. They clearly stated in that application that they would willingly accept whatever decision the said arbitrators unanimously arrived at. The case was thereupon referred to arbitration, and the arbitrators filed their award on the 16th of April, 1926, under which they declared the deed of gift to be inoperative and to be treated as having been cancelled, but directed plaintiff No. 1 to pay Rs. 680. Plaintiff No. 1 was also directed to execute a mortgage-deed with possession and if he failed to do so, defendant No. 1 would be entitled to get it executed through Court. Parties were ordered to bear their own costs. It was also declared that plaintiff No. 1 was quite separate from plaintiff No. 2 and that the latter had, therefore, nothing to do with the property in suit.

On the 24th of April, 1926, the two defendants filed a joint application urging their objections against the validity of the award. Their chief objection was that the provision in the award directing plaintiff No. 1 to execute a mortgage-deed in favour of defendant No. 1 was legally invalid and incapable of being enforced, such a provision being beyond the power of the arbitrators to impose. They, however, clearly stated in the application that they had no objection if the Court passed a decree on the basis of the rest of the award.

The learned Munsif passed a very brief order on the 19th May, 1926, in the following terms:—

"The award is obviously illegal. I, there-

fore, supersede the order of arbitration and proceed with the suit myself." Having passed this order he tried the case himself and as a result of the trial he dismissed the plaintiffs' suit with costs.

Plaintiff No. 1 appealed and the appeal was heard by the Additional Subordinate Judge of Hardoi. The chief contention urged in appeal was that the trial Court was wrong in having set aside the award and tried the case itself. The learned Subordinate Judge accepted that contention and disagreeing with the view of the trial Court held the award to be good and passed a decree in terms thereof.

The defendants have now come up to this Court in second appeal, and the chief contention urged by their learned Counsel is that the lower Appellate Court was wrong in passing a decree in accordance with the terms of the award since the award was invalid and no decree should have been passed on the basis thereof.

A preliminary objection was taken on behalf of the respondents that no appeal could lie from the decree of the lower Appellate Court since it had been passed in terms of the award. Paragraph 16 of Sch. II of the Code of Civil Procedure was referred to in this connection. We are of opinion that a second appeal is maintainable where the Court of first instance sets aside the award and passes a decree on the merits and the lower Appellate Court sets aside that decree and passes a decree in accordance with the award. The mere fact that the decree of the lower Appellate Court is in accordance with the award is no ground for refusing the appeal. In our opinion the provision in cl. (2) of para. 16 of the Second Schedule applies only where a decree has been pronounced by the trial Court in accordance with the terms of the award. This appears to be clear from the entire scheme of the Second Schedule. We are supported in this view by two decisions of the Calcutta High Court, one reported in *Shyama Charan Pramanik v. Prohad Durwan* (1) and the other in *Chintamani Aditya v. Haladhar Maiti* (2). Both these decisions were under the previous Code of Civil Procedure (Act XIV of 1882) in which s. 522 was equivalent to para. 16 of the Second Schedule of the present Code. Mookerjee, J., held in the second case that the bar of appeal provided

(1) 8 C. W. N. 390.

(2) 2 C. L. J. 153; 10 C. W. N. 601.

by s. 522 was applicable only when a decree had been made in accordance with the award by the Court of first instance and not when a similar decree had been made by a Court of Appeal in reversal of the order of the first Court setting aside the award. We, therefore, overrule the preliminary objection.

I now proceed to discuss the appeal on the merits, and to examine the contention urged by the learned Counsel for defendants-appellants, viz., that the award is invalid in law and that, therefore, no decree should be passed on the basis thereof. We have heard the learned Counsel at great length and have taken time to consider our judgment. The conclusion at which I have arrived is that the award, dated the 16th April, 1926, is a good award and must be maintained.

The chief contention put forward by the learned Counsel for the appellants was that the arbitrators had in the body of the award declared that the deed of gift had been executed by plaintiff No. 1 (Bhikham Singh) for consideration (*ba-muawiza*) and that Rs. 630 had been spent by defendant No. 1 (Ganesh Singh) on behalf of the plaintiff No. 1 in paying off two decrees of the Court of the Subordinate Judge of Hardoi and a debt due to one Piare Lal bazaz (cloth seller) from him. It was urged that this portion of the award was inconsistent with the operative portion thereof where the arbitrators had declared the deed to be inoperative and directed it to be cancelled, asking plaintiff No. 1 to pay a sum of Rs. 680 and to execute a possessory deed of mortgage in favour of defendant No. 1. In respect of the property in suit. It was argued that if the deed of gift was executed for consideration it necessarily implied that the deed had not been executed under fraud, misrepresentation or undue influence and consequently the award of the arbitrators could not stand. I have given my best consideration to this argument and have come to the conclusion that it cannot be accepted. I am unable to interpret the word '*ba-muawiza*' (with consideration) as used by the arbitrators to mean that the deed was a good one and its validity the arbitrators were going to uphold. Indeed, the operative portion of the award which just follows the passage containing this expression directly militates against this view. The award of the arbitrators should, according to the ordinary rule of law, be

read as a whole and portions out of it cannot be picked up to show that the finding of the arbitrators was inconsistent with those portions. We are not concerned with the reasoning of the arbitrators; the only thing with which we are concerned is the operative portion of their award. In the Appendix attached to the Second Schedule of the Code of Civil Procedure, Form No. 5 provides how an award is to be stated; and it appears to us from the said form that the only thing which arbitrators are required to state in their award is their conclusion and nothing else. It, therefore, appears to me that in order to find out what the award in this case was we have only to refer to the operative portion of the award; and the legality or illegality of the award must depend upon that portion and not upon anything else. It is possible that the arbitrators might have meant by the expression '*ba-muawiza*' to mean that some money had been spent by defendants on behalf of plaintiffs. Issue No. 4 was expressly directed towards this matter. I do not, however, wish to pursue the matter further. It appears that plaintiff No. 1 is a young man of 20 years and defendant No. 2, the father of defendant No. 1 helped him with money and in other ways while a criminal case was going on against him in the Sessions Court of Hardoi. It is, under the circumstances, possible that defendant No. 2 might have acquired influence over plaintiff No. 1, and the deed of gift might have been the result of the said influence. I do not wish to arrive at any definite finding on the point since it is not necessary for us to do so. We are not entitled to sit in judgment on the award of the arbitrators. I only point out to these circumstances as they appear to us to exist on the record as reasons which might have very well induced the arbitrators to set aside the deed of gift and to declare it inoperative and to direct at the same time plaintiff No. 1 to pay defendants a sum of Rs. 680 which in the opinion of the arbitrators was proved to have been spent by them on his behalf.

Another contention which was urged before us by the learned Counsel for the defendants-appellants was that the direction in the award calling upon plaintiff No. 1 to execute a deed of mortgage in favour of the defendants was an invalid and unenforceable condition and that the arbitrators had no jurisdiction to incorporate

such a condition in their award. I have not been able to understand the attitude of the defendants regarding this matter. The condition is obviously to their own benefit, and unless their object in raising the contention be to get thereby the whole of the award set aside, I do not see any point in the objection. In my opinion plaintiff No. 1's claim for possession of 10-biswansis share by avoidance of the deed of gift executed in favour of defendant No. 1 had been referred to arbitration and the arbitrators were quite within their authority when they declared the said deed of gift to be inoperative, and while cancelling it they also directed plaintiff No. 1 to pay defendant No. 1 a sum of Rs. 680 which in their opinion was proved to have been spent by him on his (plaintiff No. 1's) behalf. I do not see any illegality in such an award, and am of opinion that it cannot be considered to be in any way invalid or unenforceable. It was merely a direction to make the position of defendants secure in regard to the money spent by them on behalf of plaintiff No. 1.

While dealing with this point I might also state that the position of arbitrators is different from that of a Court. I may be that it would not be open to the Court to pass a decree like the one passed by the arbitrators in this case. If the Court had found the deed to have been executed under undue influence, misrepresentation or fraud, it would have passed a decree declaring the deed to be inoperative and ordering it to be cancelled. If the Court found that the deed was executed with full and free consent the suit of the plaintiffs would have been dismissed. The arbitrators are, however, Judges of law as well as of facts; and they may have erred in law but their error in law does not vitiate the award [*Vide Ghulam Khan v. Muhammad Hassan* (3)]. In *Knox v. Symmonds* (4) Lord Chancellor Thurlow observed as follows:—

"Upon a general reference to arbitration of all matters in dispute between the parties the arbitrator has a greater latitude than the Court, in order to do complete justice between the parties; for instance, he may relieve against a right, which bears hard upon one party; but which, having been

acquired legally and without fraud could not be resisted in a Court of Justice."

It, therefore, appears to me that we will not be justified in setting aside the award merely upon the ground that the decree passed by the arbitrators is not one which would have ordinarily been passed by the Court in which that suit was instituted.

I might also refer to another objection, which was urged in connection with the validity of the award, it being that the condition, as laid down by the arbitrators, requiring the plaintiff No. 1 to execute a deed of possessory mortgage in favour of defendant No. 1, was a vague and indefinite condition and was not capable of being enforced. On this point I am in entire agreement with the opinion of the learned Subordinate Judge that there is no vagueness or indefiniteness in the proposed terms of the mortgage. A possessory mortgage, laying down that the mortgagee is to obtain possession of the property in lieu of a fixed sum with a condition that the redemption is to take place whenever the mortgage money is paid, is quite a good and valid transaction. In the case of a usufructuary mortgage it is not necessary that the period for redemption should be fixed in the mortgage. As to the property to be mortgaged it is clear that the property which was the subject-matter of the gift was intended to be mortgaged. If therefore, the property to be mortgaged is capable of being ascertained and further the amount of money, for which the property is to be mortgaged, can also be ascertained, I am of opinion, that everything, which is necessary for a deed of usufructuary mortgage, is ascertainable and on that score no objection can be taken to the validity of the award. The well known rule of law is "*certum est quod certum reddi potest*" (that is sufficient certain, which is capable of being made certain) and that should be applied to this case (*vide Broom's Legal Maxims*, Ninth Edition, page 399).

I am, therefore, of opinion that the decision of the learned Subordinate Judge is correct and must be maintained. I would therefore, dismiss this appeal with costs.

Hasan, J.—(October 14, 1927).—I material portion of the award in question is as follows:—

"The facts of the case are that a deed of gift was executed by Bhikham Sir

(3) 29 C. 167 at p. 186; 29 I. A. 51; 6 C. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).
(4) (1791) 1 Ves. Jr. 369; 30 E. R. 390 at p. 391.

(plaintiff) in favour of Ganesh Singh (defendant) as against which deed Bhikham Singh has brought a suit in Court for cancellation on the allegation that it is fictitious, without consideration and obtained by deception and fraud. But Ganesh Singh, etc., the defendants, deny this. On a consideration of the evidence and documents produced by the parties we have reached this conclusion that the deed of gift executed by Bhikham Singh aforesaid was executed for consideration which comprises Rs. 680 which Ganesh Singh has paid to Bhikham Singh in the following manner...

.....Accordingly we decide this case in this way that by declaring the deed of gift as cancelled and non-existent we award Rs. 680 due to the defendants from the plaintiff for which the plaintiff shall execute within one month a deed of possessory mortgage in favour of the defendant. In the event of the plaintiff not executing the deed of mortgage within one month the defendant shall be entitled to obtain execution of the possessory mortgage from the plaintiff through Court. The parties will bear their own costs."

In my opinion this award is not only illegal in part, but is also vague and indefinite on the whole, and contradictory in its own terms. To my mind the direction in the award that the plaintiff shall give a possessory mortgage to the defendant, and that the defendant shall accept such a mortgage is a condition precedent on which the decision as to the cancellation of the deed of gift rests. The intention of the whole award is that relief as to the cancellation shall enure only in the event of the execution of the contemplated deed of mortgage. Now that is a contingency the happening of which is made to rest, first, on the option of the plaintiff, and secondly, on the option of the defendant. Either of them may well choose not to exercise the option. Thus there is an inherent lacuna in the award. This makes the award unenforceable and, therefore, illegal.

Further I do not see how it is possible any more for the arbitrators than for a Court of Justice to compel parties to specifically perform such acts as would make one of such parties the debtor of the other and the latter a creditor of the former: *South African Territories v. Wallington* (5),

5 (1898) A. C. 309; 67 L. J. Q. B. 470; 78 L. T. 426; 46 W. R. 545; 14 T. L. R. 298.

Fry on Specific Performance, page 24; and *Meenakshisundara Mudaliar v. Rathnasami Pillai* (6). In this view of the case also this part of the award is illegal, and as I am of opinion that this part lays down a condition precedent on the fulfilment of which the cancellation of the deed of gift entirely depends, the whole award must be held as illegal. It is impossible to conceive that the decision as to the cancellation of the deed of gift is not subservient or merely a sequel to the happening of the contingency contemplated by the condition under consideration. It appears to me that the principle of the decision of their Lordships of the Judicial Committee in the case of *Ram Protap Chamria v. Durga Prosad Chamria* (7) is applicable to this case.

I am of opinion that the direction that a mortgage-deed shall be executed, when carefully analysed, makes the award wholly unenforceable. We cannot treat this direction as merely indicating a method of payment of Rs. 680. To me it seems to be the essence of the whole award. If by virtue of the direction we cannot give to the plaintiff liberty to pay and cannot impose an obligation on the defendant to receive Rs. 680 in cash, as obviously we cannot, the direction cannot be treated as merely an indication of the manner of payment of Rs. 680. It appears to me that according to the intention of the arbitrators the possessory mortgage when it came into existence is to take the place of the gift in question. In so doing the arbitrators created a new relation between the parties: of debtor and creditor; of mortgagor and mortgagee. This they had no authority to do. This reasoning brings the case within the rule laid down by Lord Denman, Chief Justice, in the case of *Ross v. Boards* (8). I will quote here the observations of Lord Denman which to my mind are very apposite to the case before us:

"The objection insisted upon must prevail. The agreement between these

(6) 49 Ind. Cas. 291; 41 M. 959; 8 L. W. 438; 35 M. L. J. 489; 24 M. L. T. 315; (1918) M. W. N. 811.

(7) 92 Ind. Cas. 633; 53 I. A. 1; 3 O. W. N. 127; A. I. R. 1925 P. C. 293; 49 M. L. J. 812; 43 O. L. J. 14; 24 A. L. J. 13; (1926) M. W. N. 96; 3 Pat. L. R. 330; 28 Bom. L. R. 217; 53 C. 258; 27 P. L. R. 35 (P. O.).

(8) (1838) 7 L. J. Q. B. 209; 112 E. R. 847; 8 Ad. & E. 290; 3 N. & P. 382; 1 W. W. & H. 376; 2 Jur. 567; 47 R. R. 590.

parties was, that the defendant should sell the land to the plaintiff, the title to be made out to the satisfaction of Mr. Blunt. It was referred to the arbitrator to settle all questions between the parties, on the agreement. He does not decide the questions arising on the agreement, but awards, of and concerning the matters referred, that the defendant shall convey to the plaintiff the title, contained in the abstracts, to the parcel of ground specified in the agreement, such parcel to extend, and be bounded, as the award points out. He leaves it in doubt whether the title is good or bad, and, in effect orders that it shall be taken with all faults. The doubt is rendered stronger by the direction that an indemnity bond shall be executed, which is more than the arbitrator had a right to order. The award is not final, because, instead of deciding the questions referred, it sets on foot new ones; and, instead of ascertaining a right for the plaintiff, gives him a new action for the recovery of damages."

I have said before that the award is vague and indefinite. It is so in relation to the intended mortgage. Except the consideration every other necessary ingredient is wanting. The subject-matter of the mortgage, the period as to the continuance of the mortgage, the time at which the right to redeem shall accrue to the mortgagor are all unprovided for. The best test it seems to me will be to treat this direction as a contract between the parties and then to see whether a specific performance could be claimed, by one or the other, of such a contract. No elaborate argument is needed to show that specific performance of such a contract is wholly out of question.

I have also said before that the award is contradictory in its own terms. The first conclusion at which the arbitrators reach is that the deed of gift has been executed for consideration. This clearly means that it is not open to the objections raised by the plaintiff. This being so it is a contradiction in terms then to say, as the arbitrators have said, that it is liable to be cancelled and to be replaced by a mortgage.

Finally, it is enough to say that I am clearly of opinion that the arbitrators on the terms of the award do not declare the cancellation of the deed of gift unless the condition relating to the execution of the deed of mortgage was fulfilled and that if it was not fulfilled or was incapable of being

fulfilled, or was otherwise illegal or was beyond the authority of the arbitrators to make it, the deed of gift shall not stand cancelled.

I would, therefore, allow the appeal set aside the decree of the Court below and restore the decree of the Court of first instance with costs in favour of the appellants in all Courts.

On the preliminary objection as to the maintainability of the appeal I agree with the opinion of my learned brother.

[In view of the fact that there was a difference of opinion as to what ought to be the decision in the case, the whole case was referred for decision to a Full Bench in accordance with s. 13 (ii) (b) of the Oudh Courts Act, 1925.]

Messrs. *Har Narain Das* and *Ali Zaheer*, for the Appellants.

Mr. *Kedar Nath Tandon*, for the Respondents.

OPINION.

Stuart, C. J.—The reference before us is as follows: A certain Bhikham Singh executed on the 8th January, 1925, a deed of gift of a share in a village in favour of Ganesh Singh. The property transferred by the deed of gift is stated in the plaint to have been worth Rs. 1,500 but it is on the record that Bhikham Singh had executed a simple mortgage in reference to this property. Bhikham Singh with his brother Ratan Singh instituted, on the 4th of January, 1926, a suit in the Court of the Munsif of Hardoi in which they claimed as against Ganesh Singh the donee and his father Dulam Singh possession of the property transferred by the deed of gift on the allegations that the property in question was the property of a joint Hindu family consisting of Bhikham Singh and Ratan Singh, that Bhikham Singh alone had no power to transfer the property by gift, and that the execution of the deed of gift had been obtained by the exercise of misrepresentation, fraud and undue influence. Ganesh Singh and Dulam Singh replied that Bhikham Singh and Ratan Singh, although brothers, were not members of a joint Hindu family, that they had separated some years previously and that Ratan Singh had become a convert to the Sikh religion. They added that the property in question was the sole undivided property of Bhikham Singh, that he had executed the deed of gift of his own free-will and accord without undue

influence, misrepresentation or fraud and that the deed of gift was executed in recompense for past services rendered by the defendants who had advanced money on several occasions to Bhikham Singh. The defendants in one portion of their written statement put forward that if the plaintiffs were awarded possession they should only be awarded possession on payment of the amount paid by the defendants. The dispute between the parties may then be summarised as follows: The plaintiffs wished to repudiate the deed of gift and to obtain the property back without payment of anything. The defendants supported the deed of gift and asked that they should be allowed to retain the property, but added that if they were obliged to give it up they should be recompensed for what they had paid already. The matter was referred to the arbitration of arbitrators. The terms of the reference were very wide. The arbitrators were directed to settle all the disputes between the parties. The arbitrators decided that the property transferred by the deed of gift was the sole property of Bhikham Singh and that he had full power to make the transfer. They did not decide explicitly, but decided implicitly, that there was no fraud, misrepresentation or undue influence and they further decided that the defendants had paid money to Bhikham Singh and that deed of gift had been executed as a consequence of the receipt of benefit by Bhikham Singh from the defendants. In these circumstances it was undoubtedly open to them to dismiss the suit. But, in my opinion, they were not precluded under the terms of the reference from setting aside the deed of gift upon payment of compensation by Bhikham Singh to the defendants. The whole of the dispute had been placed before them. It was perfectly reasonable for the arbitrators to take the view that the property transferred by the deed of gift was of value considerably greater than the value of the benefits previously received and in these circumstances I consider that they were well within their rights in arriving at the decision at which they did arrive. This decision was that, although the property was the sole property of Bhikham Singh and though the execution of the deed of gift was an act of his independent volition, nevertheless he should be permitted to retain the property transferred by the deed of gift provided that he paid Rs. 680 to the defendants. They fixed

Rs. 680 as the value of the benefits which he received from the defendants and they ended with a direction that Bhikham Singh was to execute a deed of usufructuary mortgage in favour of the defendants for a consideration of Rs. 680. I do not consider that that portion of the award by which they directed that the defendants should remain in possession of the property transferred until the plaintiffs paid them Rs. 680 is objectionable either under the provisions of para. 12 or para. 14 of the Second Schedule of the Code of Civil Procedure, and I, undoubtedly, am unable to consider that that portion of the award could be set aside on any of the grounds mentioned in para. 15. I should have had more difficulty in deciding whether this Court should or should not direct that the order, that a usufructuary mortgage be executed, should be expunged from the award on the ground that it was upon a matter not referred to arbitration which could be separated from the other part and did not affect decision on the matter referred. But I have been relieved from any difficulty on that score as the parties before us have now requested that that portion of the award should be expunged. They have accepted the conclusion that it is quite sufficient if the decree states that the defendants remain in possession of the property in question until Bhikham Singh pays to them the sum of Rs. 680. The decree will be sufficient title-deed without the execution of a deed of mortgage. I should accordingly suggest that the decision on the appeal should be this: that in place of the present decree the following decree be passed: that the deed of gift of the 8th January, 1925, should be set aside and that Ganesh Singh and Dulam Singh retain possession of a share of 10 *biswansis* out of 20 *biswansis* in village Mahui Puri, Mahal Puri, Thok Purab, Pargana Gopamau until Bhikham Singh pays them Rs. 680. Bhikham Singh will recover possession of the said share on payment of Rs. 680. I should suggest that the parties pay their own costs throughout these proceedings.

Raza, J.—I agree and have nothing to add to the judgment that has just been delivered by the Hon'ble Chief Judge.

Pullan, J.—I also agree with the judgment delivered.

By the Court.—The appeal is decided accordingly.

A. N. A.

Decree modified.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 223 OF 1927.

November 14, 1927.

Present:—Mr. Justice Hasan.

Musammatt BHAIRON DEI—PLAINTIFF
—APPELLANT

versus

RAM SEWAK LAL—DEFENDANT—
RESPONDENT.*Hindu Law—Widow—Right to maintenance—Non-residence with relatives of deceased husband, whether ground for reducing amount of maintenance—Prayer for arrears of maintenance—Court-fee—Court Fees Act (VII of 1870), s. 7, cls. (i), (ii).**Refusal of a Hindu widow to live with her husband's relatives is not a ground for reducing the amount of maintenance payable to her. [p. 553, col. 1.]**Rajah Parthee Singh v. Ramee Raj Kower (1), Parvatibai Bhagirath v. Chatru Limbaji (2), Siddesury Dassee v. Janardan Sarkar (3) and Sreemutty Nittokisoree Dossee v. Jagendro Nauth Mullick (4), relied on.**Where the plaintiff claims only arrears of maintenance and asks for no relief as to the declaration of her future right to maintenance, she is liable to pay Court-fee on the amount claimed under cl. (i) of s. 7 of the Court-Fees Act and not under cl. (ii) of the said section. [p. 553, cols. 1 & 2.]*

Second appeal against the decree of the Additional Sub-Judge, Fyzabad, in Civil Appeal No. 73 of 1926, dated the 14th March, 1927, reversing that of the Munsif, Haveli, Fyzabad, dated the 2nd December, 1926.

Mr. Ali Zaheer, for the Appellant.

Mr. Naimullah, for the Respondent.

JUDGMENT.—This is the plaintiff's appeal from the decree of the Additional Subordinate Judge of Fyzabad, dated the 14th of March, 1927, modifying the decree of the Munsif of Haveli, Fyzabad, dated the 2nd of December, 1926.

This appeal arises out of a suit brought by a childless widow claiming arrears of maintenance from the defendant, who is the brother of the plaintiff's deceased husband. The plaintiff's case is that her deceased husband and the defendant formed a joint family and that on the death of the former about 6½ years ago the defendant came into possession of the ancestral joint family property by right of survivorship, the income of which was Rs. 40 a month approximately. The relief is for the recovery of Rs. 20 arrears of maintenance for the months of February and March, 1926, at the rate of Rs. 10 a month. The ground of the claim is two-fold: (1). An amicable settlement under which the defendant had

agreed to give Rs. 10 a month and (2) legal right to maintenance. The defence was the denial of the settlement and also of the plaintiff's legal right to maintenance on the ground that the plaintiff's husband had separated in the lifetime of his father.

The first ground of claim has failed in both the Courts below and, therefore, need not be considered further. The second ground has succeeded. The trial Court on the consideration of the evidence came to the conclusion that the defendant and the plaintiff's husband formed a joint Hindu family, that the defendant was possessed of ancestral property and that the income was not less than Rs. 25 a month. Accordingly a decree for a sum of Rs. 10 as arrears of maintenance at the rate of Rs. 5 a month was made in favour of the plaintiff.

The defendant filed an appeal from the decree of the Court of first instance and the plaintiff filed cross-objections. The cross-objections were dismissed and the appeal was allowed by reducing the maintenance to Rs. 2 a month. The ground of rejection is that during the continuance of certain negotiations for a compromise in the lower Appellate Court the plaintiff had expressed her willingness to go to and reside with the defendant. The defendant's family only consists of himself and his wife.

In second appeal it is urged that the ground on which the maintenance has been reduced is invalid in law. I am of opinion that the appeal succeeds. So far back as the year 1873 their Lordships of the Judicial Committee decided in the case of *Rajah Parthee Singh v. Ramee Raj Kower* (1) that "a Hindu widow is not bound to reside with the relatives of her husband; that the relatives of her husband have no right to compel her to live with them; and that she does not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's residence from any other cause than unchaste or improper purposes." In the same case their Lordships decided that the amount of maintenance should be fixed with reference to the proprietor's estate. In the present case this was done by the trial Court and the lower Appellate Court has not questioned the propriety of the amount fixed on any ground other than the refusal of the plaintiff to reside with

(1) 12 B. L. R. 238; 20 W. R. 21; I. A. Sup. Vol. 203; 3 Sar. P. C. J. 259 (P. C.).

the defendant. The principle of this decision of their Lordships of the Judicial Committee was applied in a case similar to the present case by the High Court of Bombay in *Parvatibai Bhagirath v. Chatru Limbaji* (2).

In the Bombay case the Courts below had refused to grant a decree to the plaintiff for arrears of maintenance on the ground that she had refused to live with the defendant, her husband's brother, though a decree for future maintenance was granted. In this connection the decision of the High Court at Calcutta in *Siddesury Dassee v. Janardan Sarkar* (2) may also be referred to. It is not suggested in the present case that the plaintiff is guilty of any misconduct.

It seems to me that if non-residence at her husband's house is no ground for refusing maintenance to a Hindu widow it is equally no ground for reducing it. A person cannot be compelled to do an act which he is not legally bound to do. It follows that if he does not do it he cannot be penalized for the omission. If any authority were needed for this principle it is to be found in an analogous case decided by their Lordships of the Judicial Committee—*Sreemutty Nittokisoree Dossee v. Jagendro Nauth Mullick* (4).

There is one more matter urged at the hearing of the appeal on behalf of the appellant. In the lower Appellate Court question seems to have been raised by the defendant that the plaintiff was liable to pay Court-fee not only on the amount claimed but also according to ten times the amount claimed to be payable for one year under cl. (2) of s. 7 of the Court Fees Act, 1870. The lower Appellate Court decided this question according to the defendant's contention and the plaintiff accordingly paid the additional Court-fee of Rs. 83-8-0 in respect of her plaint in the trial Court. It is now argued that the order of the Court below in the matter of the Court-fee was wrong.

I am of opinion that the argument is correct. The plaintiff's case as laid in the plaint led to no other relief other than what was prayed for, that is the arrears of maintenance, and according to cl. (2) of s. 7

the Court fee payable would be according to the amount claimed, which was originally paid by the plaintiff. Obviously in a case of this nature it would be unfair to fix the liability at the rate of Rs. 5 a month for all time to come. It may vary with the circumstances. There was, therefore, no declaration as to future right at the rate of Rs. 5 a month involved in the decree of the trial Court.

I accordingly allow this appeal, set aside the decree of the lower Appellate Court and also the order as to the additional Court-fee and restore the decree of the Court of first instance with costs in all Courts. The plaintiff will further be entitled to a refund of Rs. 83-8-0 which she paid as an additional Court-fee in the lower Appellate Court.

As regards the cross-objections, they mostly cover questions of facts which have been dealt with in the judgment. They are, therefore, dismissed with costs.

G. H.

A. N. A.

Appeal allowed.

ODDH CHIEF COURT. FULL BENCH.

STAMP REFERENCE No. 2 of 1927.

December 8, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, Mr. Justice Hasan and Mr. Justice Misra.

LAL HARIHAR PARTAB BAKHSH
SINGH—APPELLANT

versus

BISHESHAR BAKHSH SINGH AND
OTHERS—RESPONDENTS.

Stamp Act (II of 1899), ss. 40 (b), 57—Mortgage-bond executed by surety for due performance of undertaking by decree-holder to restore property—Proper stamp—'To secure the due performance of a contract,' meaning of.

A deed of mortgage executed by a surety for the due performance of an undertaking given by a decree-holder to the Court for restoring certain properties to the judgment-debtor in event of the failure of the decree-holder in appeal is a deed executed 'to secure the due performance of a contract' within the meaning of Art. 57 of Sch. I of the Stamp Act and is liable to a stamp duty of Rs. 5 only. [p. 555, cols. 1 & 2.]

Case referred by the Chief Revenue Authority, U. P., under s. 57 of the Stamp Act.

ORDER OF REFERENCE.—I am directed to invite a reference to your letter

(2) 12 Ind. Cas. 703; 36 B. 131; 13 Bom. L. R. 1023.

(3) 29 C. 557; 6 C. W. N. 530.

(4) 5 I. A. 53; 3 Sar. P. O. J. 792; Bald, 159; 3 Suth. P. C. J. 505 (P. C.).

No. 19 of 1927, First Civil Appeal Register, dated September 8, 1927, communicating the Court's opinion to the Deputy Commissioner, Bahraich, in respect of the security bond executed under O. XLI, r. 6, Civil Procedure Code, by Thakur Jagat Ambika Prasad Singh and his son in favour of the Registrar, Chief Court. I am to add in this connection that the Board, when reviewing cases of Stamp Law submitted monthly by the Deputy Commissioner have, in consultation with the Legal Remembrancer, taken a different view of the stamp duty chargeable on the document concerned for the reasons given below:—

It would appear from the language of the Art. 57, Sch. I of the Indian Stamp Act, that this Article applies only to those bonds which are executed by a surety "to secure the due performance of a contract." Section 126 of the Contract Act shows that a contract of guarantee for which a security bond is executed is a contract to perform the promise or to discharge the liability of a third person in case of his default. Article 57 Sch. I of the Stamp Act covers cases of those security bonds only, which are executed by a surety to secure the due performance of a contract and does not cover security bonds, which evidence a contract to discharge a liability of a third person. In the case concerned there was no contract made by the plaintiff-decree-holder for which the executants of the security bonds stood surety, but they did so with a view to discharge legal obligation by hypothecating landed properties. The bond executed by them is, therefore, a security bond within the meaning of the Contract Act, but because it has not been executed in order to secure the due performance of any contract between the Court and the plaintiff-decree-holder it is not covered by Art. 57.

Since the bond creates a legal liability but not a contract, Art. 40 (b), Sch. I of the Stamp Act applies and in the circumstances this bond should be stamped with *ad valorem* duty under this Article.

This same view was, held on page 376 of the Indian Stamp Act, 1899, by Messrs. Mulla and Pratt (two Judges of the Bombay High Court).

I am to request that the matter be again laid before the Court for re-consideration in the light of the arguments advanced in this letter.

Mr. M. H. Qidwai, for the Respondent.
The Government Advocate, for the Secretary to Board of Revenue.

JUDGMENT.

Stuart, C. J.—This is a reference made to this Court by the Chief Revenue Authority under s. 57, Act II of 1899 (Indian Stamp Act), with a statement of a case under s. 56 and with its opinion thereon. According to the provisions of s. 57 the case has been laid before a Bench of three Judges of the Chief Court and is now being decided under s. 59. A copy of this judgment will be sent under the provisions of s. 59 to the Chief Revenue Authority. The case is as follows.

A certain Bisheshar Bakhsh Singh instituted a suit in the Chief Court of Oudh for possession of certain property. He succeeded. In execution of his decree he applied for possession of certain property. The other side preferred an appeal against the decree. A Bench of this Court by an order of the 1st March, 1927, directed that Bisheshar Bakhsh Singh should be placed in possession of the property in question, provided he guaranteed to restore that property in event of his failure in appeal, and provided he filed security for its restoration in such circumstances. In accordance with this order certain persons executed on the 23rd March, 1927, an undertaking, whereby they agreed that if Bisheshar Bakhsh Singh did not restore the property in event of his failure in appeal, the executants of the deed would pay compensation to the Court to the extent of a lakh and a half of rupees, and in security for the payment of this amount they hypothecated certain immoveable property. This document was stamped with a stamp of Rs. 5, and this stamp was considered sufficient by the Taxing Authorities of this Court, as in their opinion it was a mortgage-deed executed by a surety to secure the due performance of a contract. Subsequently the Inspector General of Registration questioned the correctness of this view, and requested a Bench of this Court to assess the deed to a higher stamp duty. The Bench in question, agreeing with the Taxing Authorities, did not assess the document at a higher stamp duty. The present reference has then been made. In my opinion, the transaction between Bisheshar Bakhsh Singh and the Court

amounted to a contract. Bisheshar Bakhsh Singh contracted that, if he were allowed to take possession of the property in question he would restore that property in event of his failure in appeal. This deed was a mortgage-deed executed by the executants to secure the due performance of the contract by Bisheshar Bakhsh Singh. As such, the executants incurred the liability to pay the stamp duty of Rs. 5 under the provisions of Art. 57. It is true that the deed in question is a mortgage-deed and unless it came under the special provisions of Art. 57 it would be liable to pay a much higher duty based *ad valorem* upon the value of the property secured. I read, however, Art. 57 as making a special concession in favour, *inter alia*, of mortgage-deeds executed by sureties to secure the due performance of a contract. Where a mortgage-deed is a mortgage-deed executed by a surety to secure the due performance of a contract, the executant gains the privileges conferred by Art. 57. The learned Government Advocate has not been able to show us any authority upon the point. It is true that in a commentary of which two learned Judges of the Bombay High Court were the authors, there is a note in which it is made a subject of question as to whether such mortgage deeds are liable to stamp duty under Art. 40. This note, to which the Board of Revenue have referred as authoritative, is, of course, in no sense authoritative. It is merely an opinion of a commentator. The practice in this Court and in the Court of the Judicial Commissioner has been uniform upon this point. Both Courts have always treated such mortgage-deeds as liable to pay stamp duty under Art. 57. It appears to me that this practice is clearly right and that it follows from the words of the Article.

Hasan, J.—It is agreed that the deed of the 23rd of March, 1927, is a mortgage-deed. The contention raised in the reference before us is that it was not executed to secure the due performance of a contract and that being so it is liable to be taxed with a stamp duty under Art. 40 of the First Schedule of the Indian Stamp Act, 1899, and not under Art. 57 of the same Schedule. It is true that there is no contract to secure the due performance of which the deed in question was executed floating on the surface, but there is always

an implied contract in cases of this nature. The substance of the matter is that the plaintiff asked for delivery of possession of certain property which was decreed to him under a decree passed on the Original Side of this Court. The prayer for delivery of possession was made to this Court. That was clearly a request. In answer to that the Court agreed to deliver possession as prayed for provided the decree-holder agreed to do certain things in certain events and provided further that he furnished security for the due performance of the same. On these conditions being offered to the decree-holder by the Court they were accepted by him and the result was the execution of the deed of mortgage in question and the delivery of possession to the decree-holder. It is a significant fact to bear in mind that the deed in question is executed in favour of the Registrar of this Court. This clearly means that the Court is a party to the original contract for the due performance of which this mortgage-deed has been executed. I accordingly agree with the Hon'ble the Chief Judge that the document has been properly stamped with the stamp duty of Rs. 5.

Misra, J.—I am also of the same opinion as my two learned brothers who have just now delivered their opinion. I think that the mortgage-deed executed in the present case was one executed by a surety to secure the due performance of the contract entered into between the decree-holder and this Court in accordance with its order dated the 1st March, 1927. Under those circumstances the stamp of Rs. 5 paid in the present case is quite sufficient.

By the Court.—Judgment accordingly. A copy will be sent to the Chief Revenue-Authority.

A. N. A.

Reference answered.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 228 OF 1927.

November 4, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

NAGESHAR NATH SINGH AND ANOTHER
—PLAINTIFFS—APPELLANTS

versus

TEMPLE OF RAM JANKI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation by manager

—Alienation supported by necessity—Necessity for portion of consideration not specified—Validity of sale—Purchaser, whether bound to refund such surplus. Where a purchaser of joint family property from the manager of the family has acted in good faith and after due enquiry and the sale itself is justified by legal necessity, it cannot be set aside merely because a certain portion of the consideration was taken in cash by the vendors without specification of the nature of the necessity; nor is the purchaser bound to make re-payment of such surplus to the members of the family challenging the sale.

Sri Krishn Das v. Nathu Ram (1), followed.

Second appeal against the decree of the Additional Subordinate Judge, Fyzabad, dated the 30th March, 1927, confirming that of the Munsif, Haveli, Fyzabad, dated the 28th January, 1927.

Messrs. Satya Nand Roy and Radha Krishna, for the Appellants.

Messrs. A. P. Sen and B. P. Chatterji, for the Respondents.

JUDGMENT.—This appeal is only concerned with the amount of Rs. 500 which was taken in cash by the vendors without specification of the nature of the necessity. It is accepted by the learned Counsel for the appellants that the remaining consideration of the sale-deed Rs. 1,000 was legitimately taken in satisfaction of antecedent debts. The contesting respondent would admittedly only be liable to suffer to the extent of Rs. 250 out of this amount. There is a finding of fact, which is final in second appeal, that the purchaser acted in good faith and after due inquiry and that the sale itself was justified by legal necessity. The lower Courts have rightly applied; therefore, the principle laid down in *Sri Krishn Das v. Nathu Ram* (1) by their Lordships of the Judicial Committee. The purchaser was under no obligation to inquire into the application of the surplus and is not bound to make re-payment of such surplus to the members of the family challenging the sale. We, therefore, dismiss this appeal with costs.

A. N. A.

Appeal dismissed.

(1) 100 Ind. Cas. 130; 4 O. W. N. 181; 25 A. L. J. 80; A. I. R. 1927 P. C. 37; (1927) M. W. N. 89; 38 M. L. T. 43; 8 P. L. T. 210; 31 O. W. N. 462; 54 I. A. 79; 49 A. 149; 29 Bom. L. R. 825; 45 O. L. J. 386; 52 M. L. J. 720 (P. C.).

ODH CHIEF COURT.

FIRST CIVIL APPEAL No. 40 OF 1927.

December 7, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Pullan.

SAT NARAIN SINGH—DEFENDANT—

APPELLANT

versus

Babu BADRI PRASAD SINGH—

PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 52.—Lease during pendency of suit—Suit by successful claimant to avoid lease and eject lessee—Jurisdiction of Civil Court—Oudh Rent Act (XXII of 1886), s. 108.—Suit for ejectment of tenant—Lis pendens—Transferee pendente lite, whether bound by compromise decree.

The doctrine of *lis pendens* as enunciated in s. 52 of the Transfer of Property Act applies to transfers effected during the pendency of a contentious suit or proceeding even when such a suit or proceeding is subsequently compromised and a decree is passed in pursuance of such compromise. [p. 558, col. 1.] *Annamalai Chettiar v. Malayandi Appaya Naik* (1), followed.

During the pendency of a litigation between A and B with respect to the title to a certain piece of land B leased the same to C. B subsequently withdrew from the contest and a compromise decree was passed in A's favour. A then sued to eject C contending that the lease was not binding on him:

Held, (1) that the suit was cognizable by the Civil Court; [p. 557, col. 2.]

(2) that the lease was not binding on A in the absence of fraud or collusion between A and B. [p. 558, col. 2.]

First appeal from the decree of the Additional Sub-Judge, Fyzabad, dated the 8th December, 1926.

Mr. Anand Narain Bahadur, for the Appellant.

Mr. Bisheshar Nath, for the Respondent.

JUDGMENT.—This is a defendant's appeal against a decree passed by the learned Additional Subordinate Judge of Fyzabad on the 8th December, 1926. The facts of the suit out of which this appeal arises are as follows. The plaintiff, Badri Prasad Singh, came into Court on the following allegations. He alleged that the village of Arusa Azampur in the Fyzabad District had devolved upon his father, Sarju Narain Singh, and his father's brother, Bhola Singh, in equal shares, and that on the death of one brother his share devolved upon the survivor. His case was that on Bhola Singh's death in 1918 his widow Dhiraj Kuar had taken possession of Bhola Singh's share, that subsequently a 2-annas share in the village was brought to sale in execution of a decree obtained on a mortgage executed by Bhola Singh and that that share had been purchased by the

plaintiff's son. He continued that in August, 1924, Sarju Narain Singh had sued *Musammatt* Dhiraj Kuar for possession of this 6-annas, and that he obtained an *ex parte* decree against her on the 25th September, 1924. In execution of this decree, Sarju Narain Singh obtained possession on the 24th January, 1925. Admittedly on the 26th January, 1925, *Musammatt* Dhiraj Kuar, although she then had lost the suit and was out of possession, executed a *theka* of the 6-annas share in favour of the defendant-appellant Sat Narain Singh. This *theka* was for a period of twenty years. Under it the *thekadar* was to pay the land revenue as it then stood and pay Rs. 60 a year to *Musammatt* Dhiraj Kuar. The land revenue was then Rs. 241-5-0. In event of its enhancement *Musammatt* Dhiraj Kuar was to pay the difference. This *ex parte* decree in favour of Sarju Narain Singh was considered on appeal by a Bench of the late Judicial Commissioner's Court on the 27th March, 1925, and the case then went back for re-hearing to the Fyzabad Court. On the 1st December, 1925, Sarju Narain Singh died and was succeeded by the present plaintiff Badri Prasad Singh. On the 2nd February, 1926, *Musammatt* Dhiraj Kuar, who had previously been contesting the suit withdrew from contest, and admitted the claim of the plaintiff-respondent. The suit was accordingly decreed in his favour. But in the meantime she had recovered possession over the 6-annas share and had transferred that possession to Sat Narain Singh under the terms of the *theka* already mentioned. In consequence, Badri Prasad Singh instituted the suit, out of which this appeal arises, on the 20th of April, 1926, in the Court of the Subordinate Judge of Fyzabad for the ejectment of Sat Narain Singh from the 6-annas share, for possession over the 6 annas share and for mesne profits.

When the suit came on for hearing Sat Narain Singh took a very large number of pleas. The Additional Subordinate Judge decided the suit on one point only. The position which he took was this. There was no contest as to the fact that Badri Prasad Singh, after *Musammatt* Dhiraj Kuar had admitted judgment in his favour, became the owner and possessor of the 6-annas share as against Dhiraj Kuar. Thus if he could show, that Sat Narain Singh had no right to remain in occupation of

that share by virtue of his title from Dhiraj Kuar, Badri Prasad Singh had a right to eject Sat Narain Singh, and to obtain mesne profits from him. Sat Narain Singh's claim to resist the suit rested upon the validity of the *theka* of the 26th January, 1925. If that *theka* was a good *theka* he could not be ejected. The learned Additional Subordinate Judge, holding that the *theka* was bad under the provisions of s. 52, Act IV of 1882, as having been executed *pendente lite*, drew as the necessary conclusion from that finding that Sat Narain Singh had no title and directed his ejectment. Sat Narain Singh appeals against that decision. The first point taken by the learned Counsel who has argued the appeal, was that the Civil Courts had no jurisdiction to decide the case. That plea was taken in the Court below, but it has not been decided by the learned Additional Subordinate Judge. We are inclined to think from our examination of the proceedings that the reason why the learned Additional Sub-Judge did not decide that plea was because that plea had been in effect withdrawn by the defendant-appellant's Counsel. However, we do not wish to stand in the defendant-appellant's way upon the point, and we now decide ourselves whether the Court had or had not jurisdiction. It clearly had jurisdiction. Babu Badri Prasad Singh is now the landlord of his share. In order to show that the Civil Court had no jurisdiction, it was necessary for the defendant-appellant to show that this suit was one of the suits excepted from the jurisdiction of the Civil Courts under the provisions of s. 108, Local Act XXII of 1886 as amended. It would have to be included in group A covered by sub-ss. (1) to (5 a). The learned Counsel suggested that this was a suit brought by a landlord for the ejectment of a tenant. He was unable to suggest any other sub-section on which he could base his plea. Clearly this was not a suit for the ejectment of a tenant. Badri Prasad Singh's main position was that Sat Narain Singh was not a tenant but a trespasser. He took the position that *Musammatt* Dhiraj Kuar had had no right to execute the *theka*. If it had been found on the facts that the *theka* was a good *theka* the suit would have been dismissed on the ground that Sat Narain Singh was not a trespasser but a tenant. We, therefore, decide this point against the

appellant. In respect of the finding on which the suit was decreed we have gone through the record of the previous proceedings in the suit between Sarju Narain Singh and Dhiraj Kuar. What happened was this. When the suit was originally filed it came on for hearing on the 25th September, 1924. On that date *Musammatt* Dhiraj Kuar was absent, though duly served. She had not filed a written statement on the date fixed. The learned Additional Subordinate Judge considering that he was justified in taking this course under the provisions of O. VIII, r. 10 of the Code of Civil Procedure at once decreed Sarju Narain Singh's claim against her on the 25th September, 1924. On the 27th September, 1924, two days afterwards, *Musammatt* Dhiraj Kuar applied to have the decree set aside under O. IX, r. 13. The successor of the learned Subordinate Judge who had passed the *ex parte* decree decided on the 8th January, 1925, that she had no case under O. IX, r. 13 and dismissed her application. On the 2nd February, 1925, *Musammatt* Dhiraj Kuar appealed against the order of dismissal of the 8th January, 1925, to the Court of the Judicial Commissioner. Her appeal was admitted and on the 27th March, 1925*, a Bench of the Judicial Commissioners decided in her favour. The matter was sent back to the Subordinate Court. The *ex parte* proceedings were then set aside. There cannot be the slightest doubt as to the fact that as far as until a date considerably later than the 26th January, 1925, there was a *lis* between Sarju Prasad Singh and *Musammatt* Dhiraj Kuar affecting this 6-annas share. The circumstance that the contest was subsequently abandoned in no way affects the fact that the suit was contentious on the 26th January, 1925. In support of the view that the doctrine of *lis pendens* as employed in s. 52 of the Transfer of Property Act applies to transfers effected during the pendency of a contentious suit or proceeding, even when such a suit or proceeding is subsequently compromised and a decree passed in pursuance of such a compromise, we need only refer to a decision of a Full Bench of the Madras High Court in *Annamalai Chettiar v. Malayandi Appaya Naik* (1). It is true that it is open to the

transferee in such circumstances to avoid the consequences of the transfer having been made at that time by establishing that the compromise is tainted by fraud or collusion; and in this particular suit the appellant has endeavoured to show that the withdrawal of contest by *Musammatt* Dhiraj Kuar was the result of fraud and collusion. The learned trial Judge has found against him upon this point. We have come to the same conclusion. It is noticeable that, although Badri Prasad Singh was in the witness-box, the appellant's Counsel did not attempt to cross-examine him to show that the withdrawal of contest by *Musammatt* Dhiraj Kuar had been obtained dishonestly or fraudulently, or that there was a trace of collusion in the former proceedings. The appellant called two witnesses to establish fraud and collusion. The first witness Sripat Singh has been stigmatized by the learned trial Judge as a shameless liar. This strong condemnation is, in our opinion, thoroughly deserved. The second witness Ramanand stated distinctly that he knew of nothing dishonest in the litigation, and that he did not know why Dhiraj Kuar had withdrawn her contest. He said that he personally had tried to persuade her that she had a good case but that she refused to continue the contest. The learned Counsel for the appellant has endeavoured to show to us that *Musammatt* Dhiraj Kuar must have succeeded if she had continued the contest. We do not agree with him. It appears to us that on the merits Sarju Narain Singh may well have succeeded. But in any circumstances we find that on the facts the compromise was not tainted by fraud or collusion. The learned Counsel for the appellant has further taken the ground that the learned trial Judge should have decided all the issues framed in the suit. We consider that the learned trial Judge adopted a very proper course in not deciding the issue to which we have not referred. Badri Prasad Singh being clearly as against Dhiraj Kuar the owner of this 6-annas and Sat Narain Singh who derived his title from Dhiraj Kuar having thus no title to occupy this 6-annas, it would have involved an unnecessary waste of time to have determined the other points. We, therefore, dismiss this appeal with costs.

A. N. A.

Appeal dismissed.

(1) 29 M. 426; 1 M. L. T. 145; 16 M. L. J. 372 (F. B.).

*See 88 Ind. Cas. 540—[Ed.]

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 181 OF 1927.

October 24, 1927.

Present :—Mr. Justice Raza.

RAM PRASAD—DEFENDANT—APPELLANT
versus

GURPATRI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV,
r. 6—Mortgage suit—Application for personal decree.
—Limitation—Limitation Act (IX of 1908), Sch. I,
Art. 66.

The amount due on a mortgage was payable in 1910. The mortgagee instituted a suit for sale in 1922. A compromise decree was passed which directed that the mortgagor should pay the amount by the end of June, 1923, and that, on default the half of the properties should be sold. A final decree was passed on 2nd February, 1924, and the mortgagee applied for a personal decree on the 31st May, 1926:

Held, that the application was barred by limitation.

Ganesh Lal Pandit v. Khetra Mohan Mahapatra (1), referred to.

Second appeal against the decree of the District Judge, Fyzabad, in Appeal No. 202 of 1926, dated the 24th January, 1927, setting aside that of the Subordinate Judge, Fyzabad, dated the 30th October, 1926.

Mr. Naimullah, for the Appellant.

Mr. Radha Krishna Srivastava, for the Respondent.

JUDGMENT.—Gurpatri brought a suit against Ram Prasad on the 11th September, 1922, on the basis of a registered mortgage, dated 18th September, 1908. It was a simple mortgage. The mortgagor had covenanted to pay off the mortgage within two years from the date of the deed. The mortgagee was authorized to sell the mortgaged property in case the mortgagor failed to pay off the mortgage within that period. That period expired on the 18th September, 1910. Nothing was paid on account of the mortgage. Hence the mortgagee sued for sale of the mortgaged property.

The suit was compromised on the 17th February, 1923. Ram Prasad agreed to pay Rs. 833-10-3 to Gurpatri at the end of June, 1923, and it was further agreed that if the money was not paid, half of the property mortgaged should be sold.

On the 17th November, 1923, the mortgagee Gurpatri applied for a final decree for sale. The final decree was passed on the 2nd February, 1924.

The property in respect of which the decree was passed in terms of the compromise mentioned above was sold on the

23rd June, 1925. The property was purchased by the decree-holder Gurpatri himself. Rs. 700 were thus realised by the decree-holder.

On the 31st May, 1926, Gurpatri made the present application for the balance (Rs. 280-10-9) under O. XXXIV, r. 6, Sch. I, Civil Procedure Code.

The learned Subordinate Judge dismissed the application on the ground of limitation and also on the ground of *res judicata*.

Gurpatri appealed and his appeal was allowed by the learned District Judge of Fyzabad. He held that the personal liability was subsisting on the date when the parties entered into the compromise of 1923 and limitation, therefore, runs from the date of the compromise or rather from the date of the failure of the mortgagor to pay the mortgage-money entered in the deed of compromise, i. e., from June or July, 1923, and from that date the present application under O. XXXIV, r. 6, is clearly within time under Art. 66 of the Indian Limitation Act.

Ram Prasad has come to this Court in second appeal.

I think this appeal should be allowed. I am not prepared to agree with the learned District Judge that the personal liability was subsisting on the date when the parties entered into the compromise of 1923.

Before the case of *Ganesh Lal Pandit v. Khetra Mohan Mahapatra* (1) was decided by their Lordships of the Privy Council it was held by almost all the High Courts in India that no decree can be passed for the balance under O. XXXIV, r. 6, unless the balance is legally recoverable and the balance would not be legally recoverable if where the plaintiff was relying on his personal remedy against the defendant, his suit for the personal remedy were barred by limitation, i. e., if the suit were brought after the expiration of six years from the due date of the payment. Where the right to enforce that liability has been extinguished by operation of the Statute of Limitation, regard being had to the time of the institution of the suit and not to that of making an application under O. XXXIV, r. 6, a decree cannot be made under it. It was held by their Lordships of the Privy

(1) 95 Ind. Cas. 839; 3 O. W. N. 591; A. I. R. 1926 P. C. 56; 24 A. L. J. 615; 43 O. L. J. 545; 28 Bom. L. R. 931; 24 L. W. 50; 51 M. L. J. 82; 7 P. L. T. 501; (1926) M. W. N. 535; 6 Pat. 585; 31 O. W. N. 25; 53 I. A. 134 (P. C.).

Council in the case mentioned [above *Ganesh Lal Pandit v. Khetra Mohan Mahapatra* (1)] that where a mortgagee sues on a personal covenant to make the mortgagor responsible for any deficiency in the realization of the mortgage-debt out of the mortgaged properties, the claim is barred in three years, it being governed by Art. 65 of the Limitation Act. It is not necessary to decide in this case whether the suit of the mortgagee, who relies on personal remedy, should be brought within six years or within three years, as the present suit was filed more than six years after the accrual of the cause of action. In my opinion the learned Subordinate Judge was perfectly right in holding that the present application for a money-decree under O. XXXIV, r. 6, Sch. I, Civil Procedure Code, is barred by limitation. I have examined the compromise carefully. So far as I see no reservation was made in the compromise in respect of the plaintiff's right to obtain a money-decree subsequently against the mortgagor. The terms of the compromise do not impose any personal liability on Ram Prasad to pay the balance in question to Gulpatri.

Under these circumstances Gulpatri's application was rightly dismissed by the learned Subordinate Judge.

Hence I allow this appeal and setting aside the order of the learned District Judge restore the order of the learned Subordinate Judge. Ram Prasad will get his costs from Gulpatri in all the Courts.

A. N. A.

Appeal allowed.

ODISH CHIEF COURT.

SECOND CIVIL APPEAL No. 350 OF 1927.
December 5, 1927.

Present :— Sir Louis Stuart, Kt.,
Chief Judge, and Mr. Justice Pullan.

RAMPAL SINGH—DEFENDANT—

APPELLANT

versus

JAI RAM SINGH—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 100—
Construction of documents, whether question of law—
'Construction' meaning of.

The expression 'construction' as applied to a document includes two things: first, the meaning of the words, and secondly, their legal effect or the effect which is to be given to them. The meaning of the words is a question of fact in all cases and the effect of the words is a question of law.

Chatenay v. Brazilian Submarine Telegraph Co. (1), referred to.

Second appeal against the decree of the District Judge, Fyzabad, dated the 30th July, 1927, upholding that of the Sub-Judge, Sultanpur, dated the 4th October, 1926.

Messrs. R. D. Sinha and G. C. Sinha, for the Appellant.

JUDGMENT.—We have been at length through the judgment of the learned District Judge and are satisfied that his decision to the effect that no family or tribal custom to the effect that the property left by a female of the family devolves upon all the existing collaterals of the husband of the lady *per stirpes* without any regard to nearness or remoteness and in the manner that the descendants of the first born in every line get 19 shares as against the 16 shares to be got by the rest of the line has been established by reliable evidence is a finding of fact with which we cannot interfere in second appeal. He has considered the whole of the evidence before him. No point of law arises on the question of construction of documents. As was laid down by Lindley, L. J., in *Chatenay v. Brazilian Submarine Telegraph Co.* (1) the expression "construction" as applied to a document; at all events as used by English Lawyers, includes two things: first, the meaning of the words; and secondly, their legal effect, or the effect which is to be given to them. The meaning of the words is a question of fact in all cases, whether the subject under discussion is a poem or a legal document. The effect of the words is a question of law. Applying these principles it is clear that the decision of the learned District Judge is a decision of fact. We, therefore, dismiss this appeal under O. XLI, r. 11, Civil Procedure Code.

A. N. A.

Appeal dismissed.

(1) (1891) 1 Q. B. 79 at p. 85; 60 L. J. Q. B. 295; 63 L. T. 739; 39 W. R. 65.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 270 OF 1927.

May 25, 1927.

Present :—Mr. Justice Dalal.

MURLI PATHAK—ACCUSED—APPLICANT

versus

EMPEROR THROUGH BHUKKAL

—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342 (2)—Examination of accused—Defamatory statement—Prosecution for defamation, legality of—Privilege.

An accused person cannot be prosecuted for defamation in respect of a statement made by him in his examination under s. 342 of the Criminal Procedure Code.

Champa Devi v. Pirbhu Lal (1), distinguished.
Bai Shanta v. Umrao Amir Malek (2), commented upon*Potaraju Venkata Reddy v. Emperor* (3) and *Satish Chandra Chakrabarti v. Ram Dayal De* (4), referred to.

Criminal revision from an order of the Sessions Judge, Mirzapur.

Mr. M. A. Aziz, for the Applicant.

Mr. Gadadhar Prasad, for the Opposite Party.

JUDGMENT.—The only ground worth considering in this application for revision is ground No. 3 that the alleged defamatory statement having been made by the applicant as an accused person in his defence cannot form the subject-matter of a prosecution for defamation. The applicant Murli Pathak was prosecuted by Bhukkal on a charge under s. 426 of the Indian Penal Code. In the ordinary course, during the trial, the applicant Murli Pathak was examined by the Court under s. 342 of the Code of Criminal Procedure. Questions were put to him by the Court, and he answered them. At the end, one question was : "Why the charge was brought against him by Bhukkal?" and he replied that this was owing to enmity. The next question was whether he had anything more to say, and in answer he gave reason for the enmity. His answer was that he and Bhukkal were not on dining terms because Bhukkal's daughter-in-law was in the keeping of a Lohar. Bhukkal thereupon prosecuted Murli Pathak under s. 499, Indian Penal Code, for defamation, and Murli was punished by a Magistrate with fine under s. 500, Indian Penal Code. An appeal by Murli was dismissed, and he has brought this revision application to this Court.

In my opinion the provisions of s. 342 (2), Criminal Procedure Code, will apply. It is laid down there that the accused shall

not render himself liable to punishment by refusing to answer such questions, that is, those put to him by the Court, under cl. (1) or by giving false answers to them. Murli, who was an accused person in the case under s. 426 is now punished for giving a false answer to a question by the Court. In my opinion the order was prohibited by Statute. On behalf of Bhukkal, complainant, my attention was drawn to the judgment of Mr. Justice Daniels in *Champa Devi v. Pirbhu Lal* (1). In that case the accused person who was prosecuted for defamation had filed a written statement, and the learned Judge has specifically mentioned that the immunity conferred by s. 342 (2), Criminal Procedure Code, did not extend to a written statement. The learned Counsel next referred me to a Full Bench decision of the Bombay High Court *Bai Shanta v. Umrao Amir Malek* (2). The question referred to the Full Bench was whether relevant statements made by an accused person under s. 342, Criminal Procedure Code, or contained in a written statement filed by him with the Court's permission, are absolutely protected from being the subject of a prosecution for defamation under s. 500, Indian Penal Code. The answer to this was in the negative. With all respect it may be pointed out that the question includes two different matters: one privileged under s. 342 (2) and the other (a written statement) not so privileged. The learned Chief Justice while delivering the judgment of the Full Bench observed : "There is nothing in s. 342 of the Code of Criminal Procedure which gives an accused person an absolute privilege as regards defamatory statements made by him in his examination." However the matter may be put, there is no explanation of the provisions of cl. (2) of s. 342, and even if the accused did not have any absolute privilege, it will be sufficient for his purpose if he cannot be punished for making a false statement in answer to question put to him by Court. When he cannot be punished, it must be presumed that he had an absolute privilege under s. 342 (2), Criminal Procedure Code. There is no consideration given to this matter by the learned Judges of the Bombay High Court. The Madras High Court is in

(1) 92 Ind. Cas. 429; 24 A. L. J. 329; 27 Cr. L. J. 253; A. I. R. 1926 All. 287; L. R. 7 A. 64 Cr.

(2) 93 Ind. Cas. 151; A. I. R. 1926 Bom. 141; 28 Bom. L. R. 1; 27 Cr. L. J. 423; 50 B. 162.

favour of absolute privilege [See *Potaraju Venkata Reddy v. Emperor* (3)], while the Calcutta High Court has disagreed with this opinion *Satish Chandra Chakrabarti v. Ram Dayal De* (4). The question which arises here is not of absolute privilege, but of the bar to the accused being punished for anything he may state in answer to question by Court.

It was argued that the answer containing the defamatory statement was wholly irrelevant and added by Murli Pathak not in answer to any question, but of his own motion, to defame Bhukkal. I cannot agree to that view of the circumstances of the examination. Murli was asked the reason for a false charge, and when he gave that to be enmity, and when the Court proceeded to direct him to make any further statement, the natural implication was that the Court desired to know the reason for the enmity, and the defamatory statement did give that reason. The answer which is the subject of the defamation was relevant to the matter in issue and arose out of a question put by the Court. I hold that Murli was saved from punishment by the protection given to him under s. 342 (2) of the Code of Criminal Procedure, when he made the defamatory statement.

I set aside the conviction and sentence and order the fine, if any recovered, to be refunded.

A. N. A. Conviction and sentence set aside.

(3) 14 Ind. Cas. 659; 36 M. 216; (1912) M. W. N. 476; 13 Cr. L. J. 275; 11 M. L. T. 416; 23 M. L. J. 39.

(4) 59 Ind. Cas. 143; 48 O. 388; 32 C. L. J. 94; 14 C. W. N. 582; 22 Cr. L. J. 31.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 481 OF 1926.

November 25, 1927.

Present:—Mr. Justice Lindsay and
Mr. Justice Sulaiman.

Musammat KESAR KUER—DEFENDANT—
APPELLANT
versus

**KALLU RAM AND AFTER HIS DEATH HIS
NEPHEW GANGA PRASAD AND OTHERS**—
PLAINTIFFS—RESPONDENTS.

*Co-sharers—Acquisition by tenant of share in proprietary interest—Tenancy, whether extinguished—
Merger—Liability of tenant to pay rent to other co-sharers.*

There is nothing in law to prevent a co-sharer in a co-parcenary *mahal* from having tenant rights of any kind and being liable to the payment of rent to another co-sharer or the general body of the co-sharers. The acquisition by a tenant, of a share in the proprietary rights in a *mahal* does not, therefore, automatically put an end to the tenancy in its entirety and exempt the tenant from his liability to pay rent to the other co-sharers. [p. 563, col 1.]

Mahabir Singh v. Ahsanullah (1), *Abul Hasan Khan v. Bhura* (2) and *Jamna Prasad Rai v. Damri* (3), followed.

There cannot be complete merger of two rights unless the two are co-extensive. [*ibid.*]

Second appeal from a decision of the District Judge, Agra, dated the 25th November, 1925.

Dr. K. N. Katju and Mr. Benod Behari, for the Appellant.

Mr. Kamlakant, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for arrears of rent brought by Kallu Ram against *Musammat Kesar Kuar*. The suit was dismissed by the Assistant Collector but on appeal it was decreed by the District Judge. His findings on some of the points were not clear. Accordingly a former Bench of this Court framed three issues and remanded the case with direction that the learned Judge should dispose of the case on the lines indicated by the issues.

The learned District Judge has upheld his former decree.

The plots in dispute were recorded as the tenancy of one Sri Ram and on his death were recorded in the name of his widow *Musammat Kesar Kuar*. Kallu Ram was recorded as the *lambardar* and the proprietor of the *mahal* in which these plots are situated. In 1917 there was a dispute between the parties in the Civil Court and the matter was referred to the arbitration of three arbitrators and an award was pronounced on the 31st of May, 1918, followed by a decree of the Civil Court. Under this decree *Musammat Kesar Kuar* was given a half share in the proprietary interest in the *mahal*.

The learned District Judge has found, and his finding is one of fact, that the defendant has failed to prove that she had any proprietary interest in the *mahal* prior to the award of 1918. She must, therefore, be treated as a tenant of the plots prior to that date. Since then, however, she has become a co-sharer entitled to an equal share with Kallu Ram in the proprietary interest in the *mahal*.

The learned District Judge in referring to the judgment of this Court delivered

on the former occasion has remarked that there was a mistake inasmuch as it was stated that the award was delivered in 1325 *Fasli*. The learned District Judge has, without checking the record, made this remark, for we find that the 31st of May, 1918, the date of the award, fell in 1325 *Fasli*, and, therefore, the High Court's statement was quite correct and has been wrongly objected to.

The learned District Judge has given the plaintiff a decree for half the amount of rent due on account of these plots, holding that the tenancy to the extent of one half has become merged in the proprietary interest acquired by *Musammāt Kesar Kuār* since the award.

The point which has been urged before us on behalf of the appellant is that having become a proprietor in the *mahal* she has ceased to be a tenant and the only remedy now open to the plaintiff is a suit for profits in which the rent could be taken into account and adjusted. It is further urged that a person cannot both be a *zemindar* and a tenant in one and the same *mahal*. But there cannot be complete merger of two rights unless the two are co-extensive. We are of opinion that this point is concluded by a series of authorities, which it is not now possible to disturb. We may refer to the case of *Mahabir Singh v. Ahsanullah* (1) followed subsequently in S. A. No. 303 of 1918 decided on the 28th of February, 1918, and *Abul Hasan Khan v. Bhura* (2). We may also mention that the Board of Revenue has accepted the same principle as shown by the case of *Jamna Prasad Rai v. Damri* (3). All these cases are authorities for the proposition that there is nothing in law to prevent a co-sharer in a co-parcenary *mahal* from having tenant rights of any kind and being liable to the payment of rent either to another co-sharer or to the general body of co-sharers, and that if a tenant subsequently acquires proprietary rights in the land his tenancy does not automatically come to an end in its entirety.

In view of these authorities we are of opinion that this appeal must be dismissed.

The result, therefore, is that this appeal is dismissed with costs including in this Court fees on the higher scale.

A. N. A.

Appeal dismissed.

(1) A. W. N. (1901) 53.

(2) A. W. N. (1906) 226; 3 A. L. J. 763; 28 A. 763.

(3) 1 Unpub. Dec. of the Board of Rev. (1925) p. 77.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 592 OF 1927.

October 28, 1927.

Present:—Justice Sir Cecil Henry Walsh, Kt.

BUDHUA—ACCUSED—APPLICANT
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 173—"Preventing personal service", meaning of—Criminal Procedure Code (Act V of 1898), s. 69 (1)—"Tender," meaning of:

A man who gets away from the serving officer with the obvious intention of not allowing him to hold any communication with him at all and shuts himself in his house, is intentionally preventing service either by tender or by delivery, and is guilty of an offence under s. 173, Penal Code. [p. 564, cols. 1 & 2.]

Sahadeo Rai v. Emperor (1) and *Queen v. Punamalai Nandan* (2), commented upon.

Personal service under s. 69 (1), Criminal Procedure Code, may be made either by delivering or tendering, but the tender must be a real tender of a document which is understood by the person to be served, and he must have voluntarily waived actual delivery and indicated in some way that a tender was sufficient. The offence of preventing personal service is in each case, a question of fact. [p. 564, col. 1.]

Criminal reference made by the District Magistrate, Jalaun.

The Assistant Government Advocate, for the Respondent.

JUDGMENT.—This case has been referred to the High Court on a question of what may or may not constitute "intentionally preventing service on himself" of a summons within the meaning of s. 173, Indian Penal Code, and it has been referred in consequence of a decision by the late Mr. Justice Knox in the case of *Sahadeo Rai v. Emperor* (1), that inasmuch as a tender of summons is sufficient, a refusal to receive it does not amount to preventing service.

If the decision of my late brother goes as far as that was contended before the District Magistrate I find myself unable to agree, greatly as I respect every decision, especially on a question of Criminal Procedure, by that distinguished and experienced member of this Court. There is a similar decision reported as *Queen v. Punamalai Nandan* (2). I think that these decisions are liable to be misunderstood. The reasoning is based upon the method of service prescribed by s. 69, Criminal Procedure Code. Sub-s. 1 deals with personal service where it is practicable. Perso-

(1) 46 Ind. Cas. 522; 16 A. L. J. 453; 19 Cr. L. J. 746; 40 A. 577.

(2) 5 M. 199; 1 Weir. 80; 6 Ind. Jur. 410; 2 Ind. Dec. (N. S.) 139.

nal service may be made either by delivering or tendering, but it seems to me that the tender must be a real tender of a document which is understood by the person to be served, and he must have voluntarily waived actual delivery and indicated in some way that a tender was sufficient. I think, therefore, the offence of preventing personal service must be in each case a question of fact. A man might be so busily engaged or his hands, for example, might be so dirty that he might say to the server: "all right put it down on that spot." On the other hand, he might say: "it is no good delivering it, I cannot read, tell me what it says and that will satisfy me." No doubt if the man to be served gives the server an adequate opportunity of tendering the summons, the serving officer need not deliver it.

In these particular cases it has been found that the person to be served, not only refused to receive it, but actually shut the door of his house in the face of the officer, showing clearly an intention to refuse to accept service, and an intention inconsistent with a tender. By sub-s. 2 of s. 69, the person to whom the summons has been tendered may be required to sign a receipt on the back of one of the duplicates, and if he runs away and shuts himself in his house, he clearly cannot be asked to sign a receipt, and he shows his intention to prevent service. These arguments have been submitted to the High Court in the Magistrate's referring order, and I agree with them. My brother Knox in the case referred to pointed out that a mere refusal to receive a summons is not an offence. He did not deal with a case where the conduct is clearly intentional and prevents either form of service.

In the Madras case the report says as so often happens in India, "that the facts will appear from the judgment," whereas in truth they do not. It merely appears that the accused refused to receive the summons, but it does not say what the tender was nor whether they signed the receipt. The Court on that occasion followed a previous case but the facts in that case were different because the summons was actually served upon the accused and he threw it down afterwards, and, therefore, could not be said to have prevented service. I think a man who gets away from the serving officer with the obvious intention of not allowing him to hold any communication with him

at all and shuts himself in his house, is intentionally preventing service either by tender or by delivery, and that the accused in this case was rightly convicted and fined. Let the record be returned.

G. A.

Record returned.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 365 OF 1924.

November 1, 1927.

Present:—Mr. Justice Sulaiman and
Mr. Justice Ashworth.SALAIK CHAND AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

Musammat TAMIZ BANO AND OTHERS

—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 3, 67—Proof of documents—Proof of handwriting of executant, necessity of—"Proved", meaning of.

A document cannot be held to be proved, as required by the Evidence Act where there is no evidence that the signature purporting to be that of the executant is in the handwriting of the executant, even if the Court considers the execution so probable that a prudent man ought, under the circumstances of the case, act upon the supposition that there had been execution. [p. 566, col. 1.]

The definition of the word "proved" in s. 3 of the Evidence Act must, when applied to documents, be read along with s. 67 of the Act. [*ibid.*]

First appeal from a decision of the Subordinate Judge, Meerut, dated the 28th of August, 1924.

Dr. M. L. Agarwala and Mr. S. B. Shastri, for the Appellants.

Messrs. Iqbal Ahmad and Mukhtar Ahmad, for the Respondents.

JUDGMENT.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for sale on the basis of a mortgage deed alleged to have been executed by Abdul Qayum, the predecessor of the defendants, on the 24th September, 1913, and registered. The particulars of the mortgage were given in full in the plaint. The written statement of Musammat Tamiz Bano, one of the defendants, first of all merely stated that the allegations in the various paragraphs of the plaint with certain exceptions "were not admitted." It then went on to say in para. 9 that the execution, completion and the consideration of the document sued upon was not admitted by the contesting defendant. I may note here that the translation of this paragraph as printed is not accurate. The defendant meant not to admit

either the execution, completion or the consideration. The Court below framed the first issue as follows: Is the hypothecation bond genuine and for consideration? The parties led evidence on the question of execution as well as consideration, and the plaintiff produced an attesting witness Sheo Prasad and himself went into the witness-box in trying to prove due execution. The Court below found this issue against the plaintiffs and held that the requirements of the law as laid down in s. 67 of the Evidence Act, were not complied with and "execution for consideration" was not proved. Hence this appeal. In my opinion, the contention urged before us, which does not find place in the memorandum of appeal, that the execution of the bond had not been specifically denied, cannot be accepted particularly in view of the fact that the parties understood in the Court below that the execution of the bond was in dispute and issue was framed and evidence was led on it. The defendant Tamiz Bano did specifically say that she did not admit it. Even if there was some ambiguity, it was open to the Court under the Proviso to O. VIII, r. 5, Civil Procedure Code, to call upon the plaintiffs to prove it.

The main point for consideration is whether the Court below was right in finding that the execution of the document in dispute had not been fully proved.

As regards the evidence of the plaintiff, Salaiik Chand, the Court below was pointed out that on his own showing he was a boy of fourteen years of age when the document was executed and that in his evidence he purported to recognise the thumb-impression of the witness, Sheo Prasad, which showed that he was not a reliable witness. The Court below was not impressed by his evidence and did not think that his statement that he could identify the signature of Abdul Qayum could be accepted.

We must accept the estimate of the evidence of this witness as made by the Court below. The second witness was Sheo Prasad, who admittedly is an illiterate person and is unable to read the document or identify the signature of Abdul Qayum. His statement, however, was that Abdul Qayum had executed a bond for Rs. 3,000 in favour of Ram Chandra Sahai 11 years ago and that the bond was attested by him and he had

made his thumb-impression on it. The contents of the bond were read over to him and he stated that they were similar to the contents of the bond which had been executed by Abdul Qayum, though he had to admit that he did not remember the wording of it. He purported to identify his own thumb-impression on the document. The Court below was not satisfied that Sheo Prasad who was an illiterate person, could identify the thumb impression appearing on this document as that of his own. Being illiterate he cannot specifically prove the signature purporting to be that of Abdul Qayum. No doubt the document was registered and there may be ground for supposing that it was not a forged document, but it had to be proved under s. 67 of the Indian Evidence Act that the document alleged to have been signed by Abdul Qayum was in his handwriting. It is the fault of the plaintiffs themselves that they brought this suit long after the other attesting witnesses and the scribe were dead. This may be a misfortune for them, but we have to see whether they have complied with the requirements of the law. Under the circumstances, it must be held that there is not sufficient legal evidence on this record to establish that the signature which purports to be that of Abdul Qayum is that of Abdul Qayum himself. I would, therefore, uphold the decree of the Court below and dismiss the appeal.

Ashworth, J.—I concur in the dismissal of the appeal. There is, in my opinion, no force in the plea which Mr. Agarwala took up in argument, although not contained in the memorandum of appeal that the lower Court improperly framed an issue as to execution of the mortgage deed. That contention appears to me to be based on a mistranslation of para. 9 of the written statement as it appears in the record of proceedings. That paragraph denied three things, execution, completion and consideration for the deed. The translation suggests that it was merely consideration which was denied. Order VIII, r. 5, of the Civil Procedure Code, must be interpreted to mean that a defendant may either deny or not admit an allegation of the plaintiff, but if he wishes to do this, he must state that he denies or does not admit each separate allegation and must state the allegation.

He cannot make a general denial or refuse generally to admit several allegations. The rule cannot be interpreted to mean that a refusal to admit a specific allegation can be taken to be an admission of that allegation. It was argued by the appellants' Counsel in this case that it was open to the Court below and is open to this Court to come to a conclusion that the document in question was duly executed by holding that execution was proved in the sense that the word proved is defined in s. 3 of the Evidence Act. In other words, it was contended, that we might hold this document to have been executed because we considered that execution was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that there had been execution. I concur with my learned brother that the execution of a document cannot be deemed proved as required by the Evidence Act merely because it is proved in the sense of the definition of proved. That definition of the word proved must be read along with s. 67 of the Act. That section requires that there must be specific evidence that the signature purporting to be that of the executant is in the handwriting of the executant. Until this is proved, the Court cannot proceed to consider whether execution is proved. In other words, s. 67 makes proof of execution of a document something more difficult than proof of matter other than the execution of a document. In this case it was unfortunate for the plaintiffs that both their witnesses who were produced to prove the signature of the executant, were under a disability. One of them was illiterate and could only make his thumb-impression. The lower Court was right in believing that this man could not recognise a signature alleged to have been made in his presence 11 years before. As to the plaintiff, he stated that he was only 12 years old when he saw Abdul Qayum sign the document. He had never seen his signature before. He does not say that he had ever seen it since. He pretended (obviously wrongly) that he could identify the thumb-impression. These facts being taken into consideration, the lower Court was quite justified in distrusting his evidence. It may be that proof of the signature of Abdul Qayum by the plaintiff was a matter of great difficulty but the plaintiff or his

predecessor-in-interest, namely, his father cannot be said to be free from responsibility for that difficulty. They should have sued on the bond sooner. It is common sense for a person holding a bond not to wait for bringing a suit on the bond until the evidence of the signature of the person liable under it has become difficult. Every one must be presumed to know the law and consequently the plaintiff or his father should have been aware of the provision of s. 67 which requires strict proof of signature.

For the above reasons, I concur in the dismissal of this appeal.

By the Court.—The appeal is dismissed with costs including fees in this Court on the higher scale.

A. N. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 485 OF 1924.

November 10, 1927.

Present:— Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Kendall.

RAMANAND AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

THE SECRETARY OF STATE FOR
INDIA IN COUNCIL—DEFENDANT—

RESPONDENT.

Bengal Alluvion and Diluvion Regulation (XI of 1825), cl. 4—U. P. Land Revenue Act (III of 1901), s. 99—Land added by alluvion from one permanently settled village to another—Assessment to revenue, legality of—'Alluvion,' meaning of.

Land belonging to a permanently settled village which is added to another permanently settled village by alluvion is not exempt from being assessed to revenue. [p. 569, col. 1.]

Alluvion means the accession to land by gradual or momentarily insensible addition of matter by the action of water, or by the insensible reliction of water from its bank. [p. 568, col. 1.]

First appeal from a decree of the Subordinate Judge, Mirzapur.

Dr. M. L. Agarwala, for the Appellants.

Mr. U. S. Bajpai, for the Respondent.

JUDGMENT.—This is the plaintiffs' appeal from a decision of the Subordinate Judge of Mirzapur, who decided that certain land in the possession of the plaintiffs, situate on the east side of a stream, by name Jargo, was assessable to revenue. The plaint set out that the stream Jargo flowed between the villages Bagheri and Manikpur,

and that each village was permanently settled. Paragraph 5, which was not admitted, ran as follows:—"That according to custom or usage prevailing in the locality, land cut away by fluvial action from one village and added or accreted to another becomes the property of the proprietors of the village to which such land has been so added and becomes part and parcel of such village." Paragraph 6 alleged that "according to the said custom or usage the proprietors of villages liable to be affected by fluvial action have to bear any detriment or loss or enjoy any benefit or gain that may be caused by such fluvial action."

It was then said that more than 25 years ago the river Jargo began to cut away land from Manikpur and added much land to Mauza Bagheri and that by about the year 1907 some 30 acres of land had been so added to Bagheri. It was alleged that in a suit between the proprietors of Manikpur and Bagheri it was judicially decided that the said area had become the property of the owners of Bagheri. The contention was then put forward that as the added land had become part of the village Bagheri which had been the subject of the Permanent Settlement, the proprietors of Bagheri were not liable to be assessed to revenue on account thereof.

After indicating certain points of law based upon Regulation II of 1819, Regulation XI of 1825 and the Land Revenue Act (III of 1901), the plaintiff alleged that in disregard of the Permanent Settlement and of the absolute undertaking then given, the Revenue Authorities had assessed the said 30 acres to revenue, and the plaintiff asked for a declaration that the *zemindars* of Bagheri were not liable to pay any additional revenue in respect of the land detailed below. Some importance is to be attached to the word "additional." The plaintiffs also asked that the Government might be restrained from realizing the annual revenue, and that a sum of Rs. 4,200 paid under protest might be refunded to them.

A reference to the map marked G. M. and C. H. B. K. (a plain copy of which will be found at the end of the record) shows the stream Jargo flowing in a north-easterly direction and falling into the Ganges. The relatively straight red ink line marks the boundary between the two villages at the time of the Settlement in 1882. The curved green pencil line superimposed on the red ink one marks the

boundary line of the two villages at the time of the Settlement in 1921. The areas hatched in green pencil are agreed to be the 30 acres in question in this case. The contention of the Revenue Authorities, when they assessed the land was that they did so under the provisions of cl. 4 of Regulation XI of 1825 read with s. 99 of the Land Revenue Act (III of 1901). Clause 4 provided that land gained by gradual accretion "shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation II of 1819, or of any other Regulation in force." The Revenue Authorities say that the Regulation in force when they imposed the assessment was the Land Revenue Act III of 1901 and that s. 99 entitled them in terms to assess this particular land. The section is as follows "Land added by alluvions to a *mahal* may be assessed and settled by the Collector in accordance with rules made under s. 234." In the circumstances of the case it was quite certain that land had been added. It was quite certain that it had been added to a *mahal*, and in the opinion of the Board of Revenue the land so added was in its nature alluvion. They, therefore, assessed the 30 acres to revenue.

The plaintiff contested the legality of that assessment but an appellate order of the Revenue Court of the 1st of November, 1922, decided the assessment to be valid; and thereupon the plaintiffs brought this suit.

Dr. Agarwala, on behalf of the plaintiffs, contends that as the land of both the villages was permanently settled no additional settlement could ever be imposed no matter in whose hands any particular area of land might happen to be at any moment. That is to say if the *zemindar* of Bagheri held at any particular moment land which had been included in the Permanent Settlement of Manikpur that the *zemindars* of Bagheri could claim that the added land should not be the subject of any taxation, because a portion of the revenue permanently settled was being in fact paid in respect of that land by persons living across the other side of the stream, namely, the *zemindars* of Manikpur. Dr. Agarwala contended that as the village of Bagheri was permanently settled, it must follow that everything which had become part of the village of

Bagheri is by reason of the Permanent Settlement protected from further imposition. He also said that the added land could not fairly be called alluvion, and the Land Revenue Act III of 1901 and the Circular 8-1 were *ultra vires* in so far as they purported to affect permanently settled land.

Before considering the law on this matter, it is necessary to state a few facts.

The facts in relation to the movement of the river and the deposit of the added area are as follows. During each and every rainy season, or during some but not every rainy season and during the period of subsidence of the river, the river Jargo has gradually altered its course, principally to the westward, cutting into Manikpur; but on two small sections it has moved eastward cutting into Bagheri. There has been no occasion on which the river has markedly altered its course, so that any *zemindar* of Manikpur could point to land of his which originally lying on the left bank of the river has suddenly appeared on the right bank. The result of the movement has been to add in a course of years the area of 30 acres to Bagheri and a relatively small area to Manikpur. The area of 30 acres was built up in the rainy seasons and during the subsidence of the river, as we have already said, month by month, but it was in the nature of a gradual and not a sudden accretion. We are of opinion that, in the circumstances, the land so added to Bagheri satisfied the meaning attached to the word 'alluvion,' which according to Webster's Dictionary is "accretion to land by the gradual or momentarily insensible addition of matter by the action of water, or (as broadly used by some) by the insensible reliction of the water from its bank." A much shorter definition is given in the Circular 8-1 printed at page 183 of 8th edition of Dr. Agarwala's Commentary on the Land Revenue Act. There alluvion is said to mean "an actual increase in area caused by fluvial action." Dr. Agarwala objects to our acceptance of that definition, on the ground that the Board have no authority to define the meanings of words appearing in the Statute. But taking the definition given by Webster, we are of opinion that the added area of land fits in with that definition, and is in fact alluvion.

The first case to which we were referred was one of *Nogender Chunder Ghose v.*

Mahomed Esoff (1). This case does not establish any principle of law which helps Dr. Agarwala, but contains a convenient summary of Regulation No. XI of 1825 (at page 118* of the Report). The Judges point out the 4th section of the Regulation as divided into free clauses, and the first deals with land gained by gradual accession (*i. e.*, alluvion in the proper sense of the word).

He brought to our notice the case of the *Secretary of State for India v. Fahamid-annissa Begum* (2), and it certainly is an authority in point and has helped us to arrive at a decision in this case. Their Lordships of the Privy Council after dealing with the opening clauses of Regulation II of 1819, discussed at page 600† of the Report the various clauses of s. 31. It seems perfectly clear that lands permanently settled are not to be the subject of any additional assessment, and the decision of the Revenue Authorities may be reversed by a Civil Court "in any case in which it shall appear that lands which actually formed at the period in question a component part of such an estate have been unjustly subjected to assessment." The important words are of course "lands which actually formed at the period in question a component part of such an estate."

Now this added land did not at the date of the Permanent Settlement form any part of the village of Bagheri, and the position has been that since the year 1907, according to the pleadings, the *zemindars* of Bagheri have been holding these 30 acres revenue free. The difficulty in Dr. Agarwala's way throughout has been the very short answer that this land was never included in the Permanent Settlement of 1793 with the *zemindars* of Bagheri. At that date Bagheri had an acreage of 735 *bighas* 4 *biswas* and at the time of the assessment complained of the acreage was 797 *bighas* 8 *biswas*, the increase being represented by the 30 acres in dispute.

Another case cited before us was that of the *Secretary of State for India v. Maharaja of Burdwan* (3). There is a marked difference in the facts of that case and the one we

(1) 18 W. R. 113; 10 B. L. R. 406; 3 Sar. P. C. J. 151 (P. C.).

(2) 17 C. 590; 17 I. A. 40; 5 Sar. P. C. J. 391; 8 Ind. Dec. (N. S.) 933.

(3) 67 Ind. Cas. 835; 49 C. 103; 35 C. L. J. 92; 42 M. L. J. 61; 4 U. P. L. R. (P. C.) 1; 26 C. W. N. 619; A. I. R. 1922 P. C. 6; 48 I. A. 565 (P. C.).

*Page of 18 W. R.—[Ed.]

†Page of 17 C.—[Ed.]

are at present considering but there is an important passage which we shall quote. "On an analysis of the term of these Regulations, so far as they are material to the question now under consideration, it appears that, while lands included in a Permanent Settlement were carefully excluded from further assessment, this protection was extended only to lands actually in existence at the time of the Settlement and specifically included in the estate as settled." Their Lordships further point out at page 116* of the report that "property is one thing and assessability is another." In the present case we accept the statement of the plaintiffs that a suit was brought with reference to the ownership of this particular 30 acres and it was decided that that new land must pass to the *zemindars* of Bagheri, but because the property in the land has been declared to be theirs, it by no reason follows that that land is not assessable.

The plaintiffs' contention, limited to the assertion that they are entitled to hold land permanently settled free from any additional settlement is good; but when the investigation discloses that the land was not included in the Permanent Settlement of Bagheri, it becomes apparent that cl. 4 of Regulation XI of 1825 and s. 99 of the Land Revenue Act III of 1901 come into operation. It was contended in fact that revenue on the basis of a Permanent Settlement was paid by the *zemindars* of Manikpur. That may be so. The *zemindars* of Manikpur may, if they please, ask for relief against a payment in respect of land which has passed out of their possession. The *zemindars* of Bagheri wish to take credit for the payment made by the *zemindars* of Manikpur, but no case has been cited by Dr. Agarwala in support of that supposed right and in our opinion the test must be whether the lands in dispute ever formed the subject of a Permanent Settlement in the hands of the present *zemindars* of Bagheri, that is, formed part of that estate so permanently settled. It is contended that they did not.

As in our view the land is alluvion and as it cannot be said that the assessment in dispute is an additional one, we are of opinion that this case is governed by Art. 4 of Regulation 11 of 1825 and s. 99 of the Land Revenue Act. Agreeing, therefore, with the learned Subordinate Judge, we dismiss this appeal with costs.

A. N. A. Appeal dismissed.

*Page of 49 C.—[Ed.]

ALLAHABAD HIGH COURT.

First Civil Appeal No. 13 of 1924.

October 18, 1927.

Present:—Mr. Justice Sulaiman

and Mr. Justice Ashworth.

BANKY LAL AND ANOTHER

—DEFENDANTS—APPELLANTS

versus

NATHA RAM—PLAINTIFF AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 22 (3)—Appeal—Cross-objections against *pro forma* co-respondent, maintainability of—Respondent, meaning of.

Ordinarily in cases where the person against whom cross-objections are filed is not interested in the appeal and is a mere *pro forma* respondent, no cross-objections can be validly filed against him. [p. 570, col. 1.]

Sub-cl. (3) of O. XLI, r. 22, of the Civil Procedure Code as amended does not confer an absolute right on a respondent to file a cross-objection against a co-respondent even where such co-respondent is not an interested party at all and no relief has been claimed against him in the appeal. [*ibid.*]

Kallu v. Manni (1) and *Abdul Ghan v. Muhammad Fasih* (2), referred to.

Per Ashworth, J.—A party to a case cannot be regarded as a respondent in an appeal, the success or failure of which wholly or in part, can in no way affect him. [*ibid.*]

First appeal from the decision of the District Judge, Agra, dated the 30th October, 1922.

Messrs. Iqbal Ahmad and Mukhtar Ahmad, for the Appellants.

Dr. Sen, Messrs. N. P. Asthana, S. K. Das and D. N. Gupta, for the Respondents.

JUDGMENT.

Sulaiman, J.—This appeal arises out of a suit for damages on the ground that certain copyrights have been infringed. The success of the appeal depended entirely on the success of Suit No. 454 of 1922 brought to set aside the sale. That suit has now been dismissed by our order in First Appeal No. 427 of 1927 decided to-day. It is, therefore, conceded that this appeal must fail with costs on the higher scale.

The plaintiffs have filed certain cross-objections against Janki Das, defendant. A preliminary objection is taken that no such cross-objections lie. The plaintiffs had impleaded Janki Das alleging him to be a partner of the defendants' firm, and had claimed relief against him jointly with the others. The Court below has held that Janki Das is not proved to have been a partner. The suit against him has been dismissed. The plaintiffs filed no appeal against Janki Das at all within the time

allowed by law. The other defendants, viz., Banki Lal and others filed an appeal against the plaintiffs, and in the memorandum of appeal impleaded Janki Das also. It is quite clear that no relief was claimed in the appeal against Janki Das who was merely a *pro forma* respondent and need not have been impleaded at all. He was in no way interested in the appeal and there was no point common to him and the other parties which was going to be raised. The plaintiffs have tried to take advantage of Janki Das having been impleaded by the other defendants, and have filed cross-objections against him praying that the suit should be decreed against him also. In our opinion such cross objections cannot be entertained.

Without saying that in cases of partnership or partition of property or other cases of like nature, where rights common to all the parties are in dispute there can be no cross-objections by one respondent against a co-respondent, I am of opinion that ordinarily in cases where the person against whom cross-objections are filed is not interested in the appeal and is a mere *pro forma* respondent, no cross-objections can be validly filed against him. This has undoubtedly been the practice of this Court for a considerably long time, and I may refer only to the case of *Kallu v. Manni* (1), and *Abdul Ghani v. Muhammad Fasih* (2). No doubt sub-cl. 3 of O. XLI, r. 22 has been slightly amended and the words "the party who may be affected have been substituted for the word "appellant". But that sub-clause deals with the service of notice. The object of the amendment might be to allow cross-objections against a co-respondent in cases of partnership, partition, etc. I am not prepared to hold that on account of this amendment, a respondent has an absolute right of filing cross-objections against a co-respondent, even where such co-respondent is not an interested party at all and no relief has been claimed against him in the appeal. In my opinion this is not a fit case for the exercise of the discretionary power given to us under O. XLI, r. 33.

Ashworth, J.—I concur. In my view a party to a case cannot be regarded as a respondent in an appeal, the success or failure of which wholly or in part, can in no way affect him. It is only a respondent who has a right of preferring a cross-objec-

tion under the said rule. A person who is a defendant in the original suit need not necessarily be a respondent in an appeal brought by the unsuccessful plaintiff.

By the Court.—Both the appeal and the cross objections are dismissed.

The appellants will pay the costs of the plaintiff-respondent and will bear their own costs of the appeal. The plaintiff will pay the costs of Janki Das in the cross-objections and will bear his own costs.

A. N. A.,

Appeal and cross objections dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 99 OF 1926
CONNECTED WITH SECOND CIVIL APPEAL
No. 100 OF 1926.

November 8, 1927.

Present:—Mr. Justice Sulaiman and
Mr. Justice Ashworth.

*Rai Sahib Seth PHOOL CHAND AND
ANOTHER—PLAINTIFFS—APPELLANTS*

versus

*RAM NATH AND ANOTHER—DEFENDANTS
—RESPONDENTS.*

*Agra Pre-emption Act (XI of 1922), ss. 3, 7, 12—
Bundelkhand Alienation of Land Act (II of 1903),
ss. 3, 16-A as amended by Act (IV of 1915)—Sanction
of Collector to pre-empt, effect of—Pre-emptor, whe-
ther becomes person 'entitled to purchase'—Pre-exist-
ing rights to pre-emption, whether enforceable.*

In view of the provisions of s. 3 of the Agra Pre-emption Act, there can be no right of pre-emption in areas where the Act applies except in accordance with the provisions of the Act or under the Muham-
madan Law. [p. 572, col. 2.]

Section 7 of the Agra Pre-emption Act expressly prevents the Act from conferring any benefit on persons who are, under the Bundelkhand Alienation of Land Act not entitled to purchase the property in dispute. [p. 571, col. 2.]

A person who has merely obtained sanction, under s. 16-A of the Bundelkhand Alienation of Land Act, to pre-empt a property does not thereby become a person 'entitled to purchase' the property under that Act within the meaning of s. 7 of the Agra Pre-emption Act, and s. 7 of the latter Act does not, therefore, confer on him a right of pre-emption. [p. 572, col. 1.]

Section 16-A of the Bundelkhand Alienation of Land Act has not been repealed by the Agra Pre-emption Act. [p. 571, col. 2.]

Second appeal from a decision of the District Judge, Cawnpore, dated the 13th October, 1925.

Dr. K. N. Katju, for the Appellants.

Dr. S. N. Sen and *Mr. A. Sanyal*, for the Respondents.

(1) 23 A. 93; A. W. N. (1900) 212.

(2) 28 A. 95; A. W. N. (1905) 200; 2 A. L. J. 667.

JUDGMENT.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for pre-emption of a property situated in the District of Bundelkhand, which was sold on the 22nd December, 1923. The vendor was a member of an agricultural tribe and so were the vendees, but the vendees were not co-sharers in the village at all. The pre-emptors, on the other hand, are not members of the same agricultural tribe as the vendor, but are co-sharers not only in the *mahal* but in the very *khata* in which the share sold is situated. Before bringing their suit for pre-emption the plaintiffs did obtain the sanction of the Collector under the Bundelkhand Alienation of Land Act, s. 16-A as amended by Act IV of 1915.

The plaintiffs based their claim mainly on the custom recorded in the *wajib-ul-arz* of the village, the defendants contested the suit on the ground that the plaintiffs had no right to maintain the suit and that they had no preferential right as against them.

The trial Court came to the conclusion that although "purchase", in view of the pronouncement of this Court in the case of *Suraj Bhan v. Somwarपुरi* (1) did not include "pre-emption", nevertheless "pre-emption" did include "purchaser". It, therefore, came to the conclusion that the plaintiffs, having obtained the sanction of the Collector to pre-empt this property, were persons who were entitled to purchase it under the Bundelkhand Alienation of Land Act.

The learned District Judge has taken a contrary view, in his opinion, the right of pre-emption is entirely distinct from the right of purchase, and is a mere right of substitution. He is also of opinion that the reference in s. 7 of the Agra Pre-emption Act to the Bundelkhand Alienation of Land Act, 1903, does not necessarily imply a reference to that Act as amended in 1915. He is further of opinion that by implication s. 16-A of the Bundelkhand Alienation of Land Act must be deemed to have been repealed by s. 7 of the Agra Pre-emption Act, although the said provision is not mentioned in the schedule of repealed Acts.

In my opinion, there are two questions which have to be considered separately. The first is whether the Agra Pre-emption Act does confer a right on the present

plaintiffs to maintain the suit and the second is whether, if it does not, it takes away any right which they might have had independently of it.

Section 7 of the Agra Pre-emption Act provides that "Nothing in that Act shall confer a right of pre-emption on any person who is, under the Bundelkhand Alienation of Land Act, 1903, not entitled to purchase the property in dispute." In my opinion this section was merely intended not to confer a right of pre-emption on any person who was not entitled to purchase property in Bundelkhand. It does not mean that the section takes away the right of pre-emption of a person who had the right under the old Act.

I am inclined to the view that the learned Judge is in error in thinking that a reference to the Bundelkhand Alienation of Land Act, 1903, does not imply a reference to the Act as amended in 1915. The Act was referred to by its short title, and one would imagine that the Act so referred to is the Act as amended up to date. It is, however, not necessary for the purposes of this appeal to express a final opinion on this point. Section 16-A dealt with the right to pre-empt whereas s. 7 of the Agra Pre-emption Act speaks of "entitled to purchase". It is, therefore, not necessary to invoke the aid of the provisions of s. 16-A.

The learned Judge has erred in thinking that s. 16-A has by implication been repealed. That section conferred no substantive right on a pre-emptor where he had none before; it merely placed the obstacle of sanction in the way of his suing, when such right existed. Even if his right of pre-emption is destroyed, it does not necessarily amount to a repeal of s. 16-A. I would not say that the Collector has no jurisdiction to grant such a sanction, but I would say that such a sanction even if granted, is now futile.

I am, however, in agreement with the learned District Judge that in view of the long standing authorities of this Court it must now be taken as settled that a right of pre-emption is not the same thing as a right of purchase. This is now further made clear by the definition of the right of pre-emption as given in s. 4, sub-cl. 9 of the Agra Pre-emption Act. It, therefore, follows that the sanction obtained by the plaintiffs to pre-empt the property cannot

(1) 30 Ind. Cas. 949; 13 A. L. J. 949; 37 A. 662.

strictly be taken to be a sanction to purchase it.

Now s. 3 of the Bundelkhand Alienation of Land Act makes it clear that the plaintiffs are not of such a class as by right to be entitled to purchase the property, but they might, if they obtain the sanction of the Collector, become so entitled. The plaintiffs are not absolutely entitled to purchase; their right is conditional. Even assuming that after sanction they can be said to have become entitled to purchase, it seems clear that a person so long as he has not actually obtained the sanction to purchase, has not become a person entitled to purchase even under that provision.

In this particular case the present plaintiffs never obtained a sanction to purchase the property. They merely obtained sanction to pre-empt. I am, therefore, unable to hold that they are "entitled to purchase" the property under the Bundelkhand Alienation of Land Act, within the meaning of s. 7 of the Pre-emption Act. Section 7 of the latter Act accordingly does not confer on them the right to pre-empt this property.

The next question is whether it takes away any right which they had. I have already quoted the section *in extenso*, and remarked that the intention merely was not to confer a new right on persons who had not that right. The lower Appellate Court is, therefore, wrong in thinking that it was contemplated by this section to take away the right of pre-emption vested in persons who had the right independently of the Act.

There is, however, s. 3 of the Agra Pre-emption Act, which was neither noticed by the Courts below, nor referred to by Counsel before us. That section provides:—

"No right of pre-emption shall be enforced in respect of any transfer made after the commencement of this Act of an interest in land in any area to which this Act applies, except in accordance with the provisions of this Act."

This is followed by a proviso that where there is no right of pre-emption under s. 5, the Muhammadan Law remains in force when the vendor and the pre-emptor are both Muhammadans. This proviso clearly shows that the section does not deal with procedure only, but affects substantive rights. It was obviously intended that in areas where the Act applies there can be no right of pre-emption except in accordance with the Act. The Pre-emption Act

undoubtedly applies to Bundelkhand, and whatever right the present plaintiffs might have had independently of the Act, cannot now be enforced. They can only succeed if they are entitled under the Pre-emption Act to pre-empt. Although the Act applies to them, and they would come within the classes of persons mentioned in s. 12, they are debarred from taking advantage of those provisions because s. 7 expressly prevents the Act from conferring any benefit on them. The result is that s. 3 takes away any right that they might have had independently of the Act, and s. 7 prevents the conferring on them of any right under the Act. Thus they have lost all right of pre-emption. If such a result was not contemplated by the Legislature, there may have to be a further amendment of the Pre-emption Act. But as the provisions stand, I can come to no conclusion other than that indicated above.

I would, therefore, dismiss the appeal.

Ashworth, J.—I concur in the order dismissing these appeals. The plaintiffs-appellants claimed a right to pre-empt certain property sold in Bundelkhand by a co-sharer in the *mahal* to a non-co-sharer. The vendor was a member of an agricultural tribe. The plaintiffs were not; but they had obtained the Collector's sanction to bring suits to pre-empt under s. 16-A of the Bundelkhand Alienation of Land Act, 1903.

The Subordinate Judge decreed the suit. Mr. Herchenroder, District Judge of Cawnpore, dismissed it holding that the last named section was impliedly repealed by the Agra Pre-emption Act, 1922, being inconsistent with its general policy and that s. 7 of the Pre-emption Act barred a claim to pre-empt under the statutory provisions of s. 12 of that Act.

Section 7 of the Agra Pre-emption Act, 1922, runs as follows:—

"Nothing in this Act shall confer a right of pre-emption on any person who is, under the Bundelkhand Alienation of Land Act, 1903, not entitled to purchase the property in dispute".

The Subordinate Judge held that this was no bar to the plaintiffs' suit because the words in s. 7 of the Pre-emption Act "entitled to purchase" would include a person given such sanction by the Collector. The District Judge held that s. 16-A of the Bundelkhand Alienation of Land Act could not be invoked because

it was not contained in the Bundelkhand Alienation of Land Act, 1903, but was added by an amending Act in 1915. He, therefore, held that "entitled to purchase" under the Bundelkhand Alienation of Land Act, 1903, would not include a person who obtained the Collector's sanction under s. 16-A to bring a suit for pre-emption. Further he held that the Agra Pre-emption Act must be deemed to have repealed any right of pre-emption conferred by the Bundelkhand Alienation of Land Act, even though there was no provision in the Pre-emption Act expressly repealing the Bundelkhand Alienation of Land Act as a whole or repealing in particular s. 16-A of that Act, as amended by the Act of 1915.

The reasons just stated do not commend themselves to me. A right to purchase is different from a right to pre-empt. The right of pre-emption is merely a right of substitution. Nor can a sanction to pre-empt be construed as a sanction to purchase. Separate provisions of the Bundelkhand Alienation of Land Act apply to each kind of sanction and they cannot be confused. On the other hand, the reference in s. 7 of the Pre-emption Act to the Bundelkhand Alienation of Land Act, 1903, must be construed to be a reference to that Act as amended by the amending Act of 1915. When a short title is given in an original Act, the Act, however, subsequently amended, can be called by that short title. To hold otherwise would be to hold that where the Legislature had prescribed a short title it was necessary to use a longer one. An amended Act is not two Acts but one Act. Again, the District Judge was wrong in inferring that an intention should be ascribed to a later Act to repeal the provisions of an earlier Act on general principles. The former enactment must be either specifically repealed or its continuance must be inconsistent with a provision of a later Act, in which case, repeal will be deemed by necessary implication.

The correct view of this matter appears to me to be as follows. Section 16-A of the Bundelkhand Alienation of Land Act only enables a Collector to sanction a suit for pre-emption where, but for the provisions contained in the earlier part of the section, the applicant for sanction has a

tract. The sanction of the Collector does not create a substantive right, but is merely necessary for the otherwise existing substantive right to be exercised. The right of the plaintiff to pre-empt in this case was based on custom. That right which existed subject to the restrictions on its exercise imposed by the said s. 16-A] up to the passing of the Agra Pre-emption Act, ceased to exist when s. 3 of the Pre-emption Act was enacted. This is the important section which the District Judge has overlooked. The effect of that section is clearly, as described, in the marginal note, to abolish customary and other rights of pre-emption previously existing, excepting under the Muhammadan Law. The plaintiff must claim a statutory right under the Agra Pre-emption Act or cannot succeed. Such a right is barred by s. 7 of the Agra Pre-emption Act because the plaintiff is admittedly not entitled to purchase the property in dispute under the Bundelkhand Alienation of Land Act, 1903, even when amended by the Act of 1915. To discover what persons are entitled to purchase under the Bundelkhand Alienation of Land Act, 1903, we must refer to s. 3 of that Act. That section provides that any person is entitled to purchase from an alienor who is not a member of an agricultural tribe or is a member of the same tribe as himself etc. These conditions are admittedly not satisfied in this case. Sub-s. (2) allows the Collector to sanction previously or retrospectively a purchase by any one, but sub-s. (2) may be ignored for the purpose of interpreting s. 7 of the Agra Pre-emption Act. For it is obvious that the Collector could never give sanction to purchase to a person claiming to pre-empt and for these reasons no one would claim to pre-empt who could purchase directly. If there was no desire by the owner to sell, sanction would be clearly improper. Again, if the owner had already sold validly to another person, sanction would be improper. So there could never be a case of a person claiming to pre-empt getting sanction to purchase from the Collector, unless we are to suppose that the Collector might give a sanction to purchase merely in order to assist a would-be pre-emptor to overcome the bar imposed on him by s. 7 of the Agra Pre-emption Act. On the principle that officials are presumed to do the right

thing (*omnia prae-sumuntur rite et sollemniter acta esse*), we cannot suppose that the Collector would do anything of the kind. Apart from this it is clear that the phrase "entitled to purchase" as used in s. 7 of the Agra Pre-emption Act only refers to the persons given an unqualified right (*i. e.*, a right independent of the Collector's sanction) by s. 3 of the Bundelkhand Alienation of Land Act. The operation of s. 7 of the Agra Pre-emption Act, cannot have been intended to depend upon the Collector's sanction. This s. 7 appears to have been hastily added at a very late date in the proceedings culminating in the passing of the Agra Pre-emption Act, and although this fact cannot be adduced as an argument to control the meaning of s. 7, it explains why reference in s. 7 was not confined to the persons entitled to purchase the property in dispute under sub-s. (1) of s. 3 of the Bundelkhand Alienation of Land Act. Specification of sub-s. (1) would have made the matter clearer, but would not have affected the meaning to be attached to s. 7. A person claiming pre-emption could never have been given sanction by the Collector to purchase for the reasons stated.

I, therefore, hold that the decision of the District Judge was correct. The plaintiff's suit must fail not only because, after the passing of s. 3 of the Agra Pre-emption Act, 1922, he could not claim to pre-empt on the basis of custom, but also because the land being in Bundelkhand, he was barred from any right to pre-empt which he would otherwise have had under s. 12 of the Pre-emption Act by s. 7 of that Act. I would, therefore, dismiss these two appeals with costs.

By the Court.—Both the Second Appeals Nos. 99 and 100 of 1926 are dismissed with costs including fees in this Court on the higher scale.

A. N. A.

Appeals dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 437 OF 1924.

November 21, 1927.

Present:—Mr. Justice Sulaiman and Mr. Justice Kendall.

KHAZAN SINGH AND OTHERS—PLAINTIFFS,
—APPELLANTS

versus

BIKRAM SINGH AND OTHERS—DEFENDANTS,
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 57.
—*"Striking off" execution petition—Attachment, whether ceases.*

Where execution proceedings are not dismissed on account of default of the decree-holder, but the matter is merely shelved for the time being, the proceedings must be deemed to be still pending. [p. 575, col. 2.]

A attached certain properties in execution of a decree against B. B's sons instituted a suit for a declaration that the decree was not binding on the family and that the properties, which belonged to the joint family, could not be attached. The application for execution was 'struck off' pending the decision of this suit. B then mortgaged the properties to C. The properties were thereafter sold in execution of A's decree and purchased by A. In a suit by C to enforce his mortgage against B and A's heirs:

Held, that the order striking off the execution case did not terminate the attachment and that the mortgage-deed was ineffective as it was executed during the pendency of the attachment. [*ibid.*]

First appeal from a decision of the Additional Subordinate Judge, Meerut, dated the 29th May, 1924.

Dr. Sen, Messrs. B. Malick and R. C. Ghatak, for the Appellants.

Dr. K. N. Katju and Mr. Harendra Krishna Mukerji, for the Respondents.

JUDGMENT.—This is a plaintiffs appeal arising out of a suit for sale on the basis of a mortgage-deed, dated the 31st of October, 1917, executed by Mohar Singh and Ajab Singh in favour of the plaintiffs Khazan Singh and others. It appears that on the 18th of September, 1917, an application for execution of a money decree was filed by Karan Singh against Mohar Singh and Ajab Singh, his judgment-debtors, with a prayer that their property should be attached. An attachment was duly effected on the 28th of September, 1917, and the mortgage deed in suit covered the property so attached. It is not disputed in this case that on the date when the mortgage-deed was executed by the judgment-debtors the attachment in execution of the decree of Karan Singh was actually in force. Karan Singh subsequently executed his application and got the property sold and purchased it him-

self. The present suit is against the mortgagors as well as the heirs of Karan Singh. The Court below has held that the mortgage-deed is ineffective as against the auction-purchaser because it was executed during the subsistence of the attachment. The learned Advocate for the appellants, however, contends that that attachment came to an end on account of certain subsequent proceedings.

It appears that while the execution proceedings initiated by Karan Singh were pending, the sons of the judgment-debtors brought a suit for a declaration that the money-decree obtained by Karan Singh was not binding on them and the family property could not be attached and sold in execution of it. The Court was informed of the institution of the suit and on the 13th of May, 1918, passed an unfortunate order that "such a suit having been filed the execution case is struck off". There is nothing to show that the decree-holder consented to his case being struck off in that way. As a matter of fact, subsequently the decree-holder applied on the 27th of May, 1918, requesting the Court to order that the attachment proceedings were still continuing. This application also was dismissed by the same Subordinate Judge by an order, dated the 28th of May, 1917. It was as follows:—

"The attachment remains in force for six months from the date of striking off execution case as it was not struck off for default of prosecution. Hence this application, being useless is rejected." No one has been able to explain what provision of law was in the contemplation of the learned Subordinate Judge when he thought that the attachment remained in force for six months, and six months only. The order which he passed for striking off the execution case was apparently a result of some misapprehension. But his second order undoubtedly says that the previous order was not passed under O. XXI, r. 57 because it expressly says that the case had not been struck off for "default of prosecution". The order further shows that the Subordinate Judge in his mind believed that he was not putting an end to the attachment inasmuch as he thought that it would continue for six months more. Within the expiry of this supposed period, the decree-holder again applied on the 2nd of

November, 1918 for execution of his decree.

It is obvious that no default had been made by the decree-holder in the prosecution of the execution proceedings. "The striking off" of the case was, as the Court itself remarked, not due to any default of the decree-holder. Order XXI, r. 57 was, therefore, wholly inapplicable to the case. His application for execution also was not actually "dismissed" but the case was ordered to be struck off, which perhaps meant nothing more than that it should be removed from the register for the time being. The case, therefore, cannot be said to have been disposed of on the merits or dismissed for want of prosecution. The matter was only shelved for the time being pending the result of the suit brought by the sons of the judgment-debtors. The matter, therefore, was only temporarily postponed and not finally disposed of. Under these circumstances it is impossible to hold that the attachment came to an end. In several cases this Court has held that where the execution proceedings are not dismissed on account of the default of the decree-holder, but the matter is merely shelved for the time being, the proceedings must be deemed to be still pending. We may refer to the case of *Bijai Saran Sahi v. Deo Kishen Prasad Bahadur Sahi* (1) and cases referred to therein. This principle has been accepted by the Full Bench of this Court in the case of *Chhattar Singh v. Kamal Singh* (2).

It follows, therefore, that the mortgage having been executed during the pendency of the attachment is wholly ineffective and cannot affect the rights of the auction-purchaser Karan Singh or his heirs. The result, therefore, is that the suit must stand dismissed. We accordingly dismiss this appeal with costs including fees on the higher scale.

A. N. A.

Appeal dismissed.

(1) 97 Ind. Cas. 102; 24 A. L. J. 901; A. I. R. 1926 All. 734; 48 A. 735.

(2) 100 Ind. Cas. 692; 49 A. 276; 25 A. L. J. 201; A. I. R. 1927 All. 16 (F. B.).

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 62 OF 1924.

October 18, 1927.

Present:—Mr. Justice Sulaiman and
Mr. Justice Ashworth.**BANKEY LAL—PLAINTIFF—APPELLANT**
versus**NATTHA RAM—DEFENDANT 1ST PARTY AND**
ANOTHER—DEFENDANT 2ND PARTY
—RESPONDENTS.*Hindu Law—Joint family—Partnership between manager and stranger—Power of manager to dissolve partnership—Alienation by manager—Alienation for necessity, but for inadequate price, validity of—Alienation of moveables—Disposal of moveables by vendee, effect of—Equitable compensation, whether can be allowed.*

The manager of a joint Hindu family has power to dissolve a partnership which he has entered into with a stranger. He cannot be compelled to continue the partnership merely because he has a minor son, who, along with himself, is interested in it, especially when he considers that he is incapable of giving assistance as a partner. [p. 576, col. 2.]

Per Ashworth, J.—When once it is shown that a sale by a Hindu father and manager is necessary, no suit will lie against the vendee on the ground of inadequacy of the price in the absence of fraud or collusion on the part of the vendee. [ibid.]

Per Sulaiman, J.—The restrictions on the power of a Hindu father to alienate immovable property are equally applicable to transfers of moveables. [p. 578, col. 1.]

Nand Ram v. Mangal Sen (1), referred to.

The equitable relief of compensation can be granted to the members of a joint Hindu family in the case of an improper alienation of moveables by the manager even where the goods have been disposed of by the defendant-vendee. [ibid.]

The members of a joint Hindu family are entitled to question an alienation by the manager of the family where the consideration is grossly inadequate, even though necessity for the alienation is proved. [p. 577, col. 2.]

First appeal from a decision of the District Judge, Agra, dated the 30th of October, 1923.

Messrs. Iqbal Ahmad and Mukhtar Ahmad, for the Appellant.

Dr. S. N. Sen, Messrs. N. P. Asthana, S. K. Dar and S. N. Gupta, for the Respondent.

The facts of the case appear from the judgment of Ashworth, J.

JUDGMENT.

Ashworth, J.—This appeal arises out of a suit brought by the plaintiff-appellant against the defendant-respondents for setting aside a deed of sale executed by defendant No. 2, Shyam Lal, father of the plaintiff, in favour of Nattha Ram, defendant No. 1. The admitted facts are that Chiranji Lal, grandfather of the plaintiff and father of the defendant No. 2, carried on the business of publisher and bookseller in

conjunction with Nattha Ram, defendant No. 1. On the death of Chiranji Lal the partnership was maintained by Nattha Ram along with Shyam Lal. At the end of that time Shyam Lal having no inclination to continue the partnership arranged with Nattha Ram to terminate the same and divide some of the assets and sell other of the assets to Nattha Ram. The plaintiff's contention is that the disposal of the assets by Shyam Lal was for a price and consideration which was prejudicial to his interest as minor son of Shyam Lal.

The lower Court dismissed the suit. It held that nothing in Hindu Law could compel Shyam Lal to continue the partnership merely because he had a minor son who, along with himself, was interested in his (Shyam Lal's) share of the assets of the business. This decision of the lower Court has been impugned by Counsel for the appellant but, in my opinion, on no valid ground. The manager of a joint Hindu family who is partner in a business cannot be required to continue the partnership when he no longer desires to do so and especially when, as in this case, he considers that he is incapable of giving assistance as partner. It may be remarked that in the plaint the allegation was made by the plaintiff that Shyam Lal was a man without capacity or ability. This admission in itself furnishes a solid ground for Shyam Lal deciding not to continue the partnership. There were two houses among the assets of the partnership. When the partnership was dissolved between defendant No. 2 and defendant No. 1 the more valuable of the houses went to Shyam Lal and the other to Nattha Ram. A value was put on each house and the difference was taken into account in the disposal of the other assets of defendant No. 2 to defendant No. 1. It is said by the plaintiff-appellant's Counsel that the sale of the other assets to Nattha Ram was for an insufficient amount. I consider it open to doubt whether, when once it is shown that a sale by a Hindu father and manager is necessary any suit will lie against the vendee on the ground of insufficiency of price inasmuch as the father is empowered to make arrangements for the sale and the vendee can scarcely be expected to see that the price is inadequate. At any rate it is clear to me that no such suit would lie against the vendee in the absence of fraud or collusion being proved against the

vendee. No such fraud or collusion has been proved in this case.

The main point made by Counsel for the appellant is that in the sale-deed which it is desired to set aside, various mortgage bonds were included as sold to defendant No. 1. The rate of interest borne by these bonds is not entered in the sale-deed. Appellant's Counsel suggests that the failure to enter this rate of interest amounted to fraudulent concealment. He says that if this rate of interest were shown it might be obvious that these bonds were handed over by defendant No. 2 to defendant No. 1 for an insufficient consideration. It appears to me sufficiently that these mortgage bonds must have been registered and it was easy for any person who was interested in the matter to get copies of these bonds and find out the interest. The mere fact that the sale-deed did not go into the particulars of the interest accruing on these mortgage bonds did not amount to any fraudulent concealment. The consideration for these mortgage bonds was, it appears, the amount due as principal on them according to the bonds. Nattha Ram would have to spend money in suing on them. It is conceivable that although they were secured, the security might in some cases be inadequate. It was open to the appellant to produce in Court the mortgage bonds in order to show the interest due. He did not think it desirable to do so. In these circumstances I would hold that no insufficiency of price for these bonds is proved and that certainly no such insufficiency is proved as to justify the conclusion that the sale by defendant No. 1 to defendant No. 2 was fraudulent or collusive. We have to look at the state of affairs at the time of the date of the sale. It seems obvious that no outsider would have been likely to give to Shyam Lal for his and his son's share in the assets of the partnership, dissolved or not dissolved, as good a price as was given by defendant No. 1. Defendant No. 1 was continuing the business and obviously the stock, the book debts and the goodwill would be more valuable to him than to an outsider. No attempt has been made to prove that these assets would have fetched a larger sum if offered to any one else and the contrary seems to me to be a certainty. This being so, it cannot be said that the sale was for an insufficient sum, and the suit of the plaintiff was rightly dismissed. I would note that the plaintiff asks for compensation from defendant No. 1 in respect of

moveable property purchased by him from defendant No. 2 and disposed of to others. In my opinion Hindu Law would not afford any such relief. Whether an action in tort would lie is also doubtful, but it is certain that it would only lie on the ground of collusion or fraud by the vendee. None such has been proved.

For the above reasons I think that the lower Court was quite right in dismissing the suit and I would dismiss this appeal with costs on the higher scale.

Sulaiman, J.—I concur in the conclusion arrived at by my learned brother.

The contention that there was no legal necessity for the transfer is, in my opinion, without any force. Relations of strangers with joint Hindu families, when they enter into transactions of partnership, are not governed strictly by the Hindu Law but by the Contract Act. If a manager of a joint Hindu family has power on behalf of the family to enter into partnership with strangers, he has equally powers to dissolve such partnership. It is, therefore, impossible to accept the contention that the father was not competent to put a stop to this business, particularly when it was admitted in the plaint that he was wholly incompetent to carry it on. When the father decided that the business was not profitable and that he could not carry it on with profit, there was full justification for his dissolving it. There was thus necessity for the transaction.

The next question is whether the son can challenge the sale on the ground that the consideration was grossly inadequate. I am not prepared to say that once necessity has arisen for the transfer of ancestral property the sale by the father is always binding on the minor members no matter whether the consideration is grossly inadequate or not. In cases of mortgages their Lordships of the Privy Council have frequently laid down that there may be necessity for the transfer at a certain rate of interest but there may not be necessity for the high rate charged. I am, therefore, not prepared to hold that the plaintiffs' suit would fail automatically as soon as it is found that there was necessity for putting a stop to the business.

If the transaction, as is contended on behalf of the respondents, amounted to nothing more than a mere winding up of the business, it would certainly be doubtful whether the minor son can have the whole thing re-opened. Assuming, however, that it

was a sale, pure and simple I agree with my learned brother that it is not established that the consideration paid for the sale is inadequate.

The property transferred consisted of moveables and immoveables. In view of the cases referred to in *Nand Ram v. Mangal Sen* (1) I am bound to assume that the restrictions on the power of a Hindu father to alienate immoveable property are equally applicable to transfers of moveables.

It has, however, been suggested that inasmuch as the sale took place several years ago and there is no likelihood that the moveable properties now exist his suit ought to fail because in Hindu law no equitable relief for compensation can be granted. I choose to reserve my final opinion on this question as no authority either way has been cited before us. I am, however, inclined at first sight to hold that equitable relief of compensation can be granted even where the goods have been disposed of by the defendant-vendee. If this were not so, the position would be anomalous. The result of a suit brought by the minor member to avoid the alienation would depend not on the merits of the case but on the conduct of the defendant, whether he has or has not, by the time the suit is brought, disposed of the moveable properties. In many suits for setting aside alienations by limited owners equitable doctrines have been invoked, and compensations have been awarded by the Courts. I would, therefore, not be prepared to dismiss the suit on the mere ground that moveable properties which were transferred under the deed might have been disposed of by the defendants. As a matter of fact, this question has not been gone into and we cannot be sure that all the moveable properties that were transferred are not now in the possession of the defendant.

I, however, agree that the appeal must fail.

By the Court.—The appeal is dismissed with costs including in this Court fees on the higher scale.

A. N. A.

Appeal dismissed.

(1) 1 Ind. Cas. 797; 31 A. 359; 6 A. L. J. 415.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 336 of 1924.

November 23, 1927.

Present:—Mr. Justice Sulaiman and Mr. Justice Ashworth.

THE COLLECTOR OF CAWNPORE
IN CHARGE OF THE ESTATE KNOWN AS
GYAN SINGH'S ESTATE AND ANOTHER
—DEFENDANTS—APPELLANTS

versus

Babu JUGAL KISHORE—PLAINTIFF—

RESPONDENT.

U. P. Court of Wards Act (IV of 1912), ss. 37 (a), 55—Suit on hundi—Plea that defendant was a ward—Burden of proof—Application for adjournment, granting of—Evidence Act (I of 1872), ss. 57, 78—Government Notifications, whether can be taken judicial notice of—Copy of Gazette, evidentiary value of.

In a suit instituted on the basis of a *hundi* the defendant pleaded that under s. 37 (a) of the U. P. Court of Wards Act of 1912 he was not competent to enter into the contract embodied in the *hundi* and that under s. 55 of the said Act he could not personally be sued. On the date fixed for hearing evidence, the defendant's Counsel asked for a short adjournment of a few hours in order that the Head Clerk of the Court of Wards could be produced with his record. This was refused by the Court, and the suit was decreed on the ground that the defendant had summoned no witnesses for the day and that there was nothing on the record to show that he was a ward on the date of the execution of the *hundi* or on the date of the institution of the suit.

Held, that the course adopted by the trial Court was too severe and had caused hardship to the defendant [p. 580, col. 2.]

[The Government Notification was admitted as evidence in the appeal, the case was remanded to the Court below for substituting the name of the Collector and proceeding with the case according to law.]

Per Sulaiman, J.—A Government Notification does not come under s. 57 of the Evidence Act, and the Court is not bound to take judicial notice of it. But the production of the Gazette published under the authority of the Government would be sufficient proof of the Notification under s. 78 of that Act. [p. 580, col. 1.]

First appeal from a decision of the Subordinate Judge, Cawnpore, dated the 8th of July, 1924.

The Government Advocate, for the Appellant.

Dr. Sen, for the Respondent.

JUDGMENT.

Ashworth, J.—This first appeal arises out of a suit brought by Babu Jugal Kishore plaintiff against Thakur Raghuraj Singh defendant on the basis of a *hundi* for Rs. 8,000. The defendant received this money and covenanted to pay the amount after 90 days. The defence was that the contract embodied in the *hundi* was beyond

the competence of the defendant because at the time he was a ward, see s. 37 (a) of the U. P. Court of Wards Act of 1912. Another defence was that the suit against the ward personally was barred by s. 55 of the said Act, which provides that no ward shall be sued nor shall any proceedings be taken in the Civil Court otherwise than in the name of the Collector in charge of his property or such other persons as the Court of Wards may appoint in this behalf.

The suit was instituted on the 5th of March, 1924, and apparently the 24th of April, 1924, was fixed for framing the issues. At any rate on that date the defendant was examined as a ward, and the general attorney of the plaintiff was also examined. The defendant said that he had been a ward of the Court of Wards for 13 or 14 years. The general attorney for the plaintiff said that he came to know that the defendant was a ward when the written statement was filed, but he did not know since when he had been a ward. Issues were then struck. The first issue was whether the defendant was incompetent to take the loan and, whether the plaintiff was aware of his incompetency, and the second issue was whether the Collector of Cawnpore was a necessary party to the suit. The 8th of July, 1924, was fixed for hearing the evidence. On that date the Pleader for the defendant stated that his client was not ready with his evidence owing to pre-occupation with his daughter's marriage and asked for a short adjournment of a few hours in order that the Head Clerk of the Court of Wards could be produced along with his record. He stated that the Head Clerk had not arrived at his office although it was 11-30 A. M. The Court refused this adjournment on the ground that the defendant had summoned no witnesses for the day and decreed the suit on the ground that there was nothing on the record to show that the defendant was a ward on the date of the execution of the *hundi* or that the plaintiff had notice of this fact. It also held that there was nothing on the record to show that the defendant was a ward of the Court at the date of the institution of the suit and so there was nothing to sustain the objection that the Collector of Cawnpore was a necessary party.

The following pleas are taken in this appeal. One was that the adjournment

should have been allowed to enable the Government Notification declaring the defendant a ward to be produced. Another was that it was immaterial whether the plaintiff had notice of the assumption of the management by the Court of Wards of the defendant's estate. The second plea we need not consider as the suit was rightly dismissed if the Judge was right in holding that the defendant was bound to prove that he was a ward and had failed to do so.

As to the former plea there was no application by the defendant for production of the Government Notification declaring him a ward. It cannot, therefore, be said that the Court was bound to adjourn the hearing for the production of this paper.

It is not clear from the record that on the 8th of July, 1924, when the defendant's Vakil asked for an adjournment, the defendant was himself personally present in Court. If he had been, I should hold that the Court should have put him into the witness-box to prove that he was a ward. In the circumstance that the plaintiff's Vakil admitted that he was a ward at the date of the striking of issues this evidence might have been regarded as reliable to show the approximate date from which he was a ward, which was all that was necessary. In any case, however, I consider that there was sufficient material before the Subordinate Judge to justify his requiring evidence from the plaintiff that the suit as brought was not barred by s. 55 of the U. P. Court of Wards Act of 1912, which provides that no ward shall be sued otherwise than in the name of the Collector in charge of his property. To allow such a suit to result in a decree against the defendant's person is likely to cause much subsequent confusion and embarrassment. Authority in such a case, where there is a positive legal bar to a suit and where there are grounds for suspecting that that bar may exist, and where a decree (supposing such bar were to exist) would cause subsequent confusion and embarrassment, for holding that the Court should itself require to be satisfied on the point is to be found in *Guru Pershad Singh v. Gossain Munraj Puri* (1). In this case an objection was taken in appeal that the suit had been brought

(1) 11 C. 733; 10 Ind. Jur. 220; 5 Ind. Dec. (N. 1) 1247.

illegally by a married mother of a minor on behalf of the minor contrary to the express provision of s. 45, Civil Procedure Code (Act XIV of 1882). The proceedings in the lower Court were in appeal declared to be null and void. In this case we are satisfied that the defendant was a ward at the time when the suit was instituted. I would, accordingly, remand the case to the lower Court to re-hear after substituting as defendant the name of the Collector in charge of the defendant's property. Costs of this appeal should abide the result.

Sulaiman, J.—I concur in the order proposed. It is impossible to hold that the Court could have taken judicial notice of the Government Notification under s. 57 of the Indian Evidence Act. Government Notifications do not come under that section. But it is quite clear that the production of the Gazette printed under the authority of the Government would have been sufficient proof of the Notification under s. 78 of that Act.

I am unable to hold that there was any material on the record which would have justified the learned Subordinate Judge in requiring evidence from the plaintiff that the defendant was not a ward of the Court, and I would, therefore, not be prepared to hold that the Court was bound to put the defendant into the witness-box as a Court witness, in case he was himself present in the Court room, which is not at all clear. The case of *Guru Pershad Singh v. Gossain Munraj Puri* (1) is distinguishable because there no question of fact was in doubt, and the Court ought itself to have taken notice of the defect, had there been any. As regards the supposed defect, the case was subsequently overruled by a Full Bench in *Asirun Bibi v. Sharip Mondul* (2).

I am however of opinion that the Subordinate Judge acted in a hasty manner in declining to give the defendant's Counsel a short opportunity to produce evidence. The 8th of July, 1924, was the very first date fixed for hearing, there having been no previous adjournments. The office of the Court of Wards was in the same compound. The defendant's application was not for an adjournment of the case for that date, but only for a postponement for a few hours so that the Court of Wards

clerk, who was late in coming to his office on that date, not having arrived till 11-30 A. M. might be produced as a witness. The point involved was simply whether the defendant's estate had been taken over by the Court of Wards or not. This could be conclusively established by the production of the Government Notification, if one could only get the reference to the Government Gazette. The fact of the Notification could have been ascertained in the course of that very day. Once the copy of the Government Gazette was produced before the Court it would have to accept the fact without question. The valuation of the suit was over Rs. 12,000. If the defendant was really a ward of the Court, the consequences of not impleading the Collector would be to introduce considerable complications and difficulties in the Execution Department. The learned Subordinate Judge remained unmindful of these considerations and declined to give even a few hours time to the defendant. I am of opinion that this course was too severe and has caused hardship to the defendant.

If I were sitting singly I would have been inclined to remand the case for allowing a fresh opportunity to the defendant to produce evidence as to whether he was a ward of the Court, and for impleading the Collector, if the defendant satisfied the Court that he was a ward.

I have however no objection to the procedure adopted by my learned brother in admitting the Government Notification as evidence in the appeal, and holding that the defendant is in fact a ward of the Court and therefore, remanding the case to the Court below for substituting the name of the Collector and proceeding with the case according to law.

By the Court.—The appeal is accordingly allowed and the case is remanded to the lower Court to re-hear it after substituting as defendant the name of the Collector in charge of the defendant's property. Costs of this appeal should abide the result.

A. N. A.

Appeal allowed.

ALLAHABAD HIGH COURT.FIRST APPEAL FROM ORDER NO. 153
OF 1926.

July 24, 1927.

Present:—Mr. Justice Sulaiman
and Mr. Justice Banerji,
ORHANGA—APPLICANT
versus**TIRHI AND OTHERS—OPPOSITE PARTIES.***Civil Procedure Code (Act V of 1908), O. IX, r. 13—
Preliminary decree—Contemplating appeal from pre-
liminary decree, whether sufficient cause for non-
appearance in proceedings for passing of final decree
—Appeal from preliminary decree, after passing of
final decree, effect of.*

The mere fact that a party is contemplating an appeal from a preliminary decree is not a sufficient cause for his non-appearance in proceedings relating to the passing of the final decree.

The filing of an appeal from a preliminary decree subsequent to the passing of the final decree cannot have the effect of nullifying the final decree.

Lalman v. Shiam Singh (1), distinguished.

First appeal from an order of the Subordinate Judge, Muttra.

Mr. Peary Lal Banerji, for the Applicant.

Mr. Narain Prasad Asthana, for the Opposite Parties.

JUDGMENT.—This is an appeal from an order refusing to set aside the final decree in a partition suit. A preliminary decree for partition was passed on the 26th of January, 1925, and the Court appointed an *Amin* to prepare lots in the light of the observation contained in the judgment within one month and directed that the plaintiff should deposit the necessary Court fees. The fees were deposited and the *Amin* prepared the necessary lots and then the final decree was passed on the 7th of April, 1925. The appellant, however, appears to have taken no part in the proceedings relating to the preparation of the lots nor does he appear to have raised any objection to the lots prepared by the *Amin*. The final decree was passed while he put in no appearance. Subsequently, on the 23rd of April, 1925, he filed an appeal from the preliminary decree which has now been dismissed by us by our order of this date. While the appeal was pending in the High Court the defendant filed an application on the 18th of August, 1925, for setting aside the decree. The learned Subordinate Judge has dismissed this application on the ground that the applicant was fully aware of the order that the *Amin* was to prepare lots and that it was his duty to

appear and take objections. He cannot plead his ignorance when his Vakil was duly informed of the date fixed.

It is contended before us that there was sufficient cause for non-appearance because the appellant was contemplating an appeal to the High Court. In our opinion such ground does not furnish any good cause for his non-appearance.

It is next contended that when an appeal was subsequently preferred, the only preliminary decree which could be passed would be the one passed by the High Court and that, therefore, all proceedings following upon the preliminary decree made by the first Court were *ultra vires* and not binding on the appellant. Reliance was placed on the case of *Lalman v. Shiam Singh* (1). In our opinion it is not necessary to consider the point raised in that case inasmuch as in the present case there can be no doubt that on the 7th of April, 1925, when the final decree was passed, there was no appeal pending in the High Court, and it is impossible to say that the Court had no jurisdiction to pass the final decree. The subsequent filing of an appeal cannot possibly have the effect of nullifying a decree which was passed with jurisdiction. Had we modified the preliminary decree on appeal the present decree, would of course have to be altered.

It is further to be noted that the appellant has not chosen to prefer any appeal from the final decree in which he could have properly raised the question of its validity. The present appeal fails even on the simple ground that no sufficient cause was shown for non-appearance.

The appeal is accordingly dismissed with costs.

A. N. A.

Appeal dismissed.

(1) 92 Ind. Cas. 608; 24 A. L. J. 288; A. I. R. 1926 All. 291.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 69 OF 1926.

November 4, 1927.

Present:—Mr. Justice Sulaiman and Mr.
Justice Ashworth.Chaudhari MOHAMMAD SHOAB KHAN
—PLAINTIFF—APPELLANT

versus

ZAIB JAHAN BEGAM AND OTHERS—
DEFENDANTS—RESPONDENTS.

Muhammadian Law—Dower—Widow's right to

retain possession of husband's estate in lieu of dower, basis of—Entry in assertion of right of dower, whether necessary.

The right of a Muhammadan widow to retain possession of her husband's estate is founded on her power as a creditor for her dower. [p. 583, col. 2.]

A Muhammadan widow who obtains possession of her husband's estate peacefully and without fraud is, therefore, entitled to retain possession of the same till her dower-debt is paid, even though she does not actually enter into possession of the estate on the express assertion that she is taking possession in lieu of her dower-debt. [ibid.]

Beebe Bachun v. Sheikh Hamid Hossein (1), *Ali Bakhsh v. Alah Dad Khan* (2) and *Ramzan Ali Khan v. Asghari Begam* (3), relied upon.

First appeal from the decision of the Additional Subordinate Judge, Aligarh, dated the 14th May, 1924.

Messrs. A. M. Khwaja and Sherwani, for the Appellant.

Messrs. M. C. Agarwala and S. B. Johri, for the Respondents.

JUDGMENT.

Sulaiman, J.—This appeal and the connected First Appeal No. 388 of 1924 arise out of two suits for recovery of possession brought by two sets of rival claimants against *Musammat Zaib Jahan Begam* the defendant in possession. It appears that *Bakhsh Ali Beg* was the last full owner of the property in dispute and on his death he left a widow *Musammat Hazurunnissa*, a son *Yusuf Beg* and a daughter *Musammat Hayatunnissa*. The son and the daughter survived the widow. Thus they got two-thirds and one-third share respectively in the estate of *Bakhsh Ali Beg*. *Yusuf Beg* died in 1920 leaving *Musammat Zaib Jahan Begam* as his widow and his sister as two of his heirs. The remaining share in his estate would go to the residuaries, if any, and failing them to the distant kindred. It is an admitted fact that on the death of *Yusuf Beg* no claim was put forward either by any residuary or by distant kindred, and the names of *Musammat Zaib Jahan Begam* and *Musammat Hayatunnissa* were recorded on specific shares.

In 1922 *Musammat Hayatunnissa* died and soon after her death the present plaintiff *Muhammad Shoaib Khan* obtained a sale-deed from *Nur Beg* and *Yakub Beg* who asserted themselves to be the residuaries of the deceased. Suit No. 39 of 1923 out of which this appeal arises was instituted by *Muhammad Shoaib Khan*. The other suit was filed by *Afsar Beg* and others who claimed to be the distant kindreds. It may

be mentioned that in the Mutation Court *Musammat Zaib Jahan Begam* succeeded mainly on the ground of her possession.

The rival claimants of course did not admit the title of the opposite party and *Musammat Zaib Jahan Begam* denied the rights of both sides. The Court below has found in favour of *Afsar Beg* and others and held that they are the distant kindreds, and has found that the plaintiff *Muhammad Shoaib Khan* has failed to prove that his transferors were the residuaries of the deceased. It has further found that *Musammat Zaib Jahan Begam* is in possession of the estate left by *Yusuf Beg*, excluding of course her own share, in lieu of her dower debt. The amount of her dower debt has been found to be Rs. 5,000. *Musammat Zaib Jahan Begam* has submitted to the decree in favour of *Afsar Beg* and others but *Muhammad Shoaib Khan* has appealed in both the suits.

The main point which *Muhammad Shoaib Khan* had to establish was whether his vendors' grandfather *Moghul Beg* was the own brother of *Haider Beg*, the father of *Bakhsh Ali Beg*. There is admittedly no documentary evidence to prove or disprove this link in the pedigree. The case depends entirely on the oral evidence of the parties. The learned Subordinate Judge has heard all the witnesses himself except one lady who was examined on commission. It is, therefore, obvious that we should attach weight to his findings; but for certain remarks in his judgment which are based on an unsound reasoning we would not have taken the trouble to examine the evidence in such great detail as we have done. After criticising the evidence of the witnesses for the plaintiff the learned Judge has remarked that none of them is an independent witness. This remark, in our opinion, was unfounded as a good many of them are not connected with the plaintiff. Similarly his remark that none of the witnesses had any relations or connection with the family of *Haider Beg*, was perhaps a little too wide as *Muhammad Ahsan* was connected by marriage. Then again his remark that *Muhammad Ahsan* who was related to *Musammat Hayatunnissa*, his sister-in-law, was not also an independent witness, was not justified when he found that the plaintiff was in way related to *Musammat Hayatunnissa*. Lastly he has mentioned the names of the witnesses produced by the defendants

in one breath and then simply stated that they satisfactorily prove both the pedigrees and are more reliable and respectable than the witnesses for the plaintiff. He has also added that their statements are supported by documentary evidence. The documentary evidence has no bearing on the question before us and does not touch the plaintiff's case. We have been led through the evidence of the witnesses for the defendants and we find it difficult to say that they are more reliable or more respectable. Having regard to these circumstances we have felt it our duty to examine the evidence for the plaintiff on whom the burden undoubtedly lay and to see for ourselves whether that evidence is sufficient to establish his case.

[His Lordship referred to the evidence and proceeded:]

No doubt there are some circumstances in the conduct of the defendants which might seem to strengthen the plaintiff's case, but his case must stand or fall by his own evidence. In a case of this kind when the deceased ancestors died a long number of years ago and when all the evidence that is forthcoming is of witnesses of small status it is not safe for us to differ from the view taken of that evidence by the learned Subordinate Judge who had the opportunity of seeing the witnesses and examining their demeanour. It may be that he has given some reasons which are not strictly sound, nevertheless his general impression of the evidence stands and that is against the plaintiff.

It is not necessary for us to consider the other point which was raised in this appeal, namely, whether *Musammatt Zaib Jahan Begam* has made out her case that she is in possession of the property left by Yusuf Beg in lieu of her dower debt. The first argument is that at the time when the mutation of names was effected in her favour she did not profess to enter into possession in lieu of her dower debt and that, therefore, she cannot be allowed to retain the property on that plea. No authority has been cited before us which would show that unless and until the widow actually enters into possession of the estate on the express assertion that she is taking possession in lieu of her dower debt, she cannot subsequently be allowed to raise such a plea. We are inclined to think that the observation of their Lordships of the Privy Council in the case of *Babee Bachun v. Sheikh Hamid*

Hossein (1), makes it clear that "the right of a widow is founded on her power as a creditor for her dower, to hold the property of her husband, of which she has lawfully, and without force or fraud, obtained possession, until her debt is satisfied." In many subsequent judgments the learned Judges have been careful to use the words 'retain possession.' We may also refer to the case of *Ali Bakhsh v. Alah Dad Khan*, (2), where Richards, J., remarked "In my opinion, where a Muhammadan widow entitled to dower gets quietly and peacefully into possession without fraud, she is entitled to retain possession until her dower debt is paid," as also the remark of Tudbal, J., in the case of *Ramzan Ali Khan v. Asghari Begam* (3) that "the balance of authority is in favour of the view that a widow, who from the nature of things on the death of her husband in many instances finds herself in possession of some, if not of the whole, of her husband's estate, is entitled to hold that estate against other heirs until her claim to dower is satisfied, without being asked to show either consent on their part or on that of the deceased husband."

It seems to me that if the power to retain possession of the estate so long as her dower debt is not satisfied is exercised as a power of a creditor, the defendant *Musammatt Zaib Jahan Begam* is entitled to say that her dower debt must be satisfied before she is dispossessed, provided of course she did not enter into possession unlawfully or with force or fraud. There is no evidence to show that there was any force exercised or any fraud practised. *Musammatt Zaib Jahan Begam* was undoubtedly a co-sharer and her entering into possession even of the undivided whole cannot be called unlawful.

The next point urged is that on the death of Yusuf Beg she allowed *Musammatt Hayatunnissa's* name to be recorded in the revenue papers and must, therefore, be taken to have given up possession of a part of the estate. The names of both were recorded jointly and the defendant has a finding of the Revenue Court in her favour that she

(1) 14 M. I. A. 377 at p. 384; 17 W. R. 113; 10 B. L. R. 45; 2 Suth. P. C. J. 531; 3 Sar. P. C. J. 39; 20 E. R. 828.

(2) 6 Ind. Cas. 376; 32 A. 551 at p. 562; 7 A. L. J. 567.

(3) 6 Ind. Cas. 405; 32 A. 563 at p. 566; 7 A. L. J. 14.

was in possession of the whole even in the lifetime of *Musammāt Hayatunnissa*. In any case she has now entered into possession both as an heir and on the claim of her dower. The mere fact that there was a contest in the mutation Court is immaterial for there was a similar contest in the case before their Lordships of the Privy Council referred to above. I am, therefore, of opinion that this circumstance does not debar the lady from pleading that so long as her dower debt due from Yusuf Beg has not been satisfied, his heirs cannot dispossess her.

I would dismiss this appeal with costs.

Ashworth, J.—I concur.

By the Court.—This appeal is dismissed with costs including in this Court fees on the higher scale.

A. N. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1432 OF 1925.

July 18, 1927.

Present:—Mr. Justice Iqbal Ahmad and
Mr. Justice Sen.

FAZAL HAQ—DEFENDANT—APPELLANT
versus

FAZAL HAQ—PLAINTIFF—RESPONDENT.

Right of privacy—Custom in N.-W. P.—Infringement—Mandatory injunction—Equitable considerations—Courts, whether bound to order demolition of constructions where adequate remedy can otherwise be provided—Specific Relief Act (I of 1877), s. 55—End and object of law.

A customary right of privacy within certain limitations exists in the North-Western Provinces, and a material interference with such a right is an actionable wrong and affords a good cause of action to the person or persons affected thereby. [p. 585, col. 1.]

In view of the social conditions of this country which prescribe seclusion for females belonging to certain respectable classes of the Hindu and Muhammadan communities in answer to communal sentiment and as the practical result of the custom which has descended from olden times, the right of privacy has taken too deep a root to be dislodged by any *a priori* reasoning. [*ibid.*]

Mandatory injunction is essentially an equitable relief and the form in which the injunction is to be granted must necessarily vary with the posture of each particular case. This form of relief being discretionary must necessarily be flexible. [p. 585, col. 2.]

Where the infringement of the right of privacy complained of by the plaintiff can be adequately remedied by any means short of a total demolition of the constructions complained of, Indian Courts, in the exercise of their powers of a Court of Equity are

not bound to direct a complete demolition of the building. [*ibid.*]

Beharee Saboo v. Ajnas Koonwar (2), *Abdul Hakim v. Gonesh Dutt* (3) and *Bala v. Maharu* (4), relied on.

Sheenath Rai v. Ali Hussain (1), commented upon.

The end and objective of law is not vindictiveness but justice. [p. 585, col. 2.]

Second appeal from a decree of the District Judge, Pilibhit, confirming that of the Subordinate Judge.

Dr. K. N. Katju, for the Appellant.

Mr. Mukhtar Ahmad, for the Respondent.

JUDGMENT.—The parties to the suit are neighbours. There is a public road in Mohalla Panjabian of Pilibhit which runs from north to south. To the east of the said road is the house of the defendants and to the west the house of the plaintiff, which is occupied by the plaintiff and the ladies of his house. In June, 1924, the defendants started certain constructions on the upper flat of their house and opened three new doors facing the west. These doors have been marked in the site plan attached to the plaint by the letters A, B and C. The customary right of privacy applies in the neighbourhood where the plaintiff's house is situate, and it applies to the class of persons to which the plaintiff belongs. By opening the doors aforesaid the defendants invaded the plaintiff's rights of privacy. The plaintiff protested to the defendants, but the latter heeded him not. The plaintiff approached the Municipal Board of Pilibhit who had sanctioned the construction in the defendants' house, but found no redress. He next approached the Police, but the latter possessed no preventive or protective resources in a matter like this. He next lodged a regular complaint before a Magistrate but no effective relief could be had. The present suit was instituted on the 5th of July, 1924, and originally the plaintiff sought two reliefs:—(a) The closure of the three doors and (b) a perpetual injunction restraining the defendants from making any construction calculated to invade the privacy of the plaintiff's house. On the 8th of July, 1924, the Subordinate Judge issued an injunction to the defendants directing them to keep the doors closed. In spite of service of notice the injunction was disobeyed, and on the 17th of July, a notice, was issued to the defend-

ants to show cause why they should not be committed for contempt. On the 28th of July, the Subordinate Judge made a local inspection and found that the defendants had started putting up a balcony towards the west. The plaintiff thereupon added a third prayer to his plaint, namely, for the removal of the balcony.

Of the four defendants the defendant No. 1 alone contested the suit and put forward a number of flimsy and unsubstantial pleas. In para. 4 of his additional statement he admitted, however, that a portion of the present female apartment is visible from the doors in dispute.

The learned Subordinate Judge decreed the plaintiff's suit and ordered the closure of the doors and the demolition of the balcony within six weeks of the date of the decree and also a perpetual injunction. On appeal the learned District Judge affirmed the decree of the Court of first instance. The defendant now comes to this Court in second appeal. The matter is no longer open to any controversy and has indeed been settled by a long course of judicial pronouncements that a customary right of privacy within certain limitations exists in the North-Western Provinces, and a material interference with such a right is an actionable wrong and affords a good cause of action to the person or persons affected thereby. In this respect the rule enunciated above departs from the well recognised rule of English Law which renders invasion of privacy unactionable. In view of the social conditions of this country which prescribe seclusion for females belonging to certain respectable classes of the Hindu and Muhammadan communities in answer to communal sentiment and as the practical result of the custom which has descended from olden times, the right of privacy has taken too deep a root to be dislodged by any *a priori* reasoning. The learned Counsel for the appellant did not seriously attempt to press the grounds Nos. 1 and 2 of his memorandum of appeal.

His chief argument, however, was that the Courts below were not justified in directing the closure of the doors and the demolition of the balcony. He contended that adequate remedy could have been provided to the plaintiff without having the balcony removed or the doors closed which was too drastic. The learned Counsel for the respondent however took his stand on the

decision of *Sheonath Rai v. Ali Hussain* (1). In this case the defendants had built a two-storied house, made two sky-lights in the second storey and an opening on the stair-case towards the plaintiff's house which infringed the privacy of the plaintiff's house. The District Judge had ordered the defendants to close the sky-lights and the opening and to erect on the roof a wall 4 feet high. Their appeal to the High Court was dismissed by an eminent Judge of this Court, who usually brought strong common sense to bear upon his judicial pronouncements. In an appeal under the Letters Patent it was held by Stanley, C.J., and Burkitt, J., that the direction given to the defendants to build a wall upon their roof was not consistent with the nature of the mandatory injunction, the essence of which was to restore things to *statu quo ante* and not to create a new state of things. They granted a decree restraining the defendants by injunction "from permitting any portion of the building raised by them on the site of the former building by which the privacy of the plaintiff's house is or may be invaded to remain, and from erecting any building or permitting any erection to remain on the site of the former building of the defendants, so as to interfere with the privacy of the plaintiff's house, as the same was enjoyed prior to the erection of the building complained of".

It ought not to be lost sight of that mandatory injunction is essentially an equitable relief, and the form in which the injunction is to be granted must necessarily vary with the posture of each particular case. This form of relief being discretionary must necessarily be flexible, and we do not think that there is any authority for the proposition that where the infringement complained of by the plaintiff can be adequately remedied by any means short of a total demolition of the constructions complained of, the Indian Courts, in the exercise of their powers as a Court of Equity, are under a legal compulsion to direct a complete demolition of the building and nothing short of it. Section 55 of the Specific Relief Act clearly negatives such a proposition. It provides that "when, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the

Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts".

The above section limits and restricts the injunction strictly to the extent of the invasion of the plaintiff's right. That this was the intention of the Legislature is rendered manifest by referring to illustration (a) of s. 55:

"4 by new buildings obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act, Part II. B may obtain an injunction not only to restrain A from going on to the buildings but also to pull down so much of them as obstructs B's lights."

The italics are ours. There are a number of cases, which though not relating to right of privacy, proceed on the principle enunciated above. For instance, (i) *Beharee Saboo v. Ajnas Koonwar* (2). In this case the Court refused to direct the pulling down of the offending wall but required the defendants to make apertures in his own wall for the egress of smoke and ingress of air affecting the plaintiff's room. (ii) *Abdul Hakim v. Gonesh Dutt* (3). In this case the defendants had erected a dam across a natural water course which was found to interfere with the natural drainage of the surplus rain water of the adjoining land belonging to the plaintiff. The lower Court had directed the complete removal of this dam. The High Court directed, however, that the proper course for the Court below was to enquire how far the erection of the dam was an invasion of the plaintiff's right and after inquiry to remove the dam either in whole or in part as might be justified by the evidence. (iii) *Bala v. Maharu* (4). The Court directed that the demolition of the buildings by the defendants was not necessary in this case at all so long as the defendants made the necessary arrangements for the carrying away of water which was the right claimed by the plaintiffs.

Both the Courts below were evidently exasperated by the attitude of the defendant No. 1. He flouted decency and appeared to take a malicious pleasure in causing embarrassment, discomfort and

distress to the plaintiff and his unoffending womenfolk. He defied constituted authority. He adopted a line of defence which could not be supported either in fact or in law. As consequence of all this the learned Judges of the Courts below had some justification for decreeing the plaintiff's claim in its entirety as affording relief to the plaintiff.

We agree with Dr. Katju that the end and objective of law is not vindictiveness but justice. The gravamen of the plaintiff's complaint is the infringement of his privacy. If the invasion of his right of privacy is prevented and completely put an end to without the complete removal of the balcony, the plaintiff should have no further grievance. We think that we ought to respect the plaintiff's right of privacy and afford proper protection to him and the women-folk of his house. We ought not at the same time unnecessarily to trench upon the defendants' right to build upon their own land so long as the said building does not invade the privacy of the plaintiff's house. This can very well be effected by directing a blind masonry wall being built at the edge of the balcony on the west between the letters A and B on the map attached to the decree of the trial Court and also on the two sides between A and C and B and D which we have enclosed in red. Varying, therefore, the decrees of the Courts below, we allow the appeal in part and direct the above to be done. We direct that the height of the wall should be raised up to the top of the balcony. We allow the defendants to do this within two months from the date of our decree, failing which the decree of the Court below is to be affirmed, that is, the doors closed and the balcony completely removed. We also grant relief (b). We penalise the defendants with bearing their own costs throughout and paying the costs of the plaintiff in this Court and also in the Courts below.

A. N. A.

Decree varied.

(2) 6 W. R. 86.

(3) 12 C. 323; 6 Ind. Dec. (N. S.) 220.

(4) 20 B. 768; 10 Ind. Dec. (N. S.) 1098.

ALLAHABAD HIGH COURT. FULL BENCH.

APPLICATION FOR REVIEW OF JUDGMENT IN
FIRST CIVIL APPEAL No. 109 OF 1923.

June 28, 1927.

Present :—Mr. Justice Lindsay;
Mr. Justice Sulaiman and Mr. Justice
Mukerji.

SECRETARY OF STATE FOR
INDIA IN COUNCIL—APPLICANT
versus

MAKHAN DAS—OPPOSITE PARTY.

Land Acquisition Act (I of 1894), s. 23 sub-s. 1 (1) as amended by U. P. Town Improvement Act (VIII of 1919), Sch. I, para. 10 (3), interpretation of—Calculation of market value—Use to which land is put on date of notice, whether sole criterion—Land not used, value of.

The correct interpretation of s. 23, sub-s. (1) clause first of the Land Acquisition Act as amended by para 10, cl. (3) of the Schedule to the U. P. Town Improvement Act, 1919 (U. P. Act VIII of 1919) is that the market value of the land to be acquired is to be calculated exclusively in accordance with the use to which the land is being put on the date on which notice issues under s. 29 or s. 36 of the U. P. Town Improvement Act; and where on such date the land to be acquired is not being put to any use its market value may be nil. [p. 590, col. 1.]

Application for review of judgment in First Civil Appeal No. 109 of 1923, dated 26th October 1926 (Mr. Justice Lindsay and Mr. Justice Sulaiman) and reported as 100 Ind. Cas. 508 in first appeal from a decree of the Tribunal of Improvement Trust of Cawnpore.

Mr. Uma Shankar Bajpai, for the Applicant.

Dr. K. N. Katju, for the Opposite Party.

The application came on for hearing before Lindsay and Sulaiman, JJ., and their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH.

Lindsay and Sulaiman, JJ.—We have decided that it is expedient that this case should be referred for decision to a Full Bench.

The case first came before us as First Appeal No. 109 of 1923*, and was argued and decided on the assumption that the law to be applied was that laid down in the Land Acquisition Act (I of 1894).

On an application for review of judgment being made on behalf of the respondent—the Secretary of State for India in Council—it became apparent that what was really under appeal was the award of a Tribunal constituted under the United Provinces Town Improvement Act, 1919, (U. P. Act VIII of 1919).

*See 100 Ind. Cas. 508—[Ed.]

In s. 58, cl. (d) of that Act as originally enacted it was provided that the award of such a Tribunal should be final. But under the U. P. Town Improvement (appeals) Act of 1920, (Act III of 1920,) it is now declared by s. 3 that a right of appeal exists analogous to the right of second appeal conferred by s. 100 of the Code of Civil Procedure.

The U. P. Town Improvements Act has for the purposes of compulsory acquisition modified certain provisions of the Land Acquisition Act (I of 1894). Some of these modifications are set out in the Schedule to the Act and the particular modification with which we are concerned here is contained in para. 10, cl. (3) of the Schedule which introduces an alteration into the first clause of s. 23, sub-s. (1) of the Land Acquisition Act, under which in acquisition proceedings the Court must take into consideration

"The market value of the land at the date of the publication of the declaration relating thereto under s. 6."

In para. 10, cl. (3) of the Schedule above mentioned it is provided that the expression "market-value of the land" shall (for purposes of the U. P. Town Improvement Act) be the market-value according to the use to which the land was put at the date with reference to which the market-value is to be determined under that clause? This enactment, therefore, indicates a departure from the ordinary principles applied in the determination of market-value under Act I of 1894. Those principles have been laid down in varying language. Thus it has been said in many cases that the fairest and most favourable principle of compensation to owners is to estimate the market-value of the property "not according to its present disposition but laid out in the most lucrative and advantageous way in which the owners could dispose of it".

Again it has been laid down that in assessing compensation the probable use to which the land may be put is necessarily an element to be taken into consideration so that, for example, land which may probably be used for building purposes cannot be valued on the same basis as merely agricultural land. Potential value, e. g., suitability for any particular purpose, should be taken into accounts in determining market-value.

In deciding the appeal we followed the statement of the law as laid down by the House of Lords in *Fraser v. City of Fraserville* (1) thus :

"The seller is entitled to the value to him of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired".

This passage was cited with approval in the case of *Narsingh Das v. Secretary of State for India* (2).

Now, it would seem that under the special legislation we have referred to, it is not permissible to take into account any potential value of the land and a Court is precluded from making a valuation based upon the most advantageous disposition of the land. Such was the view of a Bench of the Calcutta High Court in dealing with a cognate enactment, viz., the Calcutta Municipal Act (Bengal Act III of 1899), s. 557, sub-ss. (c) and (d) under which it is provided that the market-value is to be deemed "the market value according to the disposition of the land or building" at the material date.

In *Manindra Chandra Nandy v. Secretary of State for India* (3) the Court held that the meaning of this provision is that when land is compulsorily acquired any use to which the land may be put in future should not be taken into consideration in determining its value.

In the present case the law as amended by the special legislation has to be applied to the following facts

An area of land, 5 *bighas*, 11 *biswas* and 1 *biswansi* belonging to Makhan Das has been compulsorily acquired by the Cawnpore Improvement Trust. For purposes of compensation this area has been divided into three portions, one leased to a mill, a second let out in small building sites to labourers who have erected huts to live in, and a third portion, measuring 2 *bighas*, 10 *biswas*, 17 *biswansis*—vacant land on which there are a few scattered trees.

(1) (1917) A. C. 187 at p. 194; 86 L. J. P. C. 91; 116 L. T. 258; 33 T. L. R. 179.

(2) 86 Ind. Cas. 556; 52 I. A. 133; 23 A. L. J. 113; 2 O. W. N. 137; 48 M. L. J. 386; A. I. R. 1925 P. C. 91; L. R. 6 A. (P. C.) 64; 27 Bom. L. L. 783; 6 Lah. 69; 29 C. W. N. 822 (P. C.).

(3) 23 Ind. Cas. 412; 41 C. 967; 18 C. W. N. 884.

It is with reference to this third portion that the difficulty of applying the Act arises. At the material date it was being put to no use whatsoever. According to the owner this land has never been applied to agricultural purposes since he got possession of it some 30 years ago. The Land Acquisition Officer, however, treated this portion as agricultural land and has assessed compensation accordingly. This award has been sustained by the Tribunal.

Prima facie the award is wrong for the land was not being used for agriculture at the time of notification: It was not being used at all.

In these circumstances how is the law to be applied? "The market-value of the land shall be the market-value according to the use to which the land was put" but the land was being put to no use.

We may mention that in our judgment in the appeal we came to the conclusion that the land in dispute lay in what might properly be described as the industrial area of Cawnpore. The land has a frontage on the main road running from Cawnpore to Kalpi and the evidence shows that it is in a neighbourhood where the land has been used for the manufacture of bricks and pottery. In fact the sale deed under which Makhan Das acquired the land in 1896, speaks of it as a grove "known as *Pazawawali* (i. e., brick kiln grove), and the award of the Acquisition Officer shows that much of the land round about has been devoted to the making of bricks and pottery.

Speaking of the particular area in dispute, Abdul Majid, a surveyor in the employment of the Trust, says in his evidence, "Some portion of the land was level and in some portions there were pits. They were ordinary pits. It did not appear that the earth was dug out for a kiln".

It is difficult to see, therefore, how it is possible to treat the land as agricultural land. But if not treated as such for purposes of compensation, how is it to be treated when it is shown that at the time to be regarded, it was not being used for any purpose.

We direct that the record be laid before the Hon'ble Chief Justice for the constitution of a Full Bench to determine the questions raised above, namely, the interpreta-

tion of s. 23, sub-s. (1) clause first as amended by the special legislation referred to, and the application of the law to a case in which the land being acquired was being put to no use at the material date.

We think it proper to note that the Tribunal, whose decision is now under appeal was presided over by Mr. Ashworth (now Mr. Justice Ashworth).

The reference was heard by Lindsay, Sulaiman and Mukerji, JJ., and their Lordships delivered the following

OPINION.

Lindsay, J.—There are two questions referred to this Full Bench for decision, namely:

(1) What is the correct interpretation of s. 23, sub-s. (1) clause first of the Land Acquisition Act (I of 1894,) as amended by para. 10, cl. (3) of the Schedule to the United Provinces Town Improvement Act, 1919, (United Provinces Act VIII of 1919.)? and (2) How the law as so interpreted is to be applied to a case where at the material date the land to be acquired was being put to no actual use?

As regards the first question it is at once apparent that the amendment above referred to materially affects the scope of the first clause of s. 23, sub-s. (1) as originally enacted for the market-value of the land which has now to be taken into consideration is the "market-value according to the use to which the land was put at the date with reference to which the market-value is to be determined under that clause".

In the cases to which s. 23, sub-s. (1) clause first has been applied it has always been held that the potential value of the land should be taken into account. To quote from the judgment of the House of Lords, in *Fraser v. City of Fraserville* (1):

"The seller is entitled to the value to him of the property in its actual condition at the time of its expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired".

These principles cannot be applied to cases arising under the U. P. Town Improvement Act for, as pointed out, the expression "market-value" has under this Act a narrower meaning. "Market-value" is to be assessed in accordance with the use to which the land is being put at the date when the notice issues under s. 36 of that Act.

It is, therefore, not possible for the purposes of this Act to take into account any potential value of the land, no valuation can be made with reference to what has been called "the most advantageous disposition of the land".

The consideration of potential value being excluded, the question is what factors can be considered when assessing the market-value according to the use to which the land was put at the material date.

The basis of compensation should be the value to the owner of the date of the notification, and *prima facie* this would depend upon the profit which on that date the owner is deriving from the land, and that profit could be estimated from the use to which, at that point of time, the land was being actually put. No great difficulty could arise in dealing with a case where, at the material date, the land is actually being used.

But what is to be said in a case where on this date the land is not being used for any apparent purpose which can bring in profit to the owner? Is it to be taken that in the absence of immediate profit the land is of no value to the owner, that its market-value is nil and that, in consequence, the Improvement Trust can expropriate the owner without paying him compensation?

That is a conclusion to be avoided, if possible, for it involves the inference that the Legislature has conferred upon the Trust authorities a power of confiscation. There is no express provision to the effect in the Act. It remains to be considered whether the existence of a power of confiscation must be inferred by necessary implication.

"The market-value of the land shall be the market-value according to the use to which the land was put at the date with reference to which the market-value is to be determined under that clause".

The language of the section is rigid. The governing words are "according to the use to which the land was put, etc". The determining factor is the actual use of the land at the date in question, and any use of the land prior to that date is to be disregarded.

In view of this phraseology it appears to be impossible, for the purpose of assessing the market-value, to resort to any other facts such, for example, as the history of the land, its physical features or its situation; for while data of this nature might otherwise be of weight as indicating the

value of the land to the owner, they could only be of service in estimating a potential value based upon the use to which the land might most profitably be put. But the section expressly excludes all consideration of potential use by laying down that the determining factor in the assessment of the market-value is the actual use to which the land is being put on the date of the notification; and from this the conclusion appears to be that either intentionally or through inadvertence the Legislature has declared that in certain conditions the market-value of the land on the material date may be nil.

It need hardly be pointed out that such an enactment is fraught with much possible hardship to owners of property which has become subject to the operation of the Act. Lands of great value may from a variety of causes fall temporarily out of use. Agricultural land may have to be left fallow for a season or two in order that it may recover productivity. Or the owner of a valuable site acquired for a building scheme may have to suspend the execution of his project in order, for example, to contest in Court a claim to a right of way over the land. In either case the owner is liable to be expropriated without compensation if a notification issues under the Act while the land is not being put to actual use.

It is difficult to imagine that cases of this kind were in contemplation when the Act was passed but the language of the Act, as it stands, must, if followed, lead to these results. It must be left, therefore, to the Legislature to declare whether it was intended to invest the Improvement authorities with this power of confiscation or to amend the Act so as to avoid the results above-mentioned.

In my opinion we must answer the two questions referred to the Full Bench as follows:—

- (1) The correct interpretation of s. 23, sub-s. (1) clause first of the Land Acquisition Act as amended by para. 10, cl. (3) of the Schedule to the United Provinces Town Improvement Act, 1919 (U. P. Act VIII of 1919) is that the market-value of the land to be acquired is to be calculated exclusively in accordance with the use to which the land is being put on the date on which notice issues under s. 29 or s. 35 of the U. P. Town Improvement Act; and
- (2) where on such date the land to be

acquired is not being put to any use its market value may be nil.

Sulaiman, J.—I agree.

Mukerji, J.—I agree.

On receipt of the opinion of the Full Bench their Lordships Lindsay and Sulaiman, JJ., delivered the following—

JUDGMENT.—This is a case in which a review of judgment had been allowed, but before the application could be disposed of it was found necessary to refer the case on a question of law to a Full Bench. The Full Bench delivered its judgment on the 28th of June last. The case has come back to us for decision in accordance with the principles laid down by the Full Bench decision.

The matter before us is now a matter of calculation and the figures have been worked out in the presence of the learned Counsel for both sides. It is agreed now that the proper amount which should be awarded to Makhan Das in respect of the land which has been acquired by the Improvement Trust of Cawnpore is Rs. 10,048-4.

The Tribunal awarded a sum of Rs. 8,609-9-6 and so the result is that in this Court Makhan Das has been given Rs. 1,438-10-6 more than what was given to him by the Commissioners.

We allow the appeal, therefore, to the extent indicated and we allow Makhan Das his costs in both Courts on Rs. 1,438-10-6. We also think that Makhan Das is entitled to interest on this sum at the rate of six per cent. per annum from the date of the acquisition of his land till the date of payment. A fresh decree, therefore, will be prepared on the lines above indicated.

A. N. A.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 546 OF 1924.

July 19, 1927.

Present:—Mr. Justice Mukerji and
Mr. Justice Ashworth.

RAM CHANDRA SAHAI—DEFENDANT

—APPELLANT

versus

RAMA MAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Mortgage-bond—Suit for interest alone—Subsequent suit for principal, whether barred—Provision postponing right to sue for principal, effect of—Construction of deed.

A mortgage-deed provided that on the failure of the mortgagors to pay the interest the mortgagee 'should be competent at all times to recover the mortgage-money and the interest referred to above'. There was a postscript that the mortgagee cannot, however, bring a claim for refund of the mortgage-money till two years. Interest was not paid and the mortgagee brought a suit within two years for interest alone. In a subsequent suit for principal and the balance of interest it was contended that the suit was barred inasmuch as he had not sued for principal also in the prior suit:

Held, that, upon a proper construction of the deed, the mortgagee was not entitled to sue for principal within two years even though there was default in the payment of interest and that, consequently, the subsequent suit for principal was not barred. [p. 592, col. 1.]

Muhammad Hafiz v. Muhammad Zakariya (1), distinguished.

First appeal from a decree of the Subordinate Judge, Meerut.

Mr. Kailas Chandra Mital, for the Appellant.

Dr. K. N. Katju and Mr. Peary Lal Banerji, for the Respondents.

JUDGMENT.—This first appeal arises out of a suit for recovery of the principal and balance of interest due under a mortgage-bond, dated the 3rd January, 1922. This bond mortgaged certain property. Some of the property was given into the possession of the mortgagee and the profits from the property were set off against a certain portion of the interest due. As regards the balance of the interest the mortgagors bound themselves to pay that interest year by year. It was stipulated in the deed that if this interest was not paid on due date it should itself bear interest at 7 annas per cent. per mensem. On failure of the mortgagors to pay this interest it was provided that the mortgagee "should be competent at all times to recover the mortgage money..... and the interest referred to above (and again compound interest thereon) by enforcement of the hypothecation lien and sale of the property mortgaged". The

words "at all times"—were qualified by a postscript. This postscript ran as follows:—"The mortgagee cannot bring a claim for refund of the mortgage money till two years. He can do so after two years."

The mortgagee brought a previous Suit No. 1072 of 1922 within two years for the interest referred to above, together with compound interest for the period from the 3rd February, 1922, to the 3rd July, 1922. The relief claimed in that suit was for recovery of a sum of Rs. 259 by sale of a portion of the mortgaged property. This relief was not granted. The Court, however, gave a simple money decree for recovery of the Rs. 259-1. We do not find in the mortgage-deed any provision which would have enabled the mortgagee to obtain a simple money-decree for this sum, but that decree stands good and it is immaterial whether the decree was a proper one or not.

It is urged, however, by the defendant-appellant who has appealed that in this previous suit the mortgagee should have claimed not only the interest referred to above but also the principal mortgage money. The contention is that the postscript should be construed to mean that the mortgagee could not bring a claim for the refund of the principal mortgage money in the event of the interest having been paid, but that he could bring a claim for refund of the mortgage money if the interest referred to had not been paid. It is suggested that the provision for the mortgagee being competent to recover by sale of the mortgaged property any of the interest that might not be paid was not subject in any way to the postscript. Reference has been made to a certain decision of the Privy Council, *Muhammad Hafiz v. Muhammad Zakariya* (1), in which it was held that, where there was a provision that in the event of certain interest not being paid, the mortgagee might bring a suit for recovery of the principal amount along with the interest and that there was also a provision that the mortgagee could not sue until three years for the recovery of principal and interest, the latter provision should not be held to control the former provision. This case is clearly distinguishable from the present case. In

(1) 65 Ind. Cas. 79; 44 A. 121; 20 A. L. J. 17; 26 O. W. N. 297; (1922) M. W. N. 89; 35 O. L. J. 126; 42 M. L. J. 248; 15 L. W. 377; 24 Bom. L. R. 341; 30 M. L. T. 224; 3 P. L. T. 279; 1 P. W. R. 1922; A. I. R. 1922 P. C. 23; 49 I. A. 9 (P. C.).

the present case the postscript provided that in no case should there be a suit for recovery of the mortgage money until the expiry of two years. In the decision referred to there was a provision that in a certain event the mortgage money could be recovered within the period otherwise fixed for realisation of the mortgage money and interest. The case is, therefore, to be distinguished from the present one.

The contention of the appellant's Counsel that the postscript should be given the construction assigned to it by him as stated above does not command our assent. We hold that the postscript prevented any suit for the mortgage money within two years. At the date, consequently, of the previous suit, the mortgagee could not sue for that mortgage money and his failure to do so cannot be held to be a bar to the present suit. For the above reasons we hold that the finding of the lower Court was correct and dismiss this appeal with costs.

A. N. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 589 OF 1927.

October 31, 1927.

Present:—Justice Sir Cecil Henry Walsh, Kt.

MURAT SINGH AND OTHERS—ACCUSED—
APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 263, cls. (g) and (h)—Summary trial—Failure to give reasons for conviction—Accused's plea and examination not recorded—Conviction, legality of.

Omission by a Magistrate, in a summary trial, to record the plea of the accused and his examination as required by cl. (g) of s. 263, Criminal Procedure Code, and failure to give a brief statement of the reasons for the findings as required by cl. (h) of the said section, vitiate the trial.

Criminal reference made by the Sessions Judge, Jhansi.

Facts appear from the following

ORDER OF REFERENCE.

This is an application in revision against the judgment of a Magistrate under which the applicants have been convicted in a summary trial under ss. 323 and 426 of the Penal Code.

The only pleas which can be entertained by me in revision are those embodied in

paras. 4 and 5 of the application, which are to the effect that the provisions laid down under s. 263 of the Criminal Procedure Code were not followed in the Court below.

The learned Magistrate has not recorded the plea of the accused and his examination as required by cl. (g) of s. 263; he has not given a brief statement of the reasons upon which his finding is based, as required by cl. (h); and he has not even recorded a finding that mischief was committed under s. 426, Indian Penal Code. It is established that a Magistrate in trying a summary case in which no appeal lies must record his reasons for conviction in such a way that the Court of Revision will be in a position to judge whether there are sufficient materials to support that conviction *vide Empress v. Mohan* (1), *Empress v. Lachman* (2), *Empress v. Muhammad Haniff* (3) and *Brijbasi Lal v. Emperor* (4). It has apparently also been held by the Calcutta High Court in 9 C. W. N. P. 76 that where a Magistrate has omitted to record the plea of the accused, the conviction is bad. I have been unable to secure that ruling*, but it is quoted at page 651 of Sohani's Code of Criminal Procedure, 11th Edition. In my opinion the trial of the case under revision is vitiated by the Magistrate's failure to comply with the provisions of s. 263 of the Criminal Procedure Code. The record will be sent to the Hon'ble High Court with a recommendation that the conviction and sentences be set aside and that, if the High Court think fit, a fresh trial be ordered. Before the case is sent to the High Court, the learned Magistrate will be given an opportunity to submit any statement which he may wish to make in support of his procedure.

Mr. K. N. Laghate, for the Applicants.

The Assistant Government Advocate, for the Crown.

ORDER.—I accept this reference, quash the conviction and direct the fines, if paid, to be returned.

G. A.

A. N. A.

Reference accepted.

(1) A. W. N. (1885) 213; 4 Ind. Dec. (N. S.) 875.

(2) A. W. N. (1886) 181; 5 Ind. Dec. (N. S.) 286.

(3) A. W. N. (1899) 81.

(4) 16 Ind. Cas. 516; 10 A. L. J. 251; 13 Cr. L. J. 708.

*See *Sahib Chandra Roy v. Nanda Rani Dasi*, 9 C. W. N. LXXVI (Notes)—[Ed.]

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL PETITION No. 441

OF 1927.

September 30, 1927.

Present:—Mr. Justice Tek Chand.

MESSRS. EDALJI DINSHAW AND Co., AT
KARACHI—PETITIONERS

versus

MESSRS. DHANPAT MAL-BHAGWAN DAS
—RESPONDENTS.*Civil Procedure Code (Act V of 1908), s. 22—Transfer of case—Notice to opposite party, necessity of.*

The words used in s. 22, Civil Procedure Code, are mandatory and, therefore, notice must be given to the other party before an application for transfer is made under that section and if this has not been done the application is incompetent. [p. 593, col. 2.]

Gulab Chand v. Sher Singh (1), followed.*Simmonds v. Elliott* (2), distinguished.

Petition, under ss. 22, 23, (3) and 24, Civil Procedure Code, praying for the transfer of the case pending in the Court of the Senior Subordinate Judge, Multan to the Court of the Judicial Commissioner, Sind, at Karachi.

Mr. D. C. Ralli, for the Petitioners.

Lala Badri Das, R. B., for the Respondents.

ORDER.—On the 23rd of June, 1927, Messrs. Edalji Dinshaw filed a suit against Messrs. Dhanpatmal-Bhagwandas in the Court of the Judicial Commissioner, Sind, at Karachi, for a declaration that no valid or binding contract for the sale of a factory situate at Mian Channu in the Multan District had been made between the parties and for an injunction restraining the defendants from disposing of the said factory on account and at the risk of the plaintiffs. The first hearing of this suit was fixed for the 9th August, 1927. The next i. e., on the 24th of June, 1927, Messrs. Dhanpatmal-Bhagwandas filed a suit in the Court of the Senior Subordinate Judge, Multan, for specific performance of the contract of sale of the aforesaid factory. The defendants, Messrs. Edalji Dinshaw, were summoned for the 2nd of August, 1927, on which date they were to file their defence. On the 1st of August of 1927, Messrs. Edalji Dinshaw presented to this Court the petition under ss. 22, 23 (3) and 24, Civil Procedure Code, praying for the "transfer" of the case pending at Multan to Karachi on the ground that the two suits relate to the same transaction and it was in the interests of justice and to the convenience of the parties to have both of them tried at Karachi.

The petition is opposed by Messrs. Dhanpatmal-Bhagwandas, and Mr. Badri Das who appears for them raises a number of preliminary objections. I do not think it necessary to deal with all these objections as, in my opinion, the petition must fail on the short ground that no notice had been given by the petitioners to the respondents before moving this Court to take action under ss. 22 and 23. Section 22 provides that "where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties may..... apply to have the suit transferred to another Court....." Mr. Badri Das contends that the provision requiring that notice must be given to the opposite party prior to the filing of the application is mandatory, and as no such notice was given in this case the petition does not lie. In my opinion this contention has force and must prevail. It was held by Broadway, J., in *Gulab Chand v. Sher Singh* (1) that the words used in s. 22 of the Code of Civil Procedure are mandatory and, therefore, notice must be given to the other party before the application for transfer is made and if this has not been done, the application is incompetent. Mr. Ralli for the petitioners has conceded that before filing the application no notice was given by his clients to the respondents and that the ruling cited is in point. He, however, contends that this provision of s. 22 is merely directory and that the decision in *Gulab Chand v. Sher Singh* (1) is unsound. I have given full consideration to his arguments, but see no force in them. In support of his contention, the learned Counsel has relied very strongly on *Simmonds v. Elliott* (2) but the facts of that case were wholly distinguishable. The point raised there had reference to s. 2 of the Summary Jurisdiction Act which laid down that the respondent should be served with the notice of appeal before the case had been lodged at the Central Office. In that case the required notice had been issued, but was actually served on the respondent half an hour after the

(1) 35 Ind. Cas. 616; 11 P. R. 1917; 150 P. W. R. 1916; 16 P. L. R. 1917.

(2) (1917) 2 K. B. 894; 87 L. J. K. B. 42; 15 L. G. R. 810.

lodging of the appeal. It was held that notwithstanding this irregularity in the service the Court had jurisdiction to hear the appeal. At the hearing the respondent did not appear and on the appellant's Counsel bringing this irregularity to the notice of the Court, Lord Darling held that as the respondent had not been prejudiced in any way by the delay of half an hour and had not appeared and taken the point, there was nothing to prevent the Court from hearing the appeal. It is obvious that there is no analogy between that case and the one before me. The other cases cited by Mr. Ralli merely lay down that a respondent may not take advantage of the non-observance of statutory provisions relating to procedure and may waive them. These rulings, are, however, based upon the maxim *cuiuslibet licet renuntiari juri pro se introducto* and are merely illustrations of the rule that every one has a right to waive the advantage of a law or rule made solely for his benefit and protection, which may be dispensed with without infringing on any public right or public policy. (Maxwell's Interpretation of Statutes, Sixth Edition, page 678). There has been no such waiver in the present case. I see no reason to hold that the provision as to notice laid down by the Legislature in s. 22 is merely directory and agree with Broadway, J., in holding that the failure to comply with it bars an application for transfer under that section.

Mr. Ralli admitted at the hearing that s. 24 is inapplicable to the case and that he is unable to support the prayer for transfer under that section as made in the petition.

For the foregoing reasons, I dismiss the petition with costs.

R. L.

Petition dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL

No. 727 of 1927.

December 6, 1927.

Present :—Mr. Justice Zafar Ali.

MANGAL SAIN—OBJECTOR—APPELLANT

versus

THE INDIAN MERCHANTS BANK,
LIMITED, AMRITSAR, IN

LIQUIDATION THROUGH Lala

MADAN GOPAL, ADVOCATE,

LAHORE AND Lala BISHAN DAS,

VAKIL, AMRITSAR—PLAINTIFF—

RESPONDENT.

Companies Act (VII of 1913), s. 156—Surrender of shares, legality of—Shareholder surrendering shares, liability of, as contributory.

A shareholder who surrenders his share does not cease to be a member within the meaning of s. 156 of the Companies Act. [p. 596, col. 1.]

It is not open to a shareholder to surrender at will his share, especially when he has to meet future calls, and it is not open to a Company to accept surrender of shares unless the act of the Company can be brought within the rules relating to forfeiture of shares even if the Articles empower the Directors to accept surrenders of shares. [p. 595, col. 2.]

In re Mirza Ahmad Namazi (1), followed.

Miscellaneous first appeal from an order of the Additional District Judge, Amritsar, dated the 15th December, 1926.

Lala Badri Das, R. B., for the Appellant.

Mr. Ram Lal Anand, for the Respondent.

JUDGMENT.—The Official Liquidator of the "Indian Merchants Bank Limited, Amritsar," having placed on the list of contributories the names of Mangal Sen, Ghamandi Lal, Natha Singh and Jas Ram, everyone of them filed objections to the effect that he had ceased to be a member of the Company and was not liable to contribute as he had surrendered his shares and the Board of Directors had accepted the surrender which it was competent to do under r. 43 of the Articles of Association. The Court below overruled this objection on the general ground that the "Surrenders (Acceptance of the surrenders?) of the objectors' partly paid up share (shares?) and for (?) forfeiture of their allotment money (monies?) by the Head Board of Directors was (were?) unnecessary and *ultra vires* as it was in substance a reduction by the Company of the shares at the price (?) of discharging the shareholders from further liability to calls". The objectors have appealed against the above order, separately

The law on the subject is thus reviewed and discussed by Devadoss, J., in *In re Mirza Ahmed Namazi* (1).

"Granting for argument's sake that the resolution is according to the rules, I am unable to accept the contention that the surrender of shares is permitted by law so as to enable the Directors, or the Company, to reduce its capital. Rule 118 (5) gives power to the Directors to accept surrender of shares by shareholders; but this power which is an unusual power, granting that it is valid, is subject to restrictions: Table A of the Indian Companies Act does not contain any clause empowering any Company to accept surrender of shares. The Indian Companies Act permits forfeiture of shares on certain grounds; but to give an unlimited or wide power to a Company to accept surrender of shares is, I think, opposed to the principle that a Company cannot buy its own shares and to the principle that a Company can reduce its capital only with the permission of the Court and on such terms and conditions as it may impose. The power given by r. 118 (5) is very wide. It is in these terms:—'to accept from any member on such terms and conditions as shall be agreed a surrender of his shares or stock or part thereof'. Whatever might have been the view as regards the power of a Company to accept surrender of shares, I think it is well-settled now that a Company cannot exercise wide powers of accepting a surrender. It can only accept a surrender under conditions and limitations under which shares can be forfeited. Reliance is placed upon *Snell's case*, *In re Natal Investment Co.* (2). In that case Sir G. M. Giffard, Lord Justice, held that the surrender of shares by Snell was valid. The main reason for the learned Lord Justice holding that Snell's surrender was valid was that his name was not entered on the register of shareholders and that no specific shares were allotted to him though for purposes of the Act he was a shareholder. He found that the substance of the transaction was that both parties were offering to sever their connection with each other and that the Articles of Association contained a power to cancel shares and that there was nothing in the form preventing the parties from carrying out their intention. *Snell's case*, *In re Natal Investment*

Co., (2), cannot be considered to be good law in view of the decision of the Court of Appeal in *Ballerby v. Rowland and Marwood's Steamship Co., Ltd.*, (3). Cozens Hardy, L. J., lays down the law thus:—'Every surrender of shares, whether fully paid up or not, involves a reduction of capital, which is unlawful, except when sanctioned by the Court under the Companies Acts of 1867 and 1877. Forfeiture is a statutory exception, and is the only exception. For I regard a surrender, under circumstances which would justify a forfeiture, as merely equivalent to a forfeiture.' Collins, M. R., quotes with approval the following observation of the learned Master of the Rolls in *In re Dronfield Silkstone Coal Co.*, (4). 'There is no reference in the Acts to surrenders of shares; but these have been admitted by the Courts, upon the principle, as I understand it that they have practically the same effect as forfeiture, the main difference being that the one is a proceeding *in invitum*, and the other a proceeding taken with the assent of the shareholder, who is unable to retain and pay future calls on the shares.' The principle, therefore, applicable to cases of surrender is that a surrender is good if it amounts to a forfeiture. It is not open to a shareholder to surrender at will his share, especially when he has to meet future calls and it is not open to a Company to accept surrender of shares unless the act of the Company can be brought within the rules relating to forfeiture of shares. To hold that a Company can by a resolution of its Directors accept surrender of shares would be to allow a Company to reduce its capital at its pleasure".

In the present case also there was a rule empowering the Directors to accept surrenders of shares but according to the general principles (1) that a surrender of shares involves a reduction of the capital and (2) that the capital of a Company cannot be reduced but by leave of the Court, no surrender can be lawfully accepted but under circumstances which would justify a forfeiture. There is nothing to indicate that the surrenders of shares by the objectors were accepted under such circumstances. According to the Indian Companies

(3) (1902) 2 Ch. 14 at p. 32; 71 L. J. Ch. 541; 50 W. R. 566; 86 L. T. 671; 18 T. L. R. 582; 9 Manson 291.

(4) (1881) 17 Ch. D. 76 at p. 85; 50 L. J. Ch. 337; 44 L. T. 361; 29 W. R. 768.

(1) 83 Ind. Cas. 94; 20 L. W. 74; (1924) M. W. N. 582; A. I. R. 1924 Mad. 703.

(2) (1870) 5 Ch. A. 22; 21 L. T. 445; 18 W. R. 30.

Act a shareholder ceases to be a member whose shares are forfeited. It is nowhere laid down that a shareholder who surrenders his shares ceases to be a member. It cannot, therefore, be said that the objectors ceased to be members as contemplated by s. 156 of the Indian Companies Act, I, therefore, dismiss the appeal with costs.

R. L.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION No. 119 OF 1927.
FORMERLY CIVIL APPEAL CASE No. 2065
OF 1926.

February 18, 1927.

Present.—MR. Justice TEJ CHAND.

SIKANDAR KHAN AND OTHERS—

PLAINTIFFS—APPELLANTS

versus—

BALAND KHAN AND OTHERS—DEFENDANTS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1, O. XLVII, r. 7, construction of—Appeal from order granting review limits of—Decree in favour of several plaintiffs one of whom is dead, effect of—Appeal by defendants—Appellate Court, proper procedure for—Construction of Statutes—Construction of repugnant sections—Permissive provisions, construction of—Construction against superfluity of language.

The right of appeal against an order granting a review is limited to the three cases mentioned in O. XLVII, r. 7 of the Civil Procedure Code. Order XLIII, r. 1 and O. XLVII, r. 7 are not mutually inconsistent but are really complementary of each other, one giving the right to appeal and the other defining the extent to which that right can be exercised. [p. 598, col. 1.]

Yusuf v. Naza (7); Atri v. Ghaffar (6); Fazal Ahmad v. Khan Bahadur (9); Basheshwar Nath v. Ramkishan Das (10); Uttam Chand v. Ganesha Mal (11); Jagana Nath Prasad Singh v. Ramautan Singh (12); Tripura Charan Kul v. Shoroshi Balu (13); Hari Charan Saha v. Baran Khan (14); Nundo Lal Mullick v. Panchanon Mukherjee (15); Meduri Brahmayya v. Vedulu Yellamma (16); Venkata Seetharamayya v. Veena Tulasi Babu (17); Sundar v. Habib Chiki (18); Narain Das v. Chiranj Lal (19); Madhori Saran v. Parbati (20) and Shinder Lal v. Upendra Lal (21), followed.

Daso Keshav Panchbhavi v. Karbasappa Kariyappa Mudhol (2), dissented from.

Ebbs v. Boulnois (3); Wood v. Riley (4); Taylor v. Taylor (5) and Ditcher v. Denison (6) (referred to).

A decree passed in favour of a number of plaintiffs one of whom is dead at the time is not necessarily a nullity in its entirety in every case. [p. 600, col. 2.]

Goda Coopuramier v. Sundarammal (28) and Kesho Prasad Singh v. Shamnandan Rai (29), referred to; Gohar v. Muhammad (1), distinguished.

Where a decree is passed in favour of all the plaintiffs though one of them had died before the date of the decree and no legal representative of his had been brought on the record, and the defendants appeal the proper procedure for the Appellate Court to follow is either merely to dismiss the appeal without any remarks leaving the question as to the effect of the death of the deceased plaintiff on the decree as a whole for determination in appropriate proceedings or to accept the appeal and pass a decree dismissing the plaintiffs' suit and thereby leaving them the right to second appeal. It is not a proper procedure to dismiss the appeal and incorporate in the decree that the decree of the trial Court was a nullity. [p. 601, col. 1.]

It is a well-established rule of construction that where two co-ordinate provisions in an enactment are apparently inconsistent an effort must be made to reconcile them. [p. 598, col. 1.]

Ebbs v. Boulnois (3), followed.

Where two sections of a Statute are repugnant the last must prevail and override the earlier. [*ibid.*]

Wood v. Riley (4), followed.

It is a settled canon of construction that a Statute ought to be so construed that if it can be prevented no clause, sentence or word shall be superfluous, void or insignificant. [p. 599, col. 1.]

Ditcher v. Denison (6), referred to.

Petition for revision of an order of the District Judge, Gurdaspur, dated the 23rd April, 1926, affirming that of the Judge, Fourth Class, Shakargarh, District Gurdaspur, dated the 2nd December, 1924.

MR. MEHR CHAND MAHAJAN, for the Petitioner.

MR. BISHAN NATH, for the Respondents.

JUDGMENT.—Baland Khan and others, who are defendants in this case, applied to the Collector, Gurdaspur, under the Redemption of Mortgages Act II of 1913, for redemption of the land in suit which was in possession of the present plaintiffs as mortgagees. This application was granted by the Collector on the 13th November, 1922. The defendants deposited in the Collectorate the amount that had been adjudged to be due on the mortgage by the Collector and obtained possession of the land. On the 1st October, 1923, the plaintiffs, five in number, instituted the present suit out of which this appeal has arisen alleging that the land in question originally belonged to one Malla Khan who had mortgaged it in favour of the plaintiffs' ancestor about 60 years ago and that the defendants were not the representative-in-interest of Malla Khan mortgagor, and were not entitled to redeem. They prayed for a declaration that the order of

the Collector passed in summary proceedings under Act II of 1913 was erroneous and that they had been wrongly dispossessed and were entitled to get back possession of the land.

The defendants pleaded *inter alia* that they had lawfully succeeded to Malla Khan's rights in the land and being the owners of the equity of redemption were entitled to redeem, that the order of the Collector was correct and that the plaintiffs' suit was time-barred. The Sub-Judge overruled the defendants' contentions and finding for the plaintiffs decreed the suit on the 2nd December, 1924.

On 2nd January, 1925, Baland Khan, defendant, preferred an appeal to the Court of the District Judge. On the 17th February, 1926, he filed an application under O. XXII, r. 4, stating that Ghazi Khan, one of the plaintiffs-respondents, had died about a year before, i. e., during the pendency of the appeal and that his son, Azim Khan, be brought on the record as his heir and legal representative. This application was accompanied by an affidavit by Baland Khan who also made a statement on oath in Court the next day supporting the allegation in the application. On the appeal coming up for decision on the 9th March, Beli Khan, one of the plaintiffs-respondents, was examined and he also stated that his brother, Ghazi Khan, plaintiff, had died about a year before. Baland Khan's Pleader, however, asked for an adjournment in order to show, contrary to his client's original assertion, that Ghazi Khan had really died before the date of the decision of the suit in the trial Court. The learned District Judge, declined to adjourn the case and ruled that the appellant must be confined to the statement made by him in his application of the 17th February, 1926, to the effect that Ghazi Khan, plaintiff, had died during the pendency of the appeal.

On this assumption he held that the defendant's appeal had abated against the deceased plaintiff and as the appeal was against a joint decree in favour of all the plaintiffs-respondents, it could not proceed against the others and must be dismissed.

On the 19th March, 1926, the defendant Baland Khan filed an application under O. XXII, r. 9, and O. XLVII, r. 1, Civil Procedure Code, alleging that Ghazi Khan, plaintiff had really died on the 3rd October, 1923, two days after the institution of the

suit in the trial Court and that the plaintiffs themselves had taken no steps in that Court to bring the deceased's representatives on the record. He also stated that as Ghazi Khan had never appeared before the trial Court and as his name had been shown in the decree of that Court, his Pleader had been misled into showing Ghazi Khan as a respondent to the appeal. Along with this application he filed a certified copy of an extract from the death register showing that Ghazi Khan had died on the 3rd October, 1923, and also filed an affidavit to the same effect. This application was heard by the learned District Judge on the 23rd April, 1926, when he passed the following order:—"A review of my judgment dated the 9th March, 1926, is sought on the ground that Ghazi Khan actually died on the 3rd of October, 1923, only two days after the suit was instituted and upwards of a year before it was decided. A death certificate is attached and its accuracy is not questioned. My judgment declaring that the appeal abated is, therefore, based on erroneous grounds and should, I think, be reviewed. The decree of the lower Court being passed in favour of a dead person along with others is a nullity and therefore, no appeal lies. *Gohar v. Muhammad* (1). Lala Moti Ram now attempts to argue contrary to his previous argument, which is accepted in the judgment that the suit was not a joint one. The suit was one for possession of land on the ground that the Revenue Assistant had erroneously allowed the defendants to redeem that land. Ghazi Khan and four others brought the suit as joint owners of the land and it is hard to see how the suit could have proceeded without bringing Ghazi Khan's representatives on the record. The appeal is dismissed on the ground, to be embodied in the decree, that the decree of the lower Court is a nullity."

A decree was accordingly prepared in these terms. Against this decree the surviving plaintiffs have preferred a miscellaneous appeal to this Court purporting to be under O. XLIII, r. 1 (w) and (k) of the Civil Procedure Code, and the first question that has to be decided is whether an appeal on behalf of the plaintiffs-appellants is competent. Appellants' Counsel has not sought to support the appeal under O. XLIII, r. 1 (k) for the simple reason that the order of

the lower Court was not passed under O. XXII, r. 9, but he has strenuously contended that an appeal does lie under O. XLIII, r. 1 (w). I am, however, unable to accept this contention. It is, no doubt, true that cl. (w) of r. 1 of the 43rd Order provides that an appeal shall lie from an order passed under r. 4 of O. XLVII granting an application for review, but this rule has to be read along with O. XLVII, r. 7, which specifically lays down that an order granting an application for review can be objected to on appeal only on one or the other of the three grounds specified therein. I am aware that the contrary view has been taken in a recent case decided by the Bombay High Court reported as *Daso Keshav Penchbhavi v. Karbasappa Kariyappa Mudhol* (2) where it was held that under O. XLIII, r. 1 (w) an appeal lies against an order granting an application for review, quite irrespective of the qualifications contained in O. XLVII, r. 7. Macleod, C. J., who delivered the main judgment in that case, after comparing the relevant provisions of the Codes of 1882 and 1908 remarked that the general right of appeal given by O. XLIII, r. 1 (w), could only be restricted by direct prohibition. Being pressed with the apparent inconsistency between the two rules, the learned Chief Justice came to the conclusion that the result of making an order granting a review appealable under O. XLIII, r. 1 (w), was to render O. XLVII, r. 7, superfluous. The other learned Judge, (Madgavkar, J.) thought, that O. XLIII, r. 1, being a new provision, added by the Code of 1908, "was perhaps not present in the minds of the authors when they reproduced the old s. 629 in the form of O. XLVII, r. 7."

I venture to think, that there is no real inconsistency between the two rules. The former rule merely gives a party aggrieved by an order granting a review a right of appeal, but it does not deal with the grounds on which the order appealed against can be objected to. That is a matter dealt with in O. XLVII, r. 7. The two provisions of the Code are not mutually inconsistent, but are really complementary of each other. The one gives the right to appeal and the other defines the extent to which that right can be exercised. It is a well-established rule of construction, that where two co-ordinate pro-

visions in an enactment are apparently inconsistent, an effort must be made to reconcile them. As observed by Lord Justice James in *Ebbs v. Boulnois* (3).

"It is a cardinal principle in the interpretation of Statute that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other". Applying this rule, it must be held that O. XLVII, r. 7, qualifies and controls O. XLIII, r. 1 (w), that the two must be read one along with the other and taken together they do not give an unlimited right of appeal.

If, however, it be supposed that the inconsistency between the two parts of the Code is so great and real, that it is impossible to reconcile them, the rule must be applied that "if two sections of a Statute are repugnant, the last must prevail and override the earlier" [per Keating, J., in *Wood v. Riley* (4)]. For this reason also O. XLVII, r. 7 should be held to control and restrict the earlier rule.

Nor does the suggestion appeal to me that while re-enacting s. 629 of the old Code in the form of O. XLVII, r. 7 the authors of the Code of 1908 had forgotten or overlooked the provisions of O. XLIII, r. 1 (w) which they themselves had newly introduced in the same Code, thus supplying an omission in the earlier Code. Another reason given in the Bombay judgment in support of its conclusion is that O. XLVII, r. 7, is not exhaustive of the grounds on which an order granting a review may be objected to in appeal, that it enumerates only three such grounds and cannot be taken as excluding all others. It is, no doubt, true that the phraseology used in r. 7 is that "an order granting an application (for review) may be objected to" on the three specified grounds, and other grounds are not specifically excluded, but it is obvious that the language used is permissive only in the sense that it is not obligatory on the person aggrieved by the order granting the application for review to appeal against it, but if he chooses to so appeal, the rule forbids him from objecting on any other ground. Craies in his standard work *Treatise on Statute Law* (3rd Edition page 253) points out that in such cases

(3) (1875) 10 Ch. A. 479 at p. 484; 44 L. J. Ch. 691; 33 L. T. 342; 23 W. R. 820.

(4) (1868) 3 C. P. 26; 37 L. J. C. P. 24; 17 L. T. 216; 16 W. R. 146.

(2) 94 Ind. Cas. 591; 27 Bom. L. R. 1446; A. I. R. 1926 Bom. 121.

language *prima facie* permissive not only allows a person to do a thing, which it says he may do, "but it also prohibits that particular thing from being done in any other way". As pointed out by Sir George Jessel, M. R., in the well-known case of *Taylor v. Tayler* (5) when a statutory power is conferred and a mode of exercising it is provided for, "it means that no other mode is to be adopted."

In the Bombay case, the opinion is also expressed that on a strict construction of the two rules, Order XLVII, r. 7, should be considered to have become superfluous. Here again the settled canon of construction is that a Statute ought to be so construed that "if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant", and it is well to bear in mind the warning of their Lordships of the Judicial Committee that "one who reads a legal document, whether public or private, should not be prompt to ascribe, should not, without necessity or some sound reason, impute to its language tautology or superfluity, and should be rather at the outset inclined to suppose each word intended to have some effect, or be of some use," *Ditcher v. Denison* (6).

For the foregoing reasons I venture to think that the law has not been correctly laid down in *Daso Keshav Panchbhavi v. Karbasappa Kariyappa Mudhol* (2) and must respectfully dissent from that decision. And I do so the more readily, as I find that the contrary view is supported by a uniform series of rulings of all the other Courts.

In *Yusaf v. Naza* (7) a Division Bench of the Punjab Chief Court held that the right of appeal against an order granting a review is limited to the three cases mentioned in O. XLVII, r. 7. This decision was followed by Johnstone, J., in *Atra v. Chajju* (8), Chevis, J., in *Fazal Ahmad v. Khan Bahadur* (9); Shadi Lal, J., in *Basheshar Nath v. Ramkishan Das* (10) and Martineau, J., in *Uttam Chand v. Ganesha Mal* (11). The Calcutta High Court has

also consistently taken the same view. In *Jagana Nath Prasad Singh v. Ramautar Singh* (12), Mookerji, J., (Carnduff, J., agreeing) expressed the opinion "that the two rules must be read together, otherwise the restrictive provisions contained in r. 7 would become absolutely nugatory. The object of the Legislature plainly was to provide explicitly that an order granting a review is appealable. This supplies the omission in the Code of 1882 under which the right of appeal was given only by implication and also makes it plain that a second appeal is barred under s. 104 (2)". Other Benches of that Court have followed this ruling in *Tripura Charan Kul v. Shoroshi Bala* (13), *Hari Charan Saha v. Baran Khan* (14) and *Nundo Lal Mullik v. Panchanon Mukherjee* (15). The same view has found favour with the High Courts of Madras in *Meduri Brahmayya v. Vedulu Yellamma* (16) and *Venkata Seetharamayya v. Veena Tulasi Babu* (17), Allahabad in *Sundar v. Habib Chick* (18), *Narain Das v. Chiranji Lal* (19), *Madhuri Saran v. Parbati* (20) and Patna in *Sundar Lal v. Upendra Nath Seal* (21). There is thus a consensus of authority in support of the view that the right of appeal must be restricted to the three grounds specified in O. XLVII, r. 7. In the present case it is conceded that the objections taken to the order of the learned District Judge do not fall within any of the clauses of that rule. I must, therefore, hold that no appeal lies to this Court.

The question however, remains whether under the circumstances of the case, the judgment of the learned District Judge should be allowed to stand or whether it is a fit case for the exercise of the revisional powers of this Court. Now it seems to me that a very anomalous position has been

(5) (1876) 1 Oh. D. 426 at p. 431.

(6) (1857) 11 Moore P. O. 324 at p. 337; 6 W. R. 342; 14 E. R. 718.

(7) 16 Ind. Cas. 995; 11 P. R. 1913; 17 P. L. R. 1913; 278 P. W. R. 1913.

(8) 12 Ind. Cas. 246; 49 P. W. R. 1911.

(9) 12 Ind. Cas. 624; 10 P. L. R. 1912; 221 P. W. R. 1911.

(10) 32 Ind. Cas. 860; 48 P. W. R. 1916.

(11) 3 Lah. L. J. 572.

(12) 14 Ind. Cas. 39.

(13) 22 Ind. Cas. 773.

(14) 25 Ind. Cas. 903; 41 O. 746.

(15) 42 Ind. Cas. 484; 45 O. 60 at p. 66; 21 C. W. N. 1076; 26 C. L. J. 187.

(16) 36 Ind. Cas. 437; 31 M. L. J. 509; (1916) 2 M. W. N. 278; 4 L. W. 408.

(17) 83 Ind. Cas. 548; 46 M. L. J. 463; (1924) M. W. N. 355; 34 M. L. T. 224; 19 L. W. 649; A. I. R. 1924 Mad. 602.

(18) 60 Ind. Cas. 81; 42 A. 626 at p. 631; 18 A. L. J. 838; 2 U. P. L. R. (A.) 283.

(19) 86 Ind. Cas. 168; 47 A. 361 at p. 364; 23 A. L. J. 56; L. R. 6 A. 159 Civ.; A. I. R. 1925 All. 364.

(20) 88 Ind. Cas. 653; 47 A. 881; 23 A. L. J. 534; L. R. 6 A. 451 Civ.; A. I. R. 1925 All. 552.

(21) 35 Ind. Cas. 15; 1 P. L. J. 193.

created by the decree as finally passed by the learned District Judge. He had on the 9th March, 1926, dismissed the defendants' appeal and affirmed the decree of the trial Court in favour of all the plaintiffs. By his subsequent order, he on review directed that the defendants' appeal to his Court, be dismissed "on the ground, to be embodied in the decree, that the decree of the lower Court is a nullity". If the learned Judge was of opinion that no appeal lay to his Court, he should have merely stayed his hands and dismissed the defendants' appeal on that ground alone and not proceeded to incorporate in his decree the remark that the decree of the lower Court was a nullity. By doing so, he has virtually accepted the appeal of the defendants and dismissed the plaintiffs' suit. But while this is the real meaning and effect of the decree, its wording is such that it leaves the plaintiffs without any remedy whatever. They cannot come to this Court in second appeal because the decree of the District Judge on the face of it affirms the trial Court's decree and dismisses the defendants' appeal to his Court. Nor can they execute the decree of the Sub-Judge, which the learned District Judge purports to affirm, for as soon as they proceed to execute that decree, the judgment-debtors will be entitled to urge that the District Judge having held the decree to be a nullity, it is incapable of execution. On such an objection being taken the executing Court will be bound to give effect to it and refuse to execute the decree [see *Narendra Bahadur Chand v. Gopal Sah* (22), and *Topanram v. Tekchand* (23)]. The Appellate Court should have, therefore, either merely dismissed the appeal of the defendants without any remarks, leaving the question as to the effect of the death of Ghazi Khan on the decree as a whole for determination in appropriate proceedings, or the appeal should have been accepted and a decree passed dismissing the plaintiffs' suit thus enabling them to seek relief by way of second appeal to this Court, if so advised. The decree, therefore, cannot be allowed to stand in the form in which it has been passed.

In holding that no appeal lay to his Court the learned District Judge purports to follow *Gohar v. Muhammad* (1), but I

think that that ruling is wholly inapplicable to the present case. There a decree had by inadvertence been passed by the Divisional Judge in favour of a dead person, who was the sole defendant in the case and the plaintiff had preferred a further appeal to the Chief Court making the representatives of the deceased (sole) defendant as respondents. It was held that the appeal was not maintainable against the representatives of the deceased defendant, who were not on the record, when the Divisional Judge had decided the case. The Chief Court, however, acting on the Revision side, set aside the decree of the Divisional Judge and remanded the case for disposal in accordance with law. The decision in that case proceeded on its peculiar facts and, in my opinion, the rule laid down therein is not applicable to cases in which a decree has been passed in favour of a number of persons, one of whom was dead at the time of the passing of the decree. An instance of such a case will be found in *Narain Das v. Kalu Ram* (24), where a decree had been passed by the District Judge in favour of four persons, one of whom was dead at the date of his decree, but the fact of whose death had not been brought to his notice at the time. The appeal of the opposite party was entertained by the High Court and was accepted, the decree of the District Judge being set aside and the case remanded to him for redécision after adjudicating on the effect of the death of one of the plaintiffs on the whole case. Similarly in *American Baptist Foreign Mission Society v. Amalanadhuni Pattabhiramayya* (25) the Madras High Court entertained an appeal against a decree passed by the lower Court in favour of a number of defendants, one of whom was dead, but set it aside and remitted the case to the lower Court for redécision. Other instances in which a similar course was adopted will be found in *Balaram Pal v. Kanysha Majhi* (26) and *Amanat Khan v. Miyan Khan* (27). I may also point out that a decree passed in favour of a number of plaintiffs, one of whom is dead at the time is not necessarily a nullity in its entirety in every case. A decision of this matter will de-

(24) 2 Lah. L. J. 144.

(25) 48 Ind. Cas. 859.

(26) 53 Ind. Cas. 548.

(27) 55 Ind. Cas. 498; 7 O. L. J. 20.

(22) 20 Ind. Cas. 506; 17 C. L. J. 634.

(23) 15 Ind. Cas. 832; 5 S. L. R. 260.

pend on a variety of consideration which it is not necessary to detail here. Attention may, however, be drawn to *Goda Copuramier v. Sundarammal* (28) and *Kesho Prasad Singh v. Shamandan Rai* (29) and the authorities cited therein.

In arriving at the conclusion that the whole decree was a nullity in this case, the learned District Judge seems to have been pressed by the fact that the plaintiffs' Counsel had, at the earlier hearing, urged that the appeal being against a joint decree in favour of five plaintiffs, one of whom was (at the time) wrongly supposed to have died during the pendency of the appeal, the appeal had abated in its entirety and that he should not be allowed to argue that the whole decree was not a nullity. It is, however, to be noted that there is a great deal of difference between a suit instituted by a number of persons, one of whom dies and whose representatives are not brought on the record within limitation, and an appeal against a joint and indivisible decree in favour of a number of persons, the death of one of whom takes place during the pendency of the appeal against the decree and no steps having been taken under O. XXII. to implead his representatives. In the latter case it is only the decree appealed against that is to be looked at, whereas in the former case it is necessary to examine the nature of the claim, the terms of the plaint and the relief asked for. In suits by a number of co-mortgagees it would be necessary to examine the terms of the mortgage, the shares of the mortgagees, their rights *inter se* and the nature of the claim put forward by them. The learned District Judge has not discussed this aspect of the case in any detail and I am not sure if full arguments were addressed to him on it. I would not express any final opinion on that point on the scanty materials before me, especially when I am dealing with the matter on the Revision Side. This must be left for consideration by the District Judge or the trial Court as the case might be.

For the foregoing reasons I am of opinion that this petition, being treated as one for revision, should succeed and setting aside the decrees of the learned District Judge, dated the 9th March and 23rd April, 1926, I remand the case to him for disposal with reference to the foregoing remarks.

(28) 3 Ind. Cas. 739; 33 M. 167; 6 M. L. T. 271.

(29) 94 Ind. Cas. 28; 5 Pat. 233; (1926) Pat. 81; 7 P. L. T. 628; A. I. R. 1926 Pat. 504.

As the plaintiffs have not been free from blame, I leave the parties to bear their own costs in this Court.

R. L.

A. N. A.

Revision accepted:

Case remanded.

LAHORE HIGH COURT. CRIMINAL REVISION PETITION No. 1454 OF 1927.

November 16, 1927.

Present:—Mr. Justice Tek Chand.
DASONDHI AND OTHERS—ACCUSED—
PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 225-B—Resistance to warrant—Illegality of tax—Absence of seal of Court—Offence Punjab District Boards Act (XX of 1883), s. 30—Halsiyat tax, legality of.

A *halsiyat* tax which is not fixed at a flat rate for each profession but which varies according to the income of the assessee is in substance a tax on the income and cannot be imposed by a local body without the previous sanction of the Governor-General in Council. [p. 602, col. 2.]

District Board, Sialkot v. Sultan Muhammad Khan (1), followed.

Under s. 225-B of the Penal Code resistance or obstruction to the apprehension of a person is punishable only if the apprehension is lawful. Where the imposition of tax for the non-payment of which the warrants are issued is itself illegal and *ultra vires*, the resistance to their execution is not punishable under the section. [*ibid.*]

The omission of the seal of the Court issuing it renders a warrant void and a person offering resistance to apprehension under such a warrant does not commit an offence under s. 225-B Penal Code. [*ibid.*]

Mahajan Sheikh v. Emperor (2), *Alter, Cautman v. Government of Bombay* (3) and *In re Phipps* (4), referred to.

Petition for revision of an order of the Magistrate, First Class, with appellate powers, Jullundur, dated the 30th August, 1927, affirming that of the Honorary Magistrate, Second Class, Jullundur, dated the 25th July 1927.

Mr. *Fagir Chand*, for the Petitioners.

Mr. *Mulakh Raj*, for Government Advocate, for the Respondent.

JUDGMENT.—The petitioners have been convicted under s. 225-B of the Indian Penal Code, for having offered illegal obstruction to their apprehension, by certain *Tehsil* peons in execution of warrants issued for their arrest and have been sentenced each to undergo rigorous imprisonment for two weeks and pay a fine of Rs. 50.

The facts found by the lower Courts are as follows. In May, 1924, the District Board, Jullundur, with the permission of the Local Government imposed a *haisiyat* tax on the total annual income derived by all persons carrying on any trade or following any profession or calling within that district. Notification No. 3162 was issued on the 30th April, 1924, and will be found printed at pages 280 and 281 of Part I-A of the Government Gazette Punjab published on the 2nd of May, 1924. The assessment was not fixed at a flat rate for a particular profession, calling or trade but to vary according to the income of each individual assessee. Three of these assesseees, Dasondhi, Dheru and Basanta goldsmiths of village Uchha refused to pay the tax on demand and under s. 70 of the District Boards Act steps were taken to recover it as if it were arrears of land revenue. Accordingly, on the 14th August, 1926, the *Tehsildar*, Jullundur, issued warrants under s. 69 of the Punjab Revenue Act for the arrest of the defaulters. Five *tehsil* peons accompanied by a number of *zaildars* and *safedposhes* went to the village to effect the arrest. The execution of the warrants was, however, obstructed by the persons named in the warrants and their friends and relations all of whom offered resistance to the peons, with the result that the persons apprehended escaped. Accordingly they and their companions who had rescued them were prosecuted under s. 225 B of the Indian Penal Code and convicted as described above. Their appeal having been dismissed they have come up on revision to this Court.

The first point urged on their behalf is that the *haisiyat* tax, for the non-payment of which the warrants for the arrest of the assesseees had been issued, had been illegally imposed by the District Board, Jullundur. It was argued that the tax was in substance a tax on income and, as such, it could not, under s. 30 of the District Boards Act, be imposed by a local body without the previous sanction of the Governor-General in Council, which had not been obtained in this case. It is conceded for the Crown that the District Board had imposed the tax with the sanction of the Local Government only. There is, therefore, no doubt that the tax imposed under the Notification aforesaid was *ultra vires*. The question has been recently considered by a Division Bench of this

Court (Addison and Goldstream, JJ.), in *District Board Sialkot v. Sultan Muhammad Khan* (1) decided on the 31st of October, 1927, where the legality of a similar tax imposed by the District Board, Sialkot, was involved. The learned Judges in an exhaustive judgment held that the *haisiyat* tax imposed in Sialkot District under a Notification the terms of which were identical with those of the Notification now before me, was in the nature of a tax on income and could only be imposed with the previous sanction of the Governor-General in Council and as this had not been done, the assesseees were not legally liable to pay it. Following that authority, I hold that the action of the District Board, Jullundur, in assessing *haisiyat* tax on Dasondhi Dhera and Basanta petitioners was illegal and *ultra vires* and they were not legally liable to pay it. It follows, therefore, that the warrants under which it was sought to apprehend these petitioners had not been legally issued and the act of the petitioners in offering resistance to the execution of such warrants did not constitute an offence under s. 225-B. Under that section resistance or obstruction to the apprehension of a person is made punishable only if the apprehension was 'lawful' but there (as here) the imposition of the tax for the non-payment of which the warrants were issued was itself illegal and *ultra vires* the resistance to their execution cannot be punishable.

Various other defects in the warrants were pointed out by the learned Counsel for the petitioners but I think it necessary to refer only to one of these, namely; that the warrants in this case did not bear the seal of the Court issuing them. Under s. 75 of the Criminal Procedure Code every warrant must bear the seal of the Court and there is authority for holding that the omission of the seal on a warrant renders it void and a person offering resistance to apprehension on such a warrant does not commit an offence under s. 225-B of the Indian Penal Code. Reference may in this connection be made to *Mahajan Sheikh v. Emperor* (2) and *Alter Kaufman v. Government of Bombay* (3) and to the decision *In re Phipps* (4).

(1) 106 Ind. Cas. 882.

(2) 28 Ind. Cas. 672; 42 C. 708; 19 C. W. N. 224; 16 Cr. L. J. 336.

(3) 18 B. 636; 9 Ind. Dec. (N. S.) 933.

(4) (1863) 11 W. R. (Eng.) 730.

on which the rulings were based. For this reason also I hold that the petitioners were not guilty under s. 225-B of the Indian Penal Code.

Accordingly I accept the petition for revision, set aside the conviction and direct that the petitioners be acquitted. The fine, if paid, will be refunded.

R. L.

*Petition accepted.***LAHORE HIGH COURT.**

[CRIMINAL REVISION No. 1108 OF 1927.]

September 30, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice.
MUSA AND OTHERS—ACCUSED—

PETITIONERS

versus

Musammat MAM KAUR—COMPLAINANT

—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 107, 202—Security proceedings—Preliminary enquiry by zaildar—Dismissal of case upon zaildar's report, legality of.

A Magistrate should not dismiss a case under s. 107, Criminal Procedure Code, upon the report of a zaildar, but must himself decide the case on the merits after hearing the evidence of both the parties.

Case reported by the Sessions Judge, Karnal, with his No. 273-J of 23rd June, 1927.

Facts appear from the following report of the Sessions Judge:—

REPORT.—Musammat Mam Kaur's application was under s. 107, Criminal Procedure Code. The Magistrate (Khan Sahib Choudhry Miran Bakhsh, Magistrate First Class) sent it for preliminary inquiry under s. 202 to a zaildar and on his report dismissed the application under s. 203, Criminal Procedure Code, on 6th May, 1927. Musammat Mam Kaur has applied to this Court for revision of the above order.

The order of the Magistrate is clearly wrong. Section 202 applies only to complaints of offences. An application under s. 107 is not a complaint. The Magistrate had, therefore, no jurisdiction to refer the case to the zaildar under s. 202, Criminal Procedure Code. He should have recorded the evidence himself and acted upon it if it was satisfactory. For the same reason s. 436 is not applicable, and I cannot order further inquiry. The case is reported to the High Court for directing the Magis-

trate to make inquiry into the case according to law.

Mr. Shamair Chand, for the Petitioners.

Mr. Hem Raj for the Respondent.

ORDER.—It is unnecessary to determine the question whether the provisions of s. 202 of the Criminal Procedure Code apply to a case under s. 107, Criminal Procedure Code, because I am of opinion that the Magistrate should not have dismissed the case upon the report of the zaildar. I accordingly accept the application for revision and direct the Magistrate to decide the case on the merits after hearing the evidence of both the parties.

G. A.

*Application accepted.***LAHORE HIGH COURT.**

MISCELLANEOUS FIRST APPEAL No. 2799
of 1926;

December 10, 1927.

Present:—Mr. Justice Zafar Ali
JASWANT RAI DATTA CHOWDHRY—
DECREE HOLDER—APPELLANT

versus

Musammat LAJWANTI AND OTHERS—

JUDGMENT DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 146, O. XXI, r. 16—Assignment of part of decree—Assignee's right to execute decree—Registration Act (XVI of 1908), s. 17 (b)—Assignment of decree relating to immovable property—Registration, necessity of.

A transferee of a part of a decree is competent to apply for execution thereof. [p. 605, col. 2.]

Venkatramaniah v. Venkatachinnulu (5), *Kishore Chand Bhakat v. Gisborne & Co.* (6), *Ram Sahai v. Madam Lal Kanhaiya Lal* (7) and *Muthiah Chettair v. Lodd Govinda Doss Krishna Doss* (8), followed.

Mohkam Chand v. Ganga Ram (4), distinguished. An assignment of a decree for possession of immovable property is not equivalent to a transfer of property and, therefore, does not require registration. [p. 604, col. 2.]

Gous Mahomed v. Khawas Ali Khan (1), *Mumtaz Ahmad v. Sri Ram* (2) and *Prabh Dyal v. Gurmukh* (3) referred to.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Gurdaspur, dated the 27th August, 1926.

Lala Badri Das, R. B., for the Appellant.

JUDGMENT.—This is a miscellaneous first appeal against an order refusing an application for execution by the alleged assignee of a part of a decree. Nobody has appeared in this Court on behalf of the respondents who opposed the application successfully in the Court below, and, the appeal had been heard *ex parte*. The facts are briefly as given below:—

A lady of the name of Lajwanti, joining with herself Jaswant Rai and others as co-plaintiffs, brought a suit for possession of certain lands left by her father. Jaswant Rai and the other plaintiffs were strangers to her but they had undertaken to finance the litigation and in consideration for that she assigned two-fifths of the property in suit to them. The suit was dismissed by the Chief Court but the plaintiffs appealed successfully to the Privy Council and obtained a decree on the 29th January, 1924*. That decree was, however, amended by the Judicial Committee on the 19th March, 1925† and according to that amendment the suit was decreed in favour of *Musammāt Lajwanti* alone to the exclusion of Jaswant Rai and other plaintiffs. Their Lordships pronounced judgment in favour of *Musammāt Lajwanti* but "with the addition that this judgment is to be without prejudice to the appellants other than *Musammāt Lajwanti* to recover in respect of any conveyance or assignment made or of any contract to convey or assign such share of the property recovered under the judgment as may appertain to them in respect of such conveyance, assignment or contract."

Jaswant Rai then brought a suit for a declaration that he and certain other persons who were impleaded as defendants Nos. 8 to 16 were entitled to two-fifths of the property according to the award of 1922 or in the alternative for a declaration and injunction that the other defendants including *Musammāt Lajwanti* should not realise the produce of the two-fifths of the property which belonged to the plaintiff and defendants Nos. 8 to 16. Defendants Nos. 8 to 16 were co-plaintiffs in the former suit but the real defendants in the former suit were not made defendants in this case. Jaswant Rai and the lady eventually came to terms which were reduced to writing and the compromise thus entered into, was filed in Court and a decree followed embodying the terms of the compromise. Jaswant Rai and the lady then jointly made an application for execution of the decree of His Majesty in Council, but soon after that lady and Jaswant Rai fell out again and she refused to proceed with her application for execution stating that she had been the victim of a fraud; and that there was no valid assignment of the decree to Jaswant Rai.

The Executing Court came to the following conclusions:—

(1) That the alleged fraud was not proved.

(2) That as the compromise went beyond the scope of the suit, so much of the consent decree as was not within the ambit of the suit must be ignored.

(3) That though according to the compromise, two-fifths of the decree were assigned, and Jaswant Rai was empowered to take possession of the two-fifths of the property by taking out execution jointly with *Musammāt Lajwanti*, this was beyond the scope of the suit and could not be given effect to. (Here it was observed by the Court below that the compromise was not registered but it did not say that it was inadmissible in evidence for want of a registration).

(4) That as the assignee of a part of the decree Jaswant Rai had no power to apply for execution.

Conclusions Nos. (2) and (3) do not appear to be sound. There was no denying the fact that the lady made the assignment and as it was reduced to writing and embodied in a decree it fulfilled the necessary conditions and fell within the purview of O. XXI, r. 16, Civil Procedure Code. Further it is clear that it did not require registration because it had been incorporated in a decree and also because the assignment of a decree, though the decree should be for possession of immoveable property, is not equivalent to a transfer of property. In *Gous Mahomed v. Khawas Ali Khan* (1), a Division Bench of the Oudh High Court held that s. 17(b) of the Registration Act of 1877 does not apply to a *kabala* or deed of assignment of a decree and an unregistered *kabala* of a decree dealing with immoveable property of more than Rs. 100 in value is not inadmissible in evidence under s. 49 of that Act. The same view was taken by a Division Bench of the Allahabad High Court in *Mumtaz Ahmad v. Sri Ram* (2); see also *Prabhu Dyal v. Gurmukh* (3).

No. (4) was based on *Mohkam Chand v. Gangā Ram* (4). In that case Sir Donald Johnstone, Chief Judge of the Punjab Chief Court, held that the transferee of a part of a decree has no power at all to apply for execution and that O. XXI, r. 16, Civil Procedure Code, applies when the whole of

* See 80 Ind. Cas. 788—[Ed.]

† See 88 Ind. Cas. 198—[Ed.]

(1) 23 O. 450; 12 Ind. Dec. (N. S.) 300.

(2) 21 Ind. Cas. 462; 35 A. 524; 11 A. L. J. 815.

(3) 98 P. R. 1902; 18 P. L. R. 1903.

(4) 39 Ind. Cas. 654; 15 P. R. 1917.

a decree has been transferred. This view was opposed to that of the Madras and Calcutta High Courts as expressed in *Vencataramaniam v. Venkatachinulu* (5) and *Kishore Chand Bhakat v. Gisborne & Co.* (6), which were brought to the notice of the learned Chief Judge, Sir Donald Johnstone, but were not followed. These Madras, Calcutta and Punjab cases were cited before a Division Bench of the Allahabad High Court, in *Ram Sahai v. Madan Lal Kanhaiya Lal* (7), and Walsh, J., made the following observations in respect thereof:—

"I, therefore, take the view that it is wrong to say that this rule (r. 16) does not apply to an assignment by mortgage or to any transfer which has the effect of conferring upon the transferee or assignee a merely fractional interest in a decree and I am confirmed in this view by the fact, as I have already stated, that in Calcutta and Madras this question has been settled for nearly thirty years. I merely refer to *Kishore Chand Bhakat v. Gisborne & Co.* (6) and *Vencataramaniam v. Venkatachinulu* (5). These cases, I think, rightly draw attention to the fact that there is no prohibition in the Code to which reference can be made for making such an application as this, one which has no legal foundation, and in both cases the Judges were careful to point out that it was for the Execution Court below to consider with all the parties before it, the respective rights of each. These are the two cases to which the Chief Justice of the Punjab referred in *Mohkam Chand v. Ganga Ram* (4), without suggesting, although he was deciding against the applicant, that there was any doubt as to the soundness of the decisions".

On this very point a Full Bench of the Madras High Court held as follows in *Muthiah Chettiar v. Lodd Govinda Doss Krishna Doss* (8):—

"Section 146, Civil Procedure Code, recognises the validity of a transfer of a part of a decree and execution thereof by the transferee. Order XXI, r. 16 is no bar to the application of the section. Such transferee is like a joint decree-holder and can, under O. XXI, r. 15, protect his rights either by executing the decree himself or by

joining or intervening in the execution by his transferor".

Thus there is an overwhelming weight of authority against the view taken in *Mohkam Chand v. Ganga Ram* (4), and after a careful consideration of all the rulings I come to the conclusion that the transferee of a part of a decree is competent to apply for execution thereof. I, therefore, accept the appeal, set aside the order of the Court below and remand the case to be proceeded with in accordance with law.

R. L.

Appeal accepted.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 179 of 1927.

November 14, 1927.

Present :—Mr. Justice Tek Chand.

BADAR-UD-DIN AND OTHERS—

DEFENDANTS—PETITIONERS

versus

MEHR DIN—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 23—Stifling prosecution—Agreement respecting pre-existing liability pending criminal prosecution, validity of.

It is well-settled that an agreement the consideration for which is a pre-existing liability on the part of the executant is not void even though the motive for the execution of the bond is to stifle a criminal prosecution pending in respect of the same liability. [p. 606, col. 2.]

Shanti Sarup v. Lal Chand (1), followed.

Petition for revision of a decree of the Judge, Small Cause Court, Amritsar, dated the 22nd February, 1927.

Mr. Asghar Beg, for the Petitioners.

Mr. J. L. Kapur for Mr. M. Sleem, for the Respondent.

JUDGMENT.—The plaintiff instituted the suit, out of which this revision has arisen, for recovery of Rs. 500 alleged to be due on a bond under which re-payment was to be made in annual instalments of Rs. 50 each. The suit was decreed for Rs. 450 by the Judge Small Cause Court, Amritsar, and against this decree a petition for revision has been presented by the defendants to this Court.

The first point argued by Mr. Asghar Beg on behalf of the defendants is that the bond in question was unenforceable under s. 23 of the Indian Contract Act as the consideration for it was to stifle a prosecution under s. 406, Indian Penal Code, which was then pending against the

(5) 3 Ind. Cas. 444; 33 M. 80; 6 M. L. T. 242 & 294.

(6) 17 C. 341; 8 Ind. Dec. (N. S.) 766.

(7) 98 Ind. Cas. 376; 24 A. L. J. 430; 48 A. 432; A. I. R. 1926 All. 346.

(8) 69 Ind. Cas. 337; 44 M. 919; 41 M. L. J. 316; 14 L. W. 287; (1921) M. W. N. 649.

defendant-petitioners in the Court of a Magistrate, First Class, at Amritsar and the date of hearing in which was the 16th of March, 1922, i. e. one day after the date on which the bond was executed. The record of the criminal case is not before me but it appears from the statement of the plaintiff-respondent made in the present case that he had given Rs. 1,000 to the defendants for purchase of goats out of which the latter had failed to account for Rs. 600 and the plaintiff-respondent had instituted a criminal case under s. 406, Indian Penal Code against them. In the bond the defendants admitted that the sum of Rs. 600 was previously due by them to the plaintiff. The defendants did not go into the witness-box to prove that the debt was not due and that the recital in the bond was erroneous. In these circumstances the learned Judge of the Court below was right in holding that the consideration for the execution of the bond was the pre-existing liability and not merely the stifling of the prosecution that was then pending against the executants. It is now well-settled that an agreement the consideration for which is pre-existing liability on the part of the executant, is not void under s. 23 of the Indian Contract Act even though the motive for the execution of the bond is to stifle a criminal prosecution, pending in respect of the same liability. The question has been recently discussed at considerable length by Jai Lal, J., in *Shanti Sarup v. Lal Chand* (1) and I entirely concur in the conclusions arrived at by the learned Judge. I am, therefore, of opinion that there is no force in this contention and that the bond was executed for valid consideration.

Mr. Asghar Beg has further contended that the suit was barred by time as the whole of the amount due to the plaintiff has become payable on the first default and the suit had been instituted more than three years after that date. Having regard to the terms of the bond and the law applicable thereto I am, however, of opinion that the learned Judge came to a correct conclusion that the suit was within time. I do not think it necessary to repeat all that he has said on this point.

The petition for revision fails and is dismissed with costs.

R. L.

Petition dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1564 OF 1927.

November 30, 1927.

Present:—Mr. Justice Zafar Ali.

Musammat LACHHMI—DEFENDANT—

APPELLANT

versus

NANAK CHAND—PLAINTIFF—

RESPONDENT.

Guardians and Wards Act (VIII of 1890)—Proceedings under the Act, nature of—Enquiry into right and fitness of applicants for guardianship, necessity of—Residence of applicant within Court's jurisdiction, necessity of.

Proceedings under the Guardians and Wards Act are not summary and the Court should give an opportunity to the parties to produce evidence to show which of them is better entitled and qualified to act as guardian of the minor. It is also necessary for the Court to determine which of them is better entitled under the personal law of the minor.

Yusaf Ali Mamoonji v. Alibhoy (2) and *Sheoshankar v. Khupchand* (3), referred to.

The Guardians and Wards Act contemplates that an applicant for guardianship should reside within the jurisdiction of the Court to which he makes the application.

Asghar Ali v. Amina Begam (1), followed.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Ferozepore, dated the 12th May, 1927.

Mr. J. N. Bhandari, for the Appellant.

Mr. Shiv Charan Das, for the Respondent.

JUDGMENT.—The two minor boys in this case were orphans quite, and their step-mother Musammat Lachhmi made an application to be appointed guardian of their persons and property. The property is situated in the Ferozepore District where the application was made. The minors live with the husband of a sister at Kasur. He opposed the application of the step-mother and applied himself to be appointed guardian of the persons and property of the minors. The Senior Subordinate Judge of Ferozepore accepted his application and rejected that of the step-mother.

She appeals, and her Counsel contends that the proceedings of the Court below were irregular, inasmuch as the order was made without an enquiry and further because a person who did not live with

(1) 103 Ind. Cas. 444; 28 P. L. R. 388; A. I. R. 1927 Lah. 530; 9 Lah. L. J. 319.

in the jurisdiction of the Court could not have been appointed the guardian. There can be no manner of doubt that the proceedings were summary and that no proper enquiry was made. The Court should have given an opportunity to the parties to produce evidence and show which of them was better entitled and qualified to act as guardian of the minors. Further it should have been determined which of them was better entitled under the personal law of the parties. In *Asghar Ali v. Amina Begam* (1) a Division Bench of the Allahabad High Court held that the Guardians and Wards Act, 1890, contemplates that an applicant, for guardianship should reside within the jurisdiction of the Court to which he makes the application. In *Yusaf Ali Mamoonji v. Alibhai*, (2) and *Sheoshankar v. Khupchand* (3) it was held that proceedings under the Guardians and Wards Act were not summary. With these observations I accept the appeal, set aside the order of the Court below and remand the case for a fresh enquiry and decision in accordance with law.

R. L.

Appeal accepted.

(1) 24 Ind. Cas. 59; 36 A. 280; 12 A. L. J. 392.

(2) 87 Ind. Cas. 646; 255 P. L. R. 1925 A. I. R. 1927 Lah. 567.

(3) 83 Ind. Cas. 320; A. I. R. 1925 Nag. 233.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1330 OF 1927.

November 22, 1927.

Present:—Mr. Justice Tek Chand.

IMAM BAKHSH—PLAINTIFF—APPELLANT

versus

Musammat AMIRAN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Restitution of conjugal rights—Decree for restitution—Discretion of Courts—Husband neglecting to perform his obligation, effect of.

It is well-settled that the granting of a decree for restitution of conjugal rights is discretionary with the Courts and, though, ordinarily, such a decree will be refused only if the husband has been guilty of legal cruelty towards his wife, yet he may disentitle himself to this relief by his gross failure to perform the obligations which the marriage contract has imposed on him for the benefit of the wife.

Moonshee Buzloor Ruheem v. Shumsoonnissa Begum (1), *Ziada v. Jowai* (2) and *Nawab Bibi v. Allah Ditta* (3), referred to.

Second appeal from a decree of the District Judge, Mianwali, dated the 15th March, 1927, reversing that of the Subordi-

nate Judge, Fourth Class, Bhakkar District Mianwali, dated the 30th December 1926.

Mr. Shambhu Lal Puri, for the Appellant.

Mr. S. R. Laul, for the Respondents.

JUDGMENT.—The suit, which has given rise to this second appeal, was instituted by Imam Bakhsh, plaintiff-appellant for restitution of conjugal rights against Musammat Amiran, defendant No. 1, whom he claimed as his wife. The parents of Musammat Amiran and some other relations were also impleaded and an injunction was asked for against them directing them not to prevent Musammat Amiran from going over to the plaintiff.

The suit was decreed *ex parte* by the trial Court but was dismissed by the learned District Judge on appeal by the defendants.

A second appeal has been preferred by Imam Bakhsh and it is argued on his behalf that the learned District Judge having found that defendant No. 1 was validly married to the plaintiff has dismissed the suit for restitution of conjugal rights on legally inadequate grounds. The facts found are, however, as follows:—

(a) That Musammat Amiran was married to the plaintiff about 10 years before the suit, the marriage having been arranged by her father with a view to procure a bride for his son in exchange for her.

(b) That since the marriage the girl has been living with her parents, no effort having been made by the plaintiff to bring her to his house.

(c) That though Musammat Amiran attained puberty three years ago, the marriage has not been yet consummated.

(d) That about the time Musammat Amiran attained puberty the plaintiff married another woman with whom he has since been living and from whom he has got a daughter.

(e) During all this period the plaintiff has absolutely neglected Musammat Amiran.

Mr. Shambhu Lal Puri has argued that these facts are insufficient to justify refusal to the plaintiff of relief by way of restitution of conjugal rights and that the learned District Judge should have decreed the suit. He has cited before me a number of rulings each of which was, however, decided on its peculiar facts. It is well-settled that the grant of a decree for

restitution of conjugal rights is discretionary with the Courts and though ordinarily such a decree will be refused only if the husband has been guilty of legal cruelty towards his wife, he may disentitle himself to this relief by his gross failure to perform the obligations which the marriage contract had imposed on him for the benefit of the wife. See *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (1), *Ziada v. Jowai* (2) and the recent decision of this Court in *Nawab Bibi v. Allah Ditta* (3).

Having regard to the facts as found above and all the circumstances of the case I am of opinion that the learned District Judge exercised a sound discretion in dismissing the plaintiff's suit. The appeal fails, and is dismissed with costs.

R. L. *Appeal dismissed.*

(1) 11 M. I. A. 551; 8 W. R. P. O. 3; 2 Suth. P. O. J. 59; 2 Sar. P. O. J. 259; 20 B. R. 208.

(2) 34 Ind. Cas. 538; 46 P. R. 1916; 134 P. W. R. 1916; 148 P. L. R. 1916.

(3) 73 Ind. Cas. 896; A. I. R. 1924 Lah. 188; 5 Lah. L. J. 505.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL

No. 1475 of 1927.

November 28, 1927.

Present.—Mr. Justice Zafar Ali.
FIRM PARTAP SINGH-PARDHAN
SINGH THROUGH PARTAP SINGH
—DEFENDANTS—APPELLANTS

versus

FIRM Bhai MEWA SINGH-JODHA
SINGH, THROUGH GOPAL SINGH
—DECREE-HOLDERS—RESPONDENTS.

*Provincial Insolvency Act (V of 1920), ss. 28, 31—
Execution against insolvent—Leave of Court, necessity
of.*

A decree-holder is not competent to take out execution against the person of an insolvent judgment-debtor without obtaining leave of the Insolvency Court.

Easwara Aiyar v. Govindarajulu Naidu (1) and *Thakurdeen v. Dubay* (2), followed.

Miscellaneous first appeal from an order of the Subordinate Judge, First Class, Sargodha, District Shahpur, dated the 10th May, 1927.

Mr. Gullu Ram, for the Appellants.

Mr. H. C. Kumar, for the Respondents.

JUDGMENT.—Under the Provincial Insolvency Act of 1907, when a debtor was adjudged an insolvent he ordinarily became immune from arrest. This immunity was taken away by the Provincial Insolvency Act of 1920 and according to that Act he could be arrested in execution

of a decree unless he should obtain a protection order under s. 31 of that Act. But the question is whether a decree-holder is competent to take out execution against the person of an insolvent judgment-debtor without obtaining leave of the Insolvency Court. In the present case it is admitted that the Insolvency Court has refused the insolvent's petition for a protection order but the decree-holder has not yet obtained permission to execute his decree by arrest of the insolvent. According to cl. (2) of s. 28 of the Provincial Insolvency Act of 1920 "no creditor shall during the pendency of the insolvency proceedings commence any suit or other legal proceedings (against the insolvent) except with the leave of the Insolvency Court". An execution proceeding is a legal proceeding and it was the first application for execution that the judgment-creditor made after having obtained the decree that he sought to execute. He thus commenced a legal proceeding but without the leave of the Insolvency Court. The language of cl. (2) of s. 28 of the Provincial Insolvency Act of 1920 is almost the same as that of s. 17 of the Presidency Towns Insolvency Act of 1909. A Division Bench of the Madras High Court held in *Easwara Aiyar v. Govindarajulu Naidu* (1) that in view of the provision of s. 17 of the Presidency Towns Insolvency Act where a person is adjudicated insolvent, creditors seeking any remedy against him must apply to get leave for that purpose. Another case in point is *Thakurdeen v. Dubay* (2), where it was held that "the words 'other legal proceeding' in s. 17 of the Presidency Towns Insolvency Act include an application for arrest in execution of a decree and that, therefore, no such application can be made against an insolvent after an order of adjudication has been made except with the leave of the Insolvency Court."

I, therefore, set aside the order of arrest passed against the insolvent judgment-debtor by the Court below and direct that no proceedings in execution be taken against him unless the judgment-creditor should obtain leave of the Insolvency Court to commence such proceedings. The parties to bear their own costs in this Court.

R. L.

Order set aside.

(1) 31 Ind. Cas. 192; 39 M. 689.

(2) 55 Ind. Cas. 250; 12 Bur. L. T. 218.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2497 OF 1925.

November 10, 1927.

Present:—Mr. Justice Broadway and
Mr. Justice Jai Lal.**BURA MALL—PLAINTIFF—APPELLANT**
*versus***TULSI RAM—DEFENDANT—RESPONDENT.***Court Fees Act (VII of 1870), s. 7 (iv) (c)—Suit for declaration that a Will is a forgery, and for injunction—Plaintiff's right to fix valuation—Jurisdictional value follows value for Court-fee—Suits Valuation Act (VII of 1887), s. 8—Wrong valuation—Power of Court to allow amendment.*

A suit for a declaration that a Will set up by the defendant is a forgery and that the plaintiff is the legal heir of the deceased and for injunction restraining the defendant from interfering with the property of the deceased is a suit for declaration with consequential relief within the meaning of s. 7 (iv) (c) of the Court Fees Act. [p. 609, col. 2.]

Jageshra v. Durga Prashad Singh (1), *Raj Krishna Dey v. Bepin Behary Dey* (2) and *Vachhani Keshabhai v. Vachhani Nanbha Bavaji* (3), referred to.

In a suit falling under s. 7 (iv) (c) of the Court Fees Act the plaintiff is entitled to give any value he chooses to the relief sought for and the Courts cannot question the propriety of his valuation. [p. 609, col. 2; p. 610, col. 1.]

Barru v. Lachhman (4), followed.

Where a suit falling within s. 7 (iv) (c) of the Court Fees Act has been erroneously valued for purposes of jurisdiction at the actual value of the property which is subject-matter of dispute under the impression that the suit falls under Art. 17, Sch. II of the Court Fees Act, the plaintiff may be allowed to amend the plaint and value properly the relief which he seeks for purposes of Court-fee; and the jurisdictional value will be the same as the value for purposes of Court-fee. [p. 610, col. 1.]

First appeal from an order of the Senior Subordinate Judge, Sialkot, dated the 5th October, 1925.

Lala Mool Chand, R. S., and Mr. Beni Pershad Khosla, for the Appellant.

Mr. Shamair Chand and Malik Muhammad Amin, for the Respondent.

ORDER.

Broadway, J.—One Panna Lal, son of Shankar Das, died on the night of the 14th of July, 1924, leaving certain house property as well as shops. A man named Bura Mal claiming to be a relative instituted a suit on the 20th of January, 1925, for a declaration and for the issue of a perpetual injunction. He alleged that he was a cousin of the deceased and that on the death of Panna Lal he, the plaintiff, had gone to the house and shops and affixed his locks thereon, and that subsequently one Tulsi Ram had placed his locks on the same house and the same shops claiming to be entitled to the same under a Will alleged to have been executed by the deceased

ed Panna Lal on the 14th of July, 1924. Tulsi Ram, defendant, contested the case and alleged that the Will was a genuine one that he had been living with the deceased Panna Lal for a considerable period and that it was as a reward for the services rendered to the deceased that the property had been bequeathed to him, Tulsi Ram. He further pleaded that he had locked the house and the shops when taking the body of the deceased to be cremated and that on his return he found that Bura Mal had put his locks on the same premises.

Various issues were settled with which it is not necessary to deal as the plaint was rejected on the 5th of October, 1925, on the ground that it was insufficiently stamped and the plaintiff had failed to make good the Court-fees within the period fixed by the Court. Against this order of rejection the plaintiff Bura Mal has come up to this Court in appeal and on his behalf Mr. Mul Chand addressed the Court at considerable length, while Mr. Shamair Chand replied on behalf of the respondent.

It was urged by Mr. Mul Chand that the plaint ought not to have been rejected inasmuch as the suit fell within the purview of Art. 17 of the Court Fees Act, while Mr. Shamair Chand urged that the view taken by the Court below was correct and that the law applicable was s. 7 (iv) (c). Now, a reference to the plaint shows that the plaintiff definitely alleged that a certain Will had been set up, and asked for a declaratory decree to the effect that it had not been executed by the deceased on the 14th of July, 1924, that the document produced by the defendant was a forgery and that the plaintiff was the legal heir of Panna Lal. He further asked for a perpetual injunction to issue directing the defendant to refrain from interfering with his property and to remove his locks from the house and the shops in question.

It has been held in many cases that a prayer for an injunction amounts to consequential relief. In this connection a reference may be made to *Jageshra v. Durga Prashad Singh* (1), *Raj Krishna Dey v. Bepin Behary Dey* (2) and *Vachhani Keshabhai v. Vachhani Nanbha Bavaji* (3). In these circumstances I am of opinion that the suit clearly falls within the ambit of

(1) 24 Ind. Cas. 679; 36 A. 500; 12 A. L. J. 844.

(2) 17 Ind. Cas. 162; 40 O. 245; 16 C. L. J. 194; 17 C. W. N. 591.

(3) 1 Ind. Cas. 108; 33 B. 307; 11 Bom. L. R. 30; 5 M. L. T. 230.

s. 7 (iv) (c) of the Court Fees Act and that, therefore, it was necessary for the plaintiff to fix a value on the relief sought by him. He fixed the sum of Rs. 105 as the value so far as the injunction was concerned, and it is urged by Mr. Shamair Chand that inasmuch as he had fixed the value of the property in suit at Rs. 16,000 the Court below had correctly held that he should pay a stamp on the total, namely, Rs. 16,105.

It seems to me, however, that this contention is not quite correct. It is true that it was for the plaintiff to fix the value on the relief sought by him, and as was held in *Baru v. Lachhman* (4) the value fixed by the plaintiff must be treated as the value for purposes of jurisdiction. Here it was urged by Mr. Shamair Chand that although he had not valued the relief sought he had actually valued the suit for purposes of jurisdiction and that it should, therefore, be held that the value of the relief sought was Rs. 16,000. No authority has been cited for this proposition although there is ample authority for the converse proposition, namely, that when a plaintiff fixes the value of the relief he seeks, the jurisdictional value must always be regarded as being the same. It was urged that the plaintiff was not entitled to fix any arbitrary value but that the Court was entitled to see that the value fixed by him was proportionate to the value of the property. Doubtless there is authority for this proposition in a decision by the Calcutta High Court. That decision was, however, not approved of in *Baru v. Lachhman* (4) where it was held by the Full Bench that the plaintiff was entitled to fix whatever value he chose. By that decision I feel bound. In the present case a reference to the plaint shows clearly that the plaintiff and his legal adviser were under the impression, although an erroneous one, that the suit fell within the purview of Art. 17 of the Court Fees Act. That being so it was clear that they were bound to fix the value for purposes of jurisdiction which they were bound to fix at the correct figure, i.e., the value of the property. It was never present in their minds that in placing the value of Rs. 16,000 on the property in suit they were fixing the value of the relief that was being sought. In these circumstances it seems to me that the plaintiff

should be given an opportunity of fixing the value of the relief sought by him, and I would, therefore, return the memorandum of appeal to the appellant directing him within ten days to fix the value of the relief at such figure as he may choose and to pay the proper stamp thereon. When he has done so it will be necessary for us to consider the next step in the case.

Jai Lal, J.—I agree.

[In compliance with their Lordships' order of the 10th of November, 1927, the Advocate for the appellant fixed the value of the suit at Rs. 605 and paid the Court-fees on that amount so far as this appeal was concerned and their Lordships accepted the appeal and returned the case to the Court below for disposal in accordance with law. The parties were left to bear their own costs in the High Court. Their Lordships expressed no opinion whatever as to whether the suit in form in which it was brought was competent.]

R. L.

Appeal accepted.

A. N. A.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 3119 OF 1925.

October 20, 1927.

Present:—Mr. Justice Fforde and
Mr. Justice Zafar Ali.

LAL CHAND AND OTHERS, SONS AND
LEGAL REPRESENTATIVES OF *Musammam*.
JOWALA DEVI, DECEASED, AND OTHERS
—DEFENDANTS—APPELLANTS—

versus

THAKUR DASS—PLAINTIFF—
RESPONDENT.

Appeal—Preliminary and final decree—Appeal against preliminary decree after passing of final decree, competency of.

An appeal cannot be preferred against a preliminary decree alone after the final decree has been passed. [p. 612, col. 2.]

[Case-law discussed.]

First appeal from the decree of the Senior Subordinate Judge, Amritsar, dated the 15th October, 1925.

Mr. *Sundar Das*, for the Appellants.

Mr. *Jai Gopal Sethi*, for the Respondent.

JUDGMENT.

Fforde, J.—This was a mortgagee's suit to realize the capital and interest secured by certain mortgages by sale of the mortgaged property. Judgment was given for the plaintiff on the 15th of October, 1925,

(4) 22 Ind. Cas. 503; 111 P. R. 1913; 228 P. W. R. 1913; 23 P. L. R. 1914.

and a preliminary decree made on the same date. On the 21st of November, 1925, the final decree was made and on the 5th of December, 1925, the present appeal was brought against the judgment and decree of 15th of October, 1925, but no appeal was brought against the final decree of the 21st of November, 1925.

Mr. Jai Gopal Sethi for the plaintiff respondent has raised the preliminary objection that the appeal is not competent, as there is no appeal against the final decree and the period of limitation has long passed for the presentation of such an appeal. Mr. Sethi has referred to *Ganda Ram v. Sundar Lal* (1) in which Broadway, J., following *Mackenzie v. Narsing Sahai* (2), *Kuria Mal v. Bishambhar Das* (3) and *Khirdamoyi Dasi v. Adhar Chandra Ghose* (4), held that, where a final decree had been passed, an appeal against the preliminary decree only was incompetent.

Mr. Sethi cited another decision of the Calcutta High Court in *Kulada Prosad Chowdhury v. Ramanand Patnaik* (5) which, as is the case here, was an appeal by the defendant in a mortgage suit. In that case a preliminary decree was made on the 15th of January, 1920, and the appeal lodged in the High Court on the 21st of April, 1920. In the interval, namely, on the 16th of March, 1920, the final decree had been made. The appeal to the High Court, however, was directed only against the preliminary decree and not against the final decree. On an objection being taken that the appeal in these circumstances was incompetent, the Court held that the objection was "manifestly well-founded on principle" for the reason that if the preliminary decree were to be reversed against the appellant, the final decree would still remain unaffected, as no attempt had been made to challenge its propriety. The Court distinguished the case of *Abdul Jalil v. Amar Chand Paul* (6) [erroneously referred to in the report as *Khirdamoyi Dasi v. Adhar Chandra Ghose* (4)] where the final decree

was made after the appeal had been preferred against the preliminary decree. In those circumstances it was held that the final decree must be deemed to have been made on the assumption that if the preliminary decree should be modified or set aside in the appeal, the final decree also would be similarly modified or set aside.

In *Mackenzie v. Narsing Sahai* (2), a decision by a Division Bench, it was held that, where in a partition suit a final decree had been made and an appeal preferred against the preliminary decree only it was not open to the appellant to challenge the correctness of the preliminary decree without preferring an appeal against the final decree.

Mr. Sundar Das for the appellants has relied upon *Ramien v. Veerappudian* (7) in which it was held that it was competent to a party to prefer an appeal against the preliminary decree in a redemption suit, though before the appeal was presented the final decree had been passed. The Court followed the decision in *Lakshmi v. Marudevi* (8) where it was held that the right of a party to appeal against a preliminary decree was not affected by the subsequent passing of the final decree.

Kanhaiya Lal v. Tirbeni Sahai (9) is to the same effect. It was held that when an appeal had once been filed and was pending against the preliminary decree in a suit for partition, the passing of a final decree did not render the appeal nugatory, the Court holding that the final decree depended upon the preliminary decree, and if, as the result of an appeal, the latter was set aside, the former must fall with it.

To the same effect is the decision of LeRossignol, J., in *Ramditta v. Maru* (10), namely, that it is not necessary to appeal against a final decree when the preliminary decree on which it is based has been set aside on appeal. In that case the final decree was made during the pendency of the appeal from the preliminary decree.

(1) 67 Ind. Cas. 278; 2 Lah. L. J. 673; 82 P. L. R. 1922.

(2) 1 Ind. Cas. 413; 36 C. 782; 10 C. L. J. 113.

(3) 5 Ind. Cas. 276; 32 A. 225; 7 A. L. J. 210.

(4) 21 Ind. Cas. 516; 18 C. L. J. 321.

(5) 61 Ind. Cas. 923; 48 C. 1036; 33 C. L. J. 414; 25 C. W. N. 776.

(6) 21 Ind. Cas. 510; 18 C. L. J. 223.

(7) 14 Ind. Cas. 394; 37 M. 455; 11 M. L. T. 69; 22 M. L. J. 217; (1912) M. W. N. 117 & 530.

(8) 12 Ind. Cas. 664; 21 M. L. J. 1063; 10 M. L. T. 437; 37 M. 29.

(9) 24 Ind. Cas. 827; 36 A. 532; 12 A. L. J. 876.

(10) 93 Ind. Cas. 851; A. I. R. 1926 Lah. 534; 27 P. L. R. 180.

In *Chandulal Maganlal v. Motilal Harilal* (11) a Division Bench held that "when an appeal is filed against a preliminary decree, but no stay of proceedings is asked for, and a final decree is passed in the lower Court, without any appeal being filed therefrom, the proper course for the appellant in such a case is to put an appeal against the decree absolute, or in any event to inform the Court, when the appeal against the preliminary decree comes on for hearing, that a decree absolute has been made." Macleod, C. J., dealt with the question as follows:—

"The actual legal position, when an appeal is filed against a preliminary decree, but no stay of proceedings is asked for, and a final decree is passed in the lower Court without any appeal being filed therefrom, is somewhat obscure. It seems to me that the proper course for the appellant in such a case is to put an appeal on the file against the decree absolute, or in any event to inform the Court, when the appeal against the preliminary decree comes on for hearing, that a decree absolute has been made. It may not be that the Appeal Court is debarred from hearing the appeal from the preliminary decree merely on account of the Court below having passed a final decree. But to avoid the difficulties which may arise when no application has been made for stay of proceedings, it would certainly be desirable that, in any case where a preliminary decree is passed and a party appeals against that decree, when the Court below passes a final decree, he should file an appeal against that decree."

A Full Bench of the Patna High Court in *Wahidunnissa v. Dip Narain Pershad* (12) held that, where an appeal had been filed against the preliminary decree and a final decree was made thereafter, despite the objection of the appellant that the final decree should not have been made until the appeal had been disposed of, the appeal against the preliminary decree was competent. Chamier, C. J., distinguished the decisions in *Khirodamoyi Dasi v. Adhar Chandra Ghose* (4) and *Sadhu Charan Datta v. Hara Nath Datta* (13) on the ground that in these latter

(11) 92 Ind. Cas. 515; A. I. R. 1926 Bom. 43; 27 Bom. L. R. 1492.

(12) 35 Ind. Cas. 873; 20 C. W. N. 1174; 1 P. L. J. 408; 1 P. L. W. 13 (P. B.).

(13) 27 Ind. Cas. 135; 20 C. W. N. 231.

cases the final decree had been passed before an appeal against the preliminary decree was filed.

I have been referred to no authority in which the Court has permitted an appeal against the preliminary decree filed after the final decree has been passed. Following what appears to me to be the trend of judicial opinion, I am of opinion that the present appeal, having been presented after both the preliminary and final decrees were made, against the preliminary decree only, is not competent, and I would accordingly, accepting the respondent's objection, dismiss this appeal with costs.

Zafar Ali, J.—I agree.

R. L.

A. N. A.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 957 OF 1927.

November 10, 1927.

Present :—Mr. Justice Tek Chand.

HANSA AND OTHERS—PLAINTIFFS—

—APPELLANTS

versus

RAM LOK AND OTHERS—DEFENDANTS—

RESPONDENTS.

Adverse possession—Trespass over land in possession of mortgagee—Possession, whether adverse to mortgagor—Practice—Revenue records—Trespasser, entries de to, in Revenue papers—'Cultivation' and 'kaifiat' columns to be read together.

Although as a general rule adverse possession against a mortgagee is ineffectual against the mortgagor, especially when it began at a time when the mortgagee was in possession, yet, when a trespasser takes possession of the mortgaged property and asserts a title which is hostile not only to the mortgagee but which also assails the title of the mortgagor, and the mortgagor allows 12 years to elapse, the title of the trespasser will become indefeasible not only against the mortgagee but also against the mortgagor. [p. 613, col. 2.]

Khanu Mal v. Khan Muhammad (1) and *Tarabat Ramrao Patankar v. Dattaram Govindbhai Gujar* (2), distinguished.

Marquis of Cholmondeley v. Lord Clinton (3), *Lalla Kanho Lal v. Manki Bibi* (4) and *Hubdar Khan v. Gajadhar Chaube* (5), referred to.

Persons who take possession, without any title are shown in Revenue papers in the 'cultivation' column as non-occupancy tenants as long as changes in the proprietary columns are not made by mutation. Entries in the 'cultivation' column, therefore, are always to be read along with those in the 'kaifiat' column. [p. 614, col. 1.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 1st February, 1927, reversing that of the Sub-

ordinate Judge, Third Class, Hoshiarpur, dated the 1st July, 1926.

Mr. Faqir Chand, for the Appellants.

Mr. Gullu Ram, for the Respondents.

JUDGMENT.—The land in dispute covers an area of 12 *marlas* which was in the Settlement of 1884-85 a part of *khassra* No. 824, the total area of which was then 5 *kanals* 5 *marlas* and which was shown as *barani* agricultural land. By mutation dated the 7th of August, 1884, Bhola, etc., *Brahmins*, owners of this *khassra* No. 824 mortgaged it along with land in several other *khassra* numbers to Dhanna Saini. The mortgage was a possessory one and it is admitted that the mortgagees actually got possession of the entire mortgaged property including the 12 *marlas* now in dispute. In 1891, one Nandu Sadh, caste *Chamar*, got possession of this plot of 12 *marlas* and built a *dharamsala* on it. In the *jamabandi* of that year, in the 'cultivation' column the land was shown in possession of Nandu, non-occupancy tenant and in the *kaiflat* column it was stated that no rent was charged as the land was *dharamarth*. This entry continued till 1907-08. In 1911-12, at the time of the new Settlement, the plot of 12 *marlas* was included in the *abadi deh* and described as a part of *khassra* No. 1124, which was the *abadi* of *Chamars* and was shown as being in their possession.

In 1905 the descendants of the original mortgagors sued the descendants of the original mortgagees for possession of the entire mortgaged property including these 12 *marlas* and obtained a decree. But as this particular part was in possession of the successors-in-interest of Nandu *Chamar*, who had not been impleaded in that litigation, they refused to surrender possession of the land to the mortgagors. The present suit was accordingly instituted on the 21st of May, 1925, by the mortgagors against Ram Lok, etc., who had been in possession of this land since the death of their *guru*, Nandu. The suit was decreed by the trial Court, but on appeal by the defendants has been dismissed by the learned District Judge.

The sole question argued before me is whether the possession of the *Chamars* has been adverse not only against the mortgagees but also against the mortgagors. Mr. Fakir Chand for the appellants has contended that as the mortgage was with possession and the mortgagees had actually

entered into possession of the property in 1884, the act of the *Chamars* in taking possession of the land in 1891 might be adverse against the mortgagees, but can under no circumstances be adverse against the mortgagors. In support of his contention the learned Counsel has relied on *Khanu Mal v. Khan Muhammad* (1) and *Tarabai Ramrao Patankar v. Dattaram Govindbhai Gujar* (2). The facts of those cases, however, are wholly distinguishable from those of the present case. It is, no doubt, true that as a general rule adverse possession against a mortgagee is ineffectual against the mortgagor, especially when it began at a time when the mortgagee was in possession, but when a trespasser takes possession of the mortgaged property and asserts a title, which is hostile not only to the mortgagee but which also assails the title of the mortgagor, and the mortgagor allows 12 years to elapse, the title of the trespasser will become indefeasible not only against the mortgagee but also against the mortgagor. I cannot assent to the contention put forward by Mr. Faqir Chand that in a possessory mortgage so long as the mortgagor is entitled only to the equity of redemption there can be no invasion of his interest and in such a case it is not legally possible for a stranger to acquire an adverse title against him. The question was considered at great length as long ago as 1820 in the great case of the *Marquis of Cholmondeley v. Lord Clinton* (3) where Sir Thomas Plumer, M.R. held that "an equity of redemption, in common with other equitable estates in land, is capable of being extinguished by the operation of the Statute of Limitation." On appeal this view was affirmed in the House of Lords where Lord Eldon, L.C., enunciated the principle that "adverse possession of an equity of redemption for 20 years was a bar to another person claiming the same equity of redemption." Reference may also be made to the case of *Lalla Kanhoo Lal v. Manki Bibi* (4), *Hubdar Khan v. Gajadhar Chaube* (5) and the remarks of Macleod, C.J. at page 546* of the recent case of *Tarabai Ramrao Patankar*

(1) 6 P. R. 1898.

(2) 87 Ind. Cas. 765; 49 B. 539; 27 Bom. L. R. 441; A. I. R. 1925 Bom. 465.

(3) (1820) 22 R. R. 84; 2 Jac. & Walk. 1; 37 E. R. 527.

(4) 6 C. W. N. 601.

(5) 25 Ind. Cas. 600; 17 O. C. 294.

*Page of 49 B.—[Ed.]

v. Dattaram Govindbhai Gujar (2) which was cited by Mr. Faqir Chand himself.

In this case, as has already been pointed out, Nandu Chamar took possession of the land in 1891, changed its character from agricultural land to religious and constructed a *dharamsala* on it. From the report of the local Commissioner it appears that this *dharamsala* and the appurtenant land was descended from him to his *chelas*, Ram Lok, etc., defendants. Now, Nandu, by constructing the *dharamsala* not only denied the title of the mortgagee but also that of the mortgagor and asserted a hostile title to both. In addition to this in 1911-12 the name of the mortgagor was removed from the Revenue papers and this plot was included in *khasra* No. 1124 described as *Abadi Chamaran* and in the possession of the latter as owners. These facts leave no doubt that the title openly set up by the respondents in 1891, was hostile both to the mortgagors and the mortgagees and by lapse of time the rights of the mortgagors in the equity of redemption have become extinct.

Mr. Faqir Chand has relied upon the entry in the *jamabandi* of 1891-92 where Nandu is entered in the "cultivation" column as a non-occupancy tenant. But it is well-known that persons who take possession without any title are shown in the "cultivation" column as non-occupancy tenants as long changes in the proprietary column are not made by mutation. Entries in the "cultivation" column are always to be read along with those in the *kaiyat* column and reading the two together no doubt is left that Nandu did not hold the land under the mortgagees in 1891 or subsequent years.

This being my view of the facts of this case and the law applicable thereto, I am of opinion that the learned District Judge came to a correct conclusion in dismissing the plaintiffs' suit. The appeal fails and is accordingly dismissed with costs.

R. L.

Appeal dismissed.

A. N. A.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 108 OF 1927.

November 30, 1927.

Present:—Mr. Justice Bhide.

PALA SINGH AND ANOTHER—ACCUSED—
APPELLANTS

versus

EMPEROR—RESPONDENT.

Confession—Retracted confession as basis for conviction of maker and co-accused.

Even though it is not illegal to base a conviction on the retracted confession of an accused person, in the absence of corroboration in material particulars, it is not safe to convict on a confession, unless from the peculiar circumstances in which it was made and judging from the reasons alleged or apparent of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine. [p. 616, col. 1.]

Jawan v. Emperor (1), followed.

A retracted confession of a co-accused, even if genuine, is not a safe basis for conviction. [p. 615, col. 2.]

Criminal appeal from an order of the Magistrate, First Class, exercising enhanced powers under s. 30, Criminal Procedure Code, Lahore, dated the 10th December, 1926.

Mr. Pindi Das, for the Appellants.

Mr. Khurshid Zaman, for the Government Advocate, for the Respondent.

JUDGMENT—These six appeals (Nos. 108, 109, 255, 256, 286 and 287 of 1927) are connected and will be disposed of together.

Six persons, *viz.*, Gagi Santa Singh, Chanan Singh, Pala Singh, Bachan Singh and Mohan Singh, were prosecuted for two dacoities committed by them on the evening of the 7th October, 1925. The trials were held separately, but the facts being connected, the learned Magistrate has disposed of the cases in one judgment. In each case, all the accused except Mohan Singh were convicted under s. 395/397 of the Indian Penal Code and sentenced to rigorous imprisonment for seven years, the sentences to run concurrently. From this decision Santa Singh, Bachan Singh, Pala Singh, and Gagi have appealed in each case. Bachan Singh and Pala Singh having filed a joint appeal there are thus six appeals before me for disposal.

The facts are briefly as follows:—

(1) On the evening of the 7th October, 1925, Harnam Singh of Daftuh was returning from "Kahna" Mandi accompanied by Kundan Singh and Fauja Singh, when on the way near Purana Kahna he was set upon by five or six dacoits. He was beleeboured with *lathis* and was robbed of his gun and a belt of cartridges. Harnam Singh went on to the village and lodged a

report at the *Thana*. Harnam Singh's skull was injured and the injury appearing serious he was sent to the Mayo Hospital for treatment. He eventually died from the effects of the injury after some four months but before the culprits could be traced. This will be referred to hereafter as the 'gun' case.

(2) On the same evening one Bhag Singh of Ladhoke Bhullar was returning to his village on his mare from the same Mandi. He was followed at a short distance by two men Sadar Din and Khuda Bakhsh. When Bhag Singh came near the road to the village Sajjada, he was attacked by four men. He was dragged down from the mare and belaboured with *lathis*. When he raised an alarm one of the robbers fired a gun and hence none came to his rescue. The robbers eventually decamped with the mare, saddle and a blanket. Bhag Singh went to the *Thana* to report the matter but the Munshi at the *Thana* wanted money and as Bhag Singh was not willing to bribe him he merely recorded a report about the mare having gone astray. This will be referred to hereafter as the 'mare' case.

No trace of the culprits in the above two cases was forthcoming till Gagi appellant who was arrested on the 5th January, 1926, in connection with certain dacoities gave information relating to them. Gagi mentioned the present appellants and Mohan Singh as having been responsible for the two robberies committed on the 7th October, 1925. The gun and the mare were found and after investigation six persons were prosecuted under s. 395/397 of the Indian Penal Code as stated already.

The commission of the robberies as alleged appears to have been established beyond any doubt. The report as regards the 'gun' case was recorded immediately after the occurrence and Harnam Singh's story was supported by the injuries on his person. In the case of Bhag Singh no report as regards the robbery was taken down by the Police but there seem no good reasons to doubt the genuineness of the story put forward by Bhag Singh. The report about the astraying of the mare seems rather suspicious for reasons given by the learned Magistrate. The identity of the mare has been established beyond any doubt. If the mare had really gone astray, it does not appear why a false story as to dacoity should have been concocted either by Gagi or the Police. There was another case against

Gagi and the appellants and the Police had no motive for setting up a false case at all.

The guilt of the appellants in these cases rests mainly on the evidence of certain eye-witnesses who are alleged to have seen them at the time of the commission of the offences and identified them after their arrest and in the case of Pala Singh also on a retracted 'confession'. I shall first deal with the cases of Santa Singh, Bachan Singh and Gagi, who have not made any confession.

Santa Singh.—In the 'gun' case, Harnam Singh died before the culprits were traced as already mentioned. The only two persons who were on the spot and might have been expected to identify the assailants were the companions of Harnam Singh, Fauja Singh and Kundan Singh. Neither of these witnesses was able to identify Santa Singh. Fauja Singh is said to have identified Santa Singh at an identification parade, but he has definitely stated in Court that he could not identify him and hence the previous identification, if any, is of no assistance. The only other evidence to which Counsel for the Crown drew my attention was the retracted confessions of Pala Singh and Chanan Singh co-accused. I shall discuss the admissibility and value of these confessions presently, but assuming that the confessions are genuine and admissible, it seems clear that the mere retracted confession of a co-accused cannot be sufficient to sustain the convictions of Santa Singh. Santa Singh's conviction in the 'gun' case cannot, therefore, be upheld. *Jawan v. Emperor* (1).

In the 'mare' case, Bhag Singh (P. W. No. 7), identified Santa Singh as one of the dacoits who struck him with *lathis*. Bhag Singh had opportunity of seeing him at close quarters and has no motive for implicating him falsely. The name of Santa Singh was disclosed by Gagi and it has not been shown that Gagi or any other person had any motive for implicating Santa Singh. In fact he has offered no explanation of the evidence against him.

[His Lordship then discussed the cases against Bachan Singh and Gagi and proceeded:—]

Pala Singh.—Lastly, I come to the case of Pala Singh. This appellant was not identified by any one in the 'gun' case.

(1) 25 Ind. Cas. 634; 30 P. R. 1914 Cr.; 264 P. L. R. 1914; 50 P. W. R. 1914; 15 Cr. L. J. 626.

Not only this, but Bhag Singh has definitely stated that he did not see Pala Singh amongst his assailants. In the 'mare' case also, there is no evidence as regards his identification. The learned Magistrate has solely relied upon the retracted confession of Pala Singh, and it is, therefore, necessary to examine it carefully.

There is no doubt that it is not *illegal* to base a conviction even on the retracted confession of an accused person; but as pointed out in *Jawan v. Emperor* (1) "experience and common sense show that, in the absence of corroboration in material particulars, it is not safe to convict on a confession, unless, from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine." Now, looking at the facts of this case, I do not think, this is one of those exceptional cases, wherein a conviction may be justifiable even on a retracted confession. Pala Singh accused is aged only about twenty. In the story put forward by him, he has denied having taken any active part in the commission of the offence. Bhag Singh denies in the 'mare' case that he was amongst the persons who attacked him. He withdrew the confession not long after it was made. The learned Magistrate has held that the confession was not withdrawn at the earliest possible opportunity, but I am not satisfied on this point. The confession was made on the 12th March, 1927, but (according to the Magistrate) was not retracted in Court till the 6th October, 1926, when the statements of the accused were recorded. But the learned Magistrate concedes that from the trend of the prosecution witnesses it was apparent that the confessions were going to be withdrawn. There are actually two applications dated the 3rd June, 1926, retracting the confession on the record, but the learned Magistrate considers that these were smuggled in some time and his order "*shamil misl howe*" thereon was obtained thereon somehow without his knowledge. But when it is apparent from the cross-examination of the Magistrate who took down the confession on the 12th March, 1926, that the confessions were going to be withdrawn, I do not see why it should be considered improbable that the applications were put in about that time.

The papers on a judicial record are placed in chronological order and entered in the index and I am not at all convinced that these applications were antedated and 'smuggled' at a later date. The accused were not questioned till the 6th October, 1926, and had, therefore, no other opportunity of retracting the confessions.

The circumstances of the retracted confession are, therefore, by no means so exceptionally free from suspicion as to justify a conviction based upon that confession alone.

For reasons given above I accept the appeals of Bachan Singh and Pala Singh and acquit them in both the cases. I accept the appeal of Santa Singh in the 'gun' case (Criminal Appeal No. 256 of 1927) and acquit him.

As regards the 'mare' case, I have found that there is sufficient evidence to justify the convictions of Santa Singh and Gagi, but the convictions should have been under s. 395 of the Indian Penal Code, as according to Bhag Singh's own statement only four persons attacked him. I accordingly set aside the order of the learned Magistrate and alter the convictions of Santa Singh and Gagi in the 'mare' case to those under s. 394 of the Indian Penal Code. I sentence Gagi, who appears to have played a prominent part, to seven years' rigorous imprisonment including three months' solitary confinement under s. 394 of the Indian Penal Code. I sentence Santa Singh to four years' rigorous imprisonment including three months' solitary confinement under the same section.

In the 'gun' case, I alter Gagi's conviction to one under s. 414 of the Indian Penal Code and sentence him to rigorous imprisonment for three years including three months' solitary confinement. The sentences of Gagi in the two cases, will run concurrently.

R. L.

A. N. A.

Order accordingly.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1509 OF 1927.

November 24, 1927.

Present:—Mr. Justice Tek Chand.

FIRM TIRKHA RAM-CHUNILAL

THROUGH CHUNI LAL—PLAINTIFF—

APPELLANT

versus

HAIDAR—DEFENDANT—RESPONDENT.

Interest—Unconscionable rate of interest—No undue influence—Power of Court to interfere—Compound interest at same rate as principal, whether penal.

The mere fact that a rate of interest is harsh or unconscionable is not a sufficient ground for not enforcing the contract between the parties. [p. 617, col. 2.]

Aziz Khan v. Duni Chand (1) and Balla Mal v. Ahad Shah (2), followed.

The rule of law is now firmly established that in the absence of proof of undue influence, a provision for charging compound interest at the same rate as simple interest on the failure of the mortgagor to pay the principal or interest on the due date is perfectly legal and cannot be relieved against on the mere ground of hardship. [p. 618, col. 1.]

Mangat Rai v. Babu Singh (3), followed.

"Second appeal from the decree of the District Judge, Karnal, dated the 9th March, 1927, modifying that of the Additional Subordinate Judge, Fourth Class, Sonapat, dated the 30th of March, 1926.

Mr. Shamair Chand, for the Appellant.

Mr. Parkash Chandra, for Mr. Mohammad Amin, for the Respondent.

JUDGMENT.—The plaintiff instituted the suit, out of which this second appeal has arisen for recovery of Rs. 720 alleged to be due to him as principal, interest and compound interest on foot of a mortgage-deed executed by the defendant-respondent in his favour. The execution of the deed was admitted by the defendant, and the only material plea, put forward was that the rate of interest was penal. It was not alleged, however, that any undue influence had been exercised by the mortgagee over the mortgagor at the time of the execution of the mortgage-deed. A number of issues were framed most of which referred to technical points as to the framing of the suit, the only material issue being No. 8 "whether the rate of interest is penal and should be decreed?"

The learned Subordinate Judge found that the rate of interest was not penal, but he was of opinion that the stipulation as to compound interest was "harsh" and should "not be given effect to." He, therefore, allowed simple interest and passed a decree for Rs. 200-6 only.

On appeal by the mortgagee the learned

District Judge held that the compound interest could not be allowed as the consideration for the mortgage consisted of prior dealings between the parties and, therefore, the mortgagee was in a position to dominate over the will of the mortgagor. He, accordingly, held that the term as to compound interest was unconscionable and could not be enforced. He, however, held that the plaintiff-mortgagee was entitled to certain sum on account of rent and enhanced the decretal amount to Rs. 319.

The mortgagee has come up to this Court in second appeal and contends that undue influence had not been pleaded and that the mere fact that the consideration for the mortgage was the amount due on account of previous dealings between the parties, or that the rate of interest was excessive, is no ground in law to disallow compound interest. Mr. Parkash Chandra for the respondent concedes that undue influence was not pleaded in the *jawab dawa* nor was it covered by the issues. In these circumstances the learned District Judge should not have set up an entirely new case for the defendant and made it the basis of his decision. The Subordinate Judge had refused to allow compound interest on the simple ground that the rate was 'harsh' and the learned District Judge thought the condition to be unconscionable. This, however, is not a sufficient ground for not enforcing the contract between the parties: see in this connection the well-known decisions of their Lordships of the Privy Council in *Aziz Khan v. Duni Chand (1)* and *Balla Mal v. Ahad Shah (2)*.

Both the lower Courts have held that the condition as to compound interest was not penal. Mr. Parkash Chandra for the respondent urges that this finding is not correct and that the condition to pay compound interest on default of payment of the principal or interest is in the nature of a penalty and must be relieved against. This, however, is not a correct view of the law. The question was recently examined by a Division Bench of this Court in *Mangat Rai v. Babu Singh (3)* where it was

(1) 48 Ind. Cas. 933; 101 P. R. 1918; 23 C. W. N. 130; 165 P. W. R. 1918 (P. C.).

(2) 48 Ind. Cas. 1; 124 P. R. 1918; 35 M. L. J. 614; 16 A. L. J. 905; 23 C. W. N. 233; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

(3) 103 Ind. Cas. 437; 28 P. L. R. 380; 9 Lah. L. J. 301; A. I. R. 1927 Lah. 445.

held that "the rule of law is now firmly established that in the absence of proof of undue influence, a provision for charging compound interest at the same rate as simple interest, on the failure of the mortgagor to pay the principal or interest on the due date, is perfectly legal and cannot be relieved against on the mere ground of hardship."

I, therefore, hold that the lower Courts were not justified in not allowing compound interest according to the stipulation in the deed. In view of this finding the appellant is not entitled to the amount of rent allowed to him by the District Judge.

I, therefore, accept the appeal, set aside the judgment of the District Judge and pass a decree for the sum claimed in favour of the plaintiff-appellant against the respondent with costs throughout.

R. L.

Appeal accepted.

A. N. A.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1352 OF 1927.

December 5, 1927.

Present:—Mr. Justice Zafar Ali.

MAHTAB DIN—DEFENDANT—APPELLANT
versus

KASAR SINGH AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Evidence Act (I of 1872), s. 74—'Public document', meaning of.

A document cannot be said to be a public document within the meaning of s. 74 of the Evidence Act unless it is shown to have been prepared by a public servant in the discharge of his official duty. The mere fact that it is kept in a public office does not lead to the inference that it is a public document. [p. 618, col. 2.]

Nittyamund Roy v. Abdar Raheem (1), referred to.

Second appeal from the decree of the District Judge, Gujranwala, dated the 19th of February, 1927, reversing that of the Subordinate Judge, Fourth Class, Wazirabad, District Gujranwala, dated the 15th of July, 1926.

Mr. Niaz Muhammad, for the Appellant.

Dr. G. C. Narang, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by certain inhabitants of Wazirabad with regard to a drinking well situated in that town, claiming that the well was constructed by their ancestors and had been dedicated to the

use of the public, and that the defendant had no right to sell it which he intended to do. The trial Court, finding that the plaintiffs had failed to establish their claim, dismissed the suit. On appeal the learned District Judge allowed the plaintiffs to produce additional evidence, documentary as well as oral, and mainly on the strength of an entry in the register of houses that was thus received in evidence, he came to the contrary conclusion and decreed the plaintiffs' suit.

On behalf of the defendant-appellant it is urged that there was no good ground for admitting additional evidence and that the register in question was inadmissible in evidence not being a public document or a document prepared by a Government Officer in the discharge of his official duty. The first objection is untenable. The learned District Judge had a discretion in the matter which he does not appear to have exercised unjudicially.

As regards the second, the said register of houses was prepared in 1856 and again in 1856 and in both, the well in dispute was shown as "*shamilat shahr*." Now the question is: was the register a public document as defined in s. 74 of the Indian Evidence Act or was it an official book falling within the purview of s. 35 of that Act? There is no evidence to show that the registers were prepared by a public servant in the discharge of his official duty. The registers are kept in the record room of the Deputy Commissioner's Office at Gujranwala, but the mere fact that they are kept in a public office does not lead to the inference that they are public documents. In *Nittyamund Roy v. Abdar Raheem* (1) a Division Bench of the Calcutta High Court held that certain measurement records produced from the Collectorate were not public documents within the meaning of s. 74 where there was nothing to show that they were the record of measurements made by any Government Officer. As already stated, there is nothing to show that these registers were prepared by any Government Officer, or by any public servant whose duty it was to prepare them. Nor is there anything to show that the entries therein were made after due enquiry so that a presumption of correctness should attach to them. This being so, they are inadmissible in evidence.

The learned District Judge based his finding mainly on the said entries. It cannot be divined what his finding would have been if had excluded them from consideration.

I, therefore, accept the appeal, set aside the judgment and decree of the lower Appellate Court and remand the case for re-decision of the appeal on the basis of the evidence on the record that is admissible. The costs to abide the event.

A. N. A.

Case remanded.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1519 OF 1927.

November 28, 1927.

Present:—Mr. Justice Tek Chand.

GHULAM MOHAMMAD—VENDEE—

DEFENDANT—APPELLANT

versus

ABDUL MAJID—PLAINTIFF AND NABI

BAKHSI—VENDOR—DEFENDANT—

RESPONDENT.

Punjab Pre-emption Act (I of 1913), s. 15 (c), thirdly—'Owner of estate', meaning of—Owner in shamilat, whether owner of estate.

If a person has no land in the *khewat* but owns a share in the *shamilat* which is culturable and is assessed to land revenue, he is an 'owner of the estate' within the meaning of s. 15 (c), thirdly, of the Punjab Pre-emption Act.

Narain Singh v. Gopal Singh (1) and *Jawala Singh v. Tara Singh* (2), followed.

Second appeal from the decree of the District Judge, Shahpur at Sargodha, dated the 7th of March, 1927, affirming that of the Subordinate Judge, Second Class, Sargodha, dated the 1st of February, 1927.

Mr. Nanak Chand, for the Appellants.

Mr. Niaz Muhammad, for the Respondents.

JUDGMENT.—The facts of this case are set out in detail in the judgment of the learned District Judge and need not be recapitulated. Briefly they are that the defendant-appellant purchased 52 *kanals*, 7½ *marlas* of land in two *khata*s, i.e., (a) 52¼ *kanals* in *khata* No. 3 and (b) ¼th of ½ *kanal* of land in *khata* No. 18. The plaintiff sued to pre-empt the sale and has been successful in both Courts. The defendant-vendee has come up to this Court on second appeal.

As regards, the small plot of land, ¼th of ½ *kanal* in area in *khata* No. 18, the finding is that the plaintiff-respondent is a co-

sharer in the *khata*, while the defendant-appellant (vendee) is not. It is conceded by Mr. Nanak Chand that the suit has been rightly decreed, so far as this plot of land is concerned. The appeal fails *qua* this plot and is dismissed. As regards the 52¼ *kanals* of land in *khata* No. 3, the findings are that the defendant-appellant (vendee) is a co sharer in the *shamilat* of the village in which the land sold is situate but has no *khewat* land in that village, whereas the plaintiff-respondent (pre-emptor) owns land both in the *khewat* as well as in the *shamilat* of this village. Mr. Niaz Muhammad, for the respondent, concedes that the reason for the vendee holding a share in the *shamilat* of this village is wholly irrelevant for the determination of the respective rights of the pre-emptor and the vendee and that the real question is whether the land owned by the vendee is assessed to land revenue. He admits that if a person has no land in the *khewat* but owns a share in the *shamilat* which is culturable and is assessed to land revenue, he would be an 'owner of the estate' within the meaning of that expression under s. 15 (c), thirdly, of the Punjab Pre-emption Act, as interpreted in the rulings of the Chief Court and this Court reported as *Narain Singh v. Gopal Singh* (1) and *Jawala Singh v. Tara Singh* (2). But the materials on the record are insufficient to decide this point. No enquiry has been made as to whether the appellant owns a share in the portion of the *shamilat* which is assessed to land revenue, and both Counsel are agreed that the case must go back to enable the parties to place the necessary evidence before the Court.

I, therefore, accept the appeal, set aside the judgments and decrees of the lower Courts so far as the land 52¼ *kanals* in *khata* No. 3 is concerned, and send the case back to the trial Court for recording evidence on the point above mentioned and decision in accordance with law. The Court-fee on appeal will be refunded and costs will be costs in the cause.

As already stated, the appeal with regard to ¼th of ½ *kanal* of land in *khata* No. 18 is dismissed.

Appeal accepted in part:

Case remanded.

R. L.

(1) 20 Ind. Cas 2; 106 P. R. 1913; 167 P. W. R. 1913; 252 P. L. R. 1913.

(2) 57 Ind. Cas. 159; 1 Lah. 503 at pp. 506, 507; 2 U. P. L. R. (Lah.) 122; 2 Lah. L. J. 565.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No 180 OF 1923.

October 26, 1927.

Present :—Mr. Justice Broadway and
Mr. Justice Agha Haidar.**BUDHA MAL—DEFENDANT—APPELLANT**
*versus***RALLIA RAM AND OTHERS—PLAINTIFFS—**
RESPONDENTS.*Suits Valuation Act (VII of 1887), s. 11—Under-valuation—Objection not taken at early stage—Absence of prejudice—Want of jurisdiction, effect of—Transfer of case—Proceedings before transfer, validity of—Practice—Omission to produce books at proper stage—Remand for fresh evidence, legality of.*

The defect of jurisdiction on territorial or pecuniary ground will not render proceedings in a case void, if objection is not taken at the earliest opportunity and there has been no consequent failure of justice. [p. 622, col. 1.]

*Sardar Khan v. Aisha Bibi (3), followed.**Khudajiatal Kubra v. Amina Khatun (4), referred to.**Radha Kishen v. Kidar Nath (1) and Parbhakarbat v. Vishwambhar Pandit (2), distinguished.*

A suit for dissolution of partnership and rendition of accounts was valued at Rs. 1,100 and filed in the Court of a Sub-Judge, Second Class. No objection was taken by the defendant to this figure with the result that the parties proceeded to trial and ultimately a preliminary decree was passed. No objection as to valuation or jurisdiction was taken in appeal from the preliminary decree which was dismissed. In the meantime the trial Court appointed a Commissioner for examining the accounts who after examining the accounts submitted a report wherein he arrived at a sum of Rs. 14,369-15-9 which was to be distributed as nett profits between the partners. The case was then transferred to Court of competent jurisdiction which passed the decree. On appeal it was objected that the appointment of the Commissioner was without jurisdiction and consequently the whole of the proceedings including the Commissioner's report should have been discarded :

Held, that inasmuch as no objection was taken to the defect of jurisdiction at an early stage and as it was not suggested that the disposal of the case on merits had been prejudicially affected by wrong valuation, the case was covered by s. 11 of the Suits Valuation Act. [p. 621, col. 2.]

A party who does not assist the Court by placing the relevant books which are admittedly in his possession before the Court cannot in appeal ask for the indulgence of the Appellate Court so as to have a fresh opportunity of going into the accounts on remand. [p. 623, cols. 1 & 2.]

First appeal from the decree of the Senior Subordinate Judge, Gurdaspur, dated the 13th November, 1922.

Lala Badri Das, R. B., and Mr. Kidar Nath Chopra, for the Appellant.

Lala Moti Sagar, R. B., and Mr. Mehr Chand Mahajan, for the Respondents.

JUDGMENT.

Agha Haidar, J.—This appeal arises out of a suit for dissolution of partnership and rendition of accounts. A preliminary

decree was passed as long ago as the 5th of July, 1920, and the present appeal is from the final decree.

It appears that on the 28th of October, 1916, three persons, namely, Ganga Ram, now represented by plaintiffs Nos. 1 and 2, Fakir Chand, plaintiff No. 3, and Budha Mal, defendant, entered into a partnership for dealing in building materials, etc. The present suit with a valuation of Rs. 1,100 was brought on the 1st of August, 1919, by the plaintiffs, and, as already stated, a preliminary decree was passed which declared the shares of the parties to be one-third each. It was further decided that the partnership included a certain liquor business as well. The suit seems to have been instituted originally in the Court of the Senior Subordinate Judge, Gurdaspur. On the 2nd of August, 1919, the Senior Subordinate Judge made an order to the effect that "the plaint be made over to the Court of Maulvi Barkat Ali, Subordinate Judge." Ultimately the trial of the case was held by Mr. Ram Kanwar, Subordinate Judge, Second Class, who passed the preliminary decree on the 5th of July, 1920. An appeal was lodged by the defendant in the Court of the District Judge against that decree. This appeal was dismissed. In the meantime on the 7th of July, 1920, the learned Subordinate Judge of the Second Class, Mr. Ram Kanwar, made an order appointing Pandit Bishambar Nath, Pleader, as a Commissioner for examining the accounts. On the 3rd of May, 1921, the Commissioner submitted his report wherein he arrived at a sum of Rs. 14,369-15-9 which was to be distributed as nett profits between the three parties.

It appears that on receipt of this report Mr. Ram Kanwar, Subordinate Judge, submitted the case to the District Judge for transfer to the proper Court having jurisdiction, because he considered that he could not grant a decree for a sum which was beyond his pecuniary jurisdiction. The case was accordingly transferred to the Court of the Senior Subordinate Judge on the 2nd of June, 1921.

Objections were filed against this report by the defendant Budha Mal on the 25th of August, 1921, in which, among other things, it was urged that the case was not triable by the Court of the Second Class Subordinate Judge and that all the proceedings taken in the Court of Lala Ram Kanwar were null and void and that the case should be

tried *de novo*. On the 19th of October, 1921, this objection was again repeated under the heading of "preliminary objections" where we find the plea of jurisdiction taken in a more crystallised form. It runs as follows:—

"1. The late Presiding Officer of the Court had no jurisdiction to hear the case. For this reason this case has been made over to this Court.

"2. All the previous proceedings should be taken *de novo*."

The learned Senior Subordinate Judge overruled these objections by an order, dated the 30th of November, 1921. He ultimately came to the conclusion that the total amount of profits of the partnership amounted to Rs. 15,619-12-9 which was distributable among the parties in certain specified sums according to their respective shares.

The defendant has come up in appeal to this Court, and his learned Counsel has repeated with considerable earnestness the plea of jurisdiction. He also urged that the defendant was entitled to more interest on his outlay. He further pleaded that the total figure arrived at by the learned Subordinate Judge should be reduced by a sum of Rs. 6,263-9-6 which, according to the defendant, represented the expenses which had been incurred in the partnership but which had not been taken into account by the Commissioner.

As to the plea of jurisdiction, as already stated, the suit was valued at Rs. 1,100. No objection whatsoever was taken by the defendant to this figure, with the result that the parties proceeded to trial and ultimately a preliminary decree was passed. In appeal against the preliminary decree no such objection was taken. In the course of the argument it was faintly suggested by the learned Counsel for the appellant that, as a result of the Commissioner's report, the preliminary decree had also become a nullity. Ultimately, however, he seems to have dropped the contention and concentrated his attack upon what took place in the Court of the Subordinate Judge, Second Class, immediately after the preliminary decree was passed. He pleaded that the appointment of the Commissioner was without jurisdiction and consequently the whole of the proceedings, including the Commissioner's report, should be discarded. He relied upon a ruling reported as *Radha*

Kishen v. Kidar Nath (1). That case, however, is quite different from the present case and does not support the contention of the appellant. In that case a suit was instituted in the Court of the Munsif for dissolution of partnership and accounts. The Munsif, in order to ascertain whether the suit was within his pecuniary jurisdiction, issued a commission for the examination of account books. As a result of this commission the Munsif came to the conclusion that he had no jurisdiction to try the suit. The Subordinate Judge, First Class, before whom the case ultimately came for disposal, refused to treat as evidence in the case the proceedings taken by the Munsif with the object of ascertaining whether the subject-matter of the suit was cognizable by him. On these facts the learned Chief Judge held that the findings of the Munsif could not be treated as a finding on the merits. He further held that the proceedings before the Munsif were *coram non judice* so far as the eventual decision of the liability of the parties was concerned and that under these circumstances the order of the Subordinate Judge was correct. It may be noted that this case purports to follow *Prabhakarbhat v. Vishwambhar Pandit* (2) a ruling which was delivered at a time when the Suits Valuation Act (VII of 1887) had not been placed upon the Statute Book. Mr. Moti Sagar, on behalf of the respondents, relied upon s. 11 of the Suits Valuation Act and quoted the Full Bench decision reported as *Sardar Khan v. Aisha Bibi* (3). The provisions of s. 11 of the Suits Valuation Act are clear and provide a complete answer to the appellant's contention. As already stated, no objection was taken as regards pecuniary jurisdiction as required by s. 11 (a) of the Suits Valuation Act. And if the argument were open to the appellant that after the passing of the preliminary decree and the receipt of the Commissioner's report such objection was raised, the answer is supplied by s. 11 (b) and (2) of the Suits Valuation Act, for it has not been even suggested that the undervaluation has prejudicially affected the disposal of the suit on its merits. I may quote here the following sentence from the Full Bench judgment reported as *Sardar Khan v. Aisha Bibi* (3):—

(1) 15 Ind. Cas. 773; 96 P. R. 1912; 221 P. W. R. 1912.

(2) 8 B. 313; 4 Ind. Dec. (N. S.) 583 (F. B.).

(3) 88 Ind. Cas. 72; 8 Lah. 105; A. I. R. 1925 Lah. 290 (F. B.).

"The object of the Legislature in both cases is the same, namely, that the defect of jurisdiction on territorial or pecuniary ground should not render proceedings in a case abortive if such objection was not taken at the earliest opportunity and there has been no consequent failure of justice."

I may also refer to *Khudajiatul Kubra v. Amina Khatun* (4) and the observations at page 125* of the report. The inanity of the objections raised by the defendant would further appear from the fact that the Commissioner, Pandit Bishambar Nath, had been appointed by the Court with the consent of parties and even in the objection (dated the 25th August, 1921) to the Commissioner's report the defendant himself asked for the retention of the Commissioner Pandit Bishambar Nath.

I accordingly overrule the plea of jurisdiction raised by the appellant.

As regards the question of interest, it may be observed that in the objections filed by the defendant on the 25th of August, 1921, no complaint is made that the Commissioner did not allow interest on his outlay to the defendant. In fact on the 29th of April, 1921, the defendant stated that interest should be charged on the amount invested by him from the date of the investment to the 1st of April, 1919. In this report dated the 3rd of May, 1921, pages 53—58, at page 56 of the printed paper book No. II, the Commissioner has allowed interest up to the 1st of April, 1919. This sum comes to Rs. 1,962-8. The Commissioner observes as follows:—

"This interest has been calculated with effect from the date of investment of the money to the 1st April, 1919. Lala Budha Mal demands interest on the items other than those of the *khata* relating to liquor up to the date when all the goods were delivered to him according to the statements of the parties. But, in my opinion, he is not entitled to any other amount of interest because there is profit in each *khata*, and he received the amount of money spent by him before the 1st April, 1919. I think Lala Budha Mal has been investing sums of money unnecessarily in this *khata* of his own accord and he has thus unjustly burdened the shop with interest."

Thus the Commissioner has allowed interest to the defendant up to the date

up to which he asked for it, but he has very properly refused to allow interest for having over financed the partnership business. The learned Judge of the trial Court has accepted the reasons given by the Commissioner as regards the interest which has been allowed and also as regards the interest which has been disallowed, and sufficient ground has not been shown to this Court to take a different view.

Mr. Badri Das, the learned Counsel for the appellant, devoted the best part of his argument to the account given at pages 66 and 67 of the printed paper book No. II. The total of these items comes to Rs. 6,263-9-6, and Mr. Badri Das's grievance is that if this amount had been shown among the items of expenditure the sum ultimately found due from the defendant would have been reduced by that sum. What he wanted was, as he frankly admitted, that the case should be remanded and the accounts overhauled once again, but he has not been able to show that these items, which are detailed at pages 66 and 67 of the printed paper book No. II, have not been included in the Commissioner's account. It may be observed that at pages 122 and 123 of the printed paper book No. I the Commissioner has given an abstract of the account and a note by him is subjoined to the same. He says that comparison was made with the original with the help of the parties and mistakes corrected. Then again, there is a long statement by Lala Budha Mal defendant before the Commissioner which is printed at pages 41—43 of the printed paper book No. II. This statement too, does not contain any reference to the omission of the items mentioned at pages 66 and 67 of the printed paper book No. II. I also find from the Commissioner's report that the parties were present throughout the proceedings and that Lala Budha Mal, the defendant, had every opportunity of correcting mistakes, if any, in the Commissioner's report. As has already been observed, in his objections dated the 25th of August, 1921, Lala Budha Mal in para. 9 does not object to the retention of Pandit Bishambar Nath as a Commissioner. In fact he asked the Court that the said Commissioner may be retained, though he prayed that a new *Munim* may be appointed. Mr. Badri Das was repeatedly asked to show to the Court from the voluminous accounts which have been printed in the case and also from other account books which, we are informed, were

(4) 80 Ind. Cas. 413; 22 A. L. J. 122; 46 A. 250; A. I. R. 1924 All. 388; L. R. 5 A. 142 Civ.

*Page of 22 A. L. J.—[Ed.]

on the record that there has been a serious mistake involving a shortage of Rs. 6,000 odd in the account of expenditure, but beyond his assertion that this sum has not been included in the accounts of the Commissioner the learned Counsel did not go any further. I may also observe that Chanan Mal, on whose evidence reliance has been placed to support the argument that the Commissioner's accounts were wrong, cuts a very sorry figure in the course of his cross examination. After giving the details of the various items which go to make up the total of Rs. 6,263-9-6, in cross-examination this witness states as follows:—

"There is no invoice of any of the above items. I cannot say whether the said items are entered in the *roznamcha*, *kachi rokar* and *khata* of the liquor account or not. Some items are not shown in these *bahis*, while they are shown in the account filed by the Local Commissioner in the Court..... I cannot also say how much money has been paid to the distillery under these *bahis* and how much money is credited to it. The whole account is given in the report of Pandit Bishambar Nath, Local Commissioner..... I cannot say without checking the account that such and such item of the distillery *khata* is included in any other item of the *sharab khata* or not. I have not come across any of the above items, during the short space of time I have been able to check the account."

All this is not very illuminating and is not calculated to inspire confidence in the account given by him in his examination-in-chief. The plaintiffs repeatedly called upon the defendant Lala Budha Mal to produce his account books and the Court also made an order for the production of those account books, but for reasons best known to himself Lala Budha Mal failed to comply with the order of the Court up to the last moment, *vide*, the application of the plaintiffs dated the 1st August, 1919, (page 3 of the printed paper book No. II), and the order of the Court dated the 7th of August, 1919, page 5 of the same paper book, and a subsequent order dated the 7th of January, 1920, page 17. Lala Budha Mal in his various statements admitted that the *bahis* were in his possession. A party who does not assist the Court by placing the relevant books which are admittedly in his possession before the Court, cannot in appeal ask for the indulgence of the Appellate Court so as

to have a fresh opportunity of going into the accounts on remand. The learned Subordinate Judge has not relied absolutely upon the report of the Commissioner but has tested the accounts of the Commissioner independently and has come to his own conclusions. There is a slight mistake in his account whereby he has added two items, namely, Rs. 374-8 and Rs. 35 to the profits of the liquor business. As would appear from a reference to page 123 of the printed paper book No. I these items had already been credited and by some oversight the learned Subordinate Judge has shown them again in the total of the profits of the liquor business. Mr. Moti Sagar frankly admitted the mistake which the Subordinate Judge had made. This mistake must be rectified.

The result is that Rs. 374-8 plus Rs. 35- Rs. 409-8 must be deducted from the total profits of the partnership business, *i. e.*, Rs. 15,619-12-9. The resultant sum, *i. e.*, Rs. 15,210-4-9 would be equally divisible between plaintiffs Nos. 1 and 2, who as the legal representatives of Ganga Ram, the deceased partner, would be entitled to a one-third and plaintiff No. 4 and the defendant would be entitled to one share each out of the remaining two-thirds. Thus the share of plaintiffs Nos. 1 and 2 would be Rs. 5,070-1-7, and plaintiff No. 3 and the defendant would be entitled to the same amount each. But the share due to the plaintiffs would be augmented by the addition of a sum of Rs. 875-14-6 which they had advanced, thus making a total of Rs. 5,946-0-1. It will be payable to plaintiffs Nos. 1 and 2. A sum of Rs. 100 will have to be deducted from the share of plaintiff No. 3 so that his share would be reduced to Rs. 4,970-4-7 which he would be entitled to recover from the defendant. Thus the total amount due to the plaintiffs would come to Rs. 10,916-1-8.

I would accordingly allow the appeal to the extent stated above and, modifying the decree of the Court below, order that a decree may be prepared granting the plaintiffs their shares as noted above. These sums would be recoverable by plaintiffs Nos. 1 and 2 and plaintiff No. 3 from the defendant. As the defendant has succeeded to a very small extent only, I would order that the parties should bear their own costs of this appeal. The plaintiffs, of course, must make good the defi-

ency in Court-fee before they can proceed to execute the decree which they have obtained.

Broadway, J.—I agree in the order proposed.

R. L.

Appeal allowed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST APPEAL No. 1154
OF 1927.

November 30, 1927.

Present :—Mr. Justice Zafar Ali.

SARDAR MUHAMMAD—DECREE-HOLDER
—DEFENDANT—APPELLANT

versus

ZAFAR DIN—JUDGMENT-DEBTOR—

DEFENDANT AND OTHERS—DEFENDANTS
AND ANOTHER—PLAINTIFF—RESPONDENTS.

Partition decree—Execution of decree by defendant, legality of.

A decree for partition is a joint declaration of the rights of all the co-sharers interested in the property of which partition is sought and each co-sharer is entitled to obtain possession of the share allotted to him under the decree by applying for execution of the decree whether he is a plaintiff or defendant.

Wasdeo v. Rupchand (1), followed.

Miscellaneous first appeal from an order of the Subordinate Judge, First Class, Lahore, dated the 25th March, 1927.

Mr. Kahan Chand, for the Appellant.

JUDGMENT.—No body appears on behalf of the respondents to oppose this miscellaneous appeal. The order of the Court below which is appealed against is contrary to *Wasdeo v. Rupchand* (1) in which it was held that a decree for partition is a joint declaration of rights of all the co-sharers interested in the property of which partition is sought. Each co-sharer is entitled to obtain possession of the share allotted to him under the decree whether he may be a plaintiff or a defendant. In the present case the appellant was a defendant and a share had been allotted to him. Therefore, he could execute the partition decree.

I, therefore, set aside the order of the Court below and direct that the appellant's application for execution be proceeded with according to law.

R. L.

Order set aside.

A. N. A.

(1) 23 P. R. 1905; 13 P. L. R. 1905; 31 P. W. R. 1905.

LAHORE HIGH COURT.

CIVIL REVISION No. 213 OF 1927.

November 15, 1927.

Present :—Mr. Justice Zafar Ali.

CHARAT SINGH AND OTHERS—PLAINTIFFS.

—PETITIONERS.

versus

SUKHDEV SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 77 (3) (d)—Suit by tenant to establish occupancy right—Jurisdiction of Revenue Court.

A suit by a tenant to establish his right of occupancy falls under cl. (d), sub-s. (3) of s. 77, Punjab Tenancy Act, and is cognizable by a Revenue Court.

Petition for revision of the order of the District Judge, Ferozepur, dated the 7th December, 1926, affirming that of the Sub-Judge, Fourth Class, Ferozepur, dated the 8th October, 1925.

Mr. J. N. Bhandari, for the Petitioners.

Dr. Nand Lal, for the Respondents.

JUDGMENT.—The plaintiffs-petitioners claimed to be reversionary heirs of Jiwan Singh and on his death they entered into possession of his occupancy holding, and an Assistant Collector sanctioned mutation in their favour. This order having been set aside by the Collector on appeal, the petitioners instituted a suit for a declaration that they were the lawful heirs of Jiwan Singh and were entitled to succeed to his occupancy holding. The Courts below have concurred in holding that the suit is cognizable by a Revenue Court and not by a Civil Court. This view appears to be correct. The plaintiffs according to their own showing are in possession as tenants and what they want to establish is that they are occupancy tenants. The suit, therefore, falls under cl. (d) of sub-s. (3) of s. 77 of the Punjab Tenancy Act and the petition of plaintiffs has been rightly returned to be presented to a Revenue Court.

I, therefore, dismiss this application in revision with costs.

G. A.

Application dismissed.

MADRAS HIGH COURT. FULL BENCH.

CIVIL APPEAL NO. 232 OF 1923.

September 16, 1927.

Present:—Sir William Watkins Phillips,
Kt., Officiating Chief Justice, Mr. Justice
Ramesam and Mr. Justice Beasley.

SONACHALAM PILLAI AND OTHERS—

DEFENDANTS NOS. 1, 3 TO 7, 9, 10, 13 AND 14

—APPELLANTS

versus

KUMARAVELU CHETTIAR AND OTHERS

—PLAINTIFFS NOS. 1 TO 6—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11, Expl. VI,
O. I, r. 8—Representative suit—Suit without leave, but
bona fide contested on behalf of community—Decision,
whether res judicata in subsequent suit under O. I, r. 8.*

Order I, r. 8, of the Civil Procedure Code, does not control Explanation VI to s. 11 of the Code, so as to prevent a suit filed with leave under O. I, r. 8, by two or more members of a community who claim a right in common to them and the other members of the community, and seek to enforce it on behalf of themselves and the community, being *res judicata* by reason of a decision given after *bona fide* contest in a previous suit filed without leave under s. 30, Civil Procedure Code, 1877, by some other members of the community claiming the same right and seeking to enforce it on behalf of the community. [p. 637, col. 1.]

[Case-law considered.]

Appeal against a decree of the Court of the Subordinate Judge, Tuticorin, dated the 17th of March, 1923, in Original Suit No. 2 of 1920.

The appeal came on for hearing before Kumaraswami Sastri and Devadoss, JJ., and their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH.

The plaintiffs are Vaniyars or oil-mongers of Tiruchendur. They sue for a declaration that they are entitled to worship in the Subrahmaniaswami temple at Tiruchendur by going into the inner Mayil Maha Mantapam, to go round all the *prakarams* in the temple, to place their Kavadies on the *koradu* in front of the Valliamman shrine, etc., and for an injunction restraining the defendants from interfering with the right of worship.

The defendants, who are the *dharma-karthas*, Stanikars of the temple and the three Vellala inhabitants of Tiruchendur, deny the plaintiffs' right to go into the Mayil Maha Mantapam for the purpose of worship and their right to place Kavadies on the *koradu* in front of the Valliamman shrine and contend that they and their caste-men are prohibited from going beyond the Irawatha Mantapam or going

round any of the *prakarams*. The Subordinate Judge of Tuticorin has granted the plaintiffs the declaration and injunction prayed for. The defendants prefer this appeal.

The first point urged by the learned Advocate-General for the appellants is that the present suit is barred by reason of the decree in O. S. No. 14 of 1877 on the file of the Subordinate Judge's Court of Tuticorin which was confirmed on appeal to the High Court in A. S. No. 73 of 1878. Before considering the appeal on the merits it is necessary to record a finding on the question of *res judicata*, for, if the suit is barred by reason of the decision in the previous suit, it would not be necessary to try the appeal on the merits. The present suit is by the Vaniyars of Tiruchendur. They have obtained permission under O. I, r. 8, of the Civil Procedure Code, to sue on behalf of all the Vaniya Vysia residents of Tiruchendur. The plaintiffs in O. S. No. 14 of 1877 were four Vaniyars, two of whom father and son were residents of Venkatramapuram and the other two were residents of That-tamadam village, Thenkarai Taluk, Tinnevely District. The plaint as translated in the printed record before us is admittedly incorrect and it has been corrected. In prayer 1 the words "and other Vaniyars" should be added between the words "plaintiffs" and "to worship" and at the end of the paragraph the words "and to establish the right of the plaintiffs and others belonging to the Vaniyar caste." Their allegation in the plaint was that they and all the other Vaniyars had from time immemorial been in the habit of worshipping the deity going as far as the wooden Ali (lattice) placed between Ardhamantapam and Mahamantapam in the temple of Sri Subrahmanya Swami at Tiruchendur and also tying and taking Kavadies and placing them before the Valliamman temple comprised within the compound of Sri Subrahmanya Swami temple, and that on the 8th February, 1876, the 1st plaintiff was taking Kavadi and bowing in worship within the temple of the said Sri Subrahmanya Swami along with the plaintiffs Nos. 2 to 4, that the defendants Nos. 1 to 7 had pushed the plaintiffs out of the said temple unjustly and forcibly and they prayed that "the Court may be pleased to pass a decree establishing the right due to the plaintiffs to worship the deity going

as far as the wooden lattice placed between Ardhmantapam and Mahamantapam in the temple of Sri Subrahmanya Swami and to tie and take Kavadies and place them before the Valliamman temple comprised within the compound of the said temple of god Subrahmanya and to establish the right of the Vaniyars and for a permanent injunction restraining the defendants from causing obstruction to them and other Vaniyars and for damages for Rs. 5,000 for loss of dignity and mental pain caused to the plaintiffs." The defendants were the Maniyam, Archakar, other servants and the *dharma-karthas* of the temple. They in their written statement denied the right of the plaintiffs and other Vaniyars to go into the Mahamantapam and averred that from immemorial usage the limit prescribed for their worship was the spot marked "O" in the plan, and that as they had exceeded that limit they were properly sent out of the temple. The Subordinate Judge of Tuticorin after a careful consideration of the evidence dismissed the plaintiffs' suit. They appealed to the High Court in A. S. No. 73 of 1878. Mr. Justice Innes and Mr. Justice Muttuswami Ayyar dismissed the appeal with the remark that "the reasons assigned by the Judge who passed the decree dismissing the plaintiffs' suit are satisfactory to show that plaintiffs have not made out the right they claim."

It is urged by the learned Advocate-General that O. S. No. 14 of 1877 was filed by the plaintiffs to assert the right of all Vaniyars and as it was litigated *bona fide*, Explanation VI to s. 11 of the Civil Procedure Code applies to the case and the present suit which is brought for the same relief as that claimed in that suit is barred by *res judicata*. The contention of Mr. Ramachandra Ayyar is that there is nothing to show that O. S. No. 14 of 1877 was brought to assert the right of the whole community of Vaniyars, that the provisions of s. 30 were not complied with and that it was a suit for a personal remedy by way of damages and, therefore, the decision in that case cannot bar the present suit. It is urged by the learned Advocate-General that permission need not be express and he relies on *Krishna Kumar Deb v. Atul Chandra Ghose* (1). He also urges relying on *Dhunput Singh v. Paresh Nath*

Singh (2) that the Court ought to presume that the rules and forms of pleading were complied with by the Court. No doubt in the case of mandatory provisions of the processual law, in the absence of any evidence to the contrary, the Court would presume that all rules and legal forms were complied with as the tribunal is presumed not to deviate from the rules and forms laid down for its guidance. But where, as in this case, the provisions of s. 30 of the Code of 1877 are only enabling and not mandatory, such a presumption does not arise. We are satisfied that no permission was applied for orally or in writing and that no permission was granted expressly or impliedly under s. 30 corresponding to O. I. r. 8, Civil Procedure Code, to the plaintiffs to sue on behalf of or for the benefit of all the Vaniyars interested along with the plaintiffs to worship in the Tiruchendur temple as alleged by the plaintiffs for the following reasons:—

(1) There was no provision in the Code of 1859 corresponding to s. 30 of the later Codes:

(2) The provisions of s. 30 were for the first time enacted in the Code of 1877 which came into force on the 1st October 1877, and

(3) It was very unlikely that the Pleaders of Tuticorin would have become familiar with the provisions of the new Code before the 8th November, 1877, the date on which the plaint was filed.

(4) Neither in the plaint nor in the written statement which is found in the printed records of A. S. No. 73 of 1878 nor in the judgment is there any reference to the new provision contained in s. 30 of the Code.

The next question is whether O. S. No. 14 of 1877 was brought in order to establish the right of the whole community and not merely the personal right of the plaintiffs on record. The only materials upon which any conclusion can be arrived at are the plaint, the judgment and the decree. In para. 1 of the plaint it is stated that the plaintiffs belong to the third caste, Vaisyas. In para. 2 the averment is "the plaintiffs and all the other Vaniyars have from time immemorial been in the habit of worshipping the deity" etc. In para. 3 they (meaning the defendants) have also from that date to this day

(1) 84 Ind. Cas. 70; 39 C. L. J. 612; A. I. R. 1924 Cal. 998.

(2) 21 C. 180; 10 Ind. Dec. (N. S.) 752.

been obstructing the entire community of Vaniyars including the plaintiffs from crossing the outside compound and entering in." In para. 4 it is alleged: "on account of the aforesaid act and obstruction the plaintiffs and other Vaniyars have been lowered in the estimation of the people of other castes of an equal status." In prayer 1 the relief is asked for establishing the right due to the plaintiffs to worship the deity, etc., and to establish the right of the Vaniyars; and in prayer 2 injunction is asked for against the obstruction caused to the plaintiffs and other Vaniyars.

Issue No. 1 is in the following terms:—

(1) Whether oil mongers commonly known as "Vaniyar" are admitted into the plaintiff temple to worship at the spots A and B?

An attempt was made by the plaintiffs to raise the larger issue whether the plaintiffs were Vaisyas as they hoped by proving that they were Vaisyas they would be entitled to go to the Mahamantapam of the temple for worship. The Subordinate Judge thought it was unnecessary to consider the issue "whether the plaintiffs come under the class of Vaisyar," as he thought that the claim was "based entirely upon immemorial usage" and "the question of caste was not one capable of easy decision among Hindus." The decree simply says that the suit is dismissed. From the pleadings, from the issue, from the way in which evidence was adduced and the number of witnesses examined and the contentions of the parties appearing in the judgment, we have no hesitation in holding that the suit was brought to assert not merely the title of the plaintiffs but also the right of the Vaniyars to enter the Mahamantapam of the temple and the relief asked for was not one personal to the plaintiffs but one which was common to them as well as to all the Vaniyars. The mere addition of a claim for damages does not change the nature or the character of the suit which was one for the establishment of the right of the whole community of which the plaintiffs were members. That the suit was litigated *bona fide* cannot be disputed. A large number of witnesses were examined; various documents were produced and every attempt was made to prove the case to the hilt. After they were defeated in the Subordinate Judge's Court, the plaintiffs preferred an appeal to the High Court where also they sustain-

ed a defeat. There is no suggestion, much less proof, that O. S. No. 14 of 1877 was not conducted *bona fide* by the plaintiffs. The question is whether the decision in that suit bars the present suit. There are a number of decisions on the point and they are not quite reconcilable. We shall deal with cases which support the appellants' contention. In *Godimella Rangamma v. Panchangam Narasimha Charyulu* (3) it was held that "Explanation VI to s. 11 of the Code of Civil Procedure is not confined to cases in which the prior suit was brought with the permission of the Court under O. I. r. 8 thereof. The Explanation does not become inapplicable because the prior suit was for the establishment of the plaintiff's individual right in addition to the right claimed by him in common to himself and others in so far as his claim in respect of the latter right is concerned." In that suit some Agraharamdars brought a suit to eject the defendants from their possession. In a former suit for the same relief, one of the plaintiffs in the later suit was not a party to the earlier suit. It was contended that inasmuch as the plaintiff was not a party to the previous suit, he was not bound by the decision in that suit. Sadasiva Ayyar and Moore, JJ., held that the plaintiffs' suit was barred by the decision in the previous suit. Sadasiva Ayyar, J., after an examination of several cases on the point came to the conclusion that Explanation VI to s. 11 made no reference to O. I. r. 8 and, therefore, O. I. r. 8 cannot control Explanation VI. He observed at page 31*: "The addition of an individual claim to a right of way cannot prevent the decision as to the right claimed on behalf of all the Agraharamdars (which is also the right claimed in the present suit) from being *res judicata* in the present suit." Moore, J., observed at page 32*: "The joint right which the plaintiff claimed is identical with the relief sought for in the present suit, and he was clearly litigating *bona fide* in the interests of all the Agraharamdars. I am unable to agree with the Subordinate Judge that Explanation VI to s. 11 of the Civil Procedure Code must be treated as confined to cases in which permission to sue in a representative character is obtained under O. I. r. 8, of the Civil Procedure

(3) 35 Ind. Cas. 116; 31 M. L. J. 26; (1916) 2 M. W. N. 58.

*Pages of 31 M. L. J.—[2d.]

Code." In *Srooman Madabushi Gopalarthi v. Emmāni Subbamma* (4) it was held "Explanation V to s. 11, Civil Procedure Code, applies not only to cases where leave of Court has been granted under O. I, r. 8, but also to cases where some of the persons claiming a private right in common with others litigate *bona fide* on behalf of themselves and such others." Sir John Wallis, C. J., who felt considerably pressed by the argument that Explanation V was enacted at the same time as s. 30 in the Code of 1877 and, therefore, the Explanation is applicable only to cases where the consent of the Court to the institution of the suit had been given under s. 30, observes at page 492*: "The Explanation no doubt applies to such cases, but it is not in terms confined to them. It may be, that if a suit to which s. 30 is applicable were brought without the consent of the Court, the plaintiff could not be considered to be litigating *bona fide* on behalf of the other persons interested, that is, not only honestly but with due care and attention, or in other cases in which he failed to implead parties who ought to have been joined, but it is in terms wide enough to include accidental slips where no real prejudice has been caused, and we should not in my opinion be justified in refusing to apply it to such cases." He considered almost all the cases on the point and referred to the decision of Sir John Edge, C. J., in *Ram Narain v. Bisheshar Prasad* (5) as to the care that should be taken in applying the Explanation only to cases which come within its very wording. These two cases were followed by Sir William Ayling and Odgers, J.J., in *Chevraya Goundan v. Athappa Goundan* (6), wherein they held the fact that the former suit was not instituted with the leave of the Court under O. I, r. 8, Civil Procedure Code, did not exclude the application of Explanation VI to s. 11. In *Veranakot Narayanan Namburi v. Veranakot Narayanan Namburi* (7) it was held by Kernan and Forbes, J.J., that Explanation V of s. 11, Civil Procedure Code, is not limited to the case of a suit

under s. 30. In that case a decree was obtained against a *karnavan* of a Malabar *tarwad*. The suit was brought to set aside the decree. The question for decision was whether the plaintiff, a member of the Malabar *tarwad*, was bound by the decree against the *karnavan* of the *tarwad* declaring that a certain land was not the *jenm* of the *tarwad* but was held by the *karnam* on *kanom*. The *karnavan* was the defendant in the previous suit. After referring to the position of the *karnavan* of the Malabar *tarwad* and its usages, the learned Judges observed at page 332*: "Explanation V is not limited in its language to a suit under s. 30, which authorises a suit or defence by one or more parties on behalf of numerous other parties having the same interest in a suit. In such suits the parties suing or defending must have permission of the Court to sue or defend, and must in the plaint or defence purport to sue or defend expressly on behalf of himself and the others, and notice is required to be given to those interested who are not parties to the suit." This observation of the learned Judges was relied upon by Sadasiva Ayyar, J., in *Godimella Rangamma v. Panchangam Narasimhacharyulu* (3). In *Madhavan v. Keshavan* (8) Kernan and Parker, J.J., observe: "There are no grounds for supposing that the litigation of the Uralars with 5th defendant was not *bona fide* and, therefore, we think that the matter is *res judicata* under s. 13, cl. (5) of the Civil Procedure Code." In that case the Uraima right over a certain Devaswam was vested in certain Illams, one Urala representing each Illam. All the Illams except that of plaintiff were represented in the litigation with defendant No. 5 in 1881. The plaintiff in the later suit was not a party to the previous one. The learned Judges held that the plaintiff was bound by the decision in the previous suit inasmuch as the previous suit was in the nature of the assertion of the common right of all the Uralars. We may remark here that Explanation VI of the present Code was Explanation V, and O. I, r. 8, was s. 30, of the previous Code. In *Chandu v. Kunhamed* (9) the mortgagee of the share of defendant No. 1 in *paramba* brought a suit for possession of that share. An issue was raised

(4) 55 Ind. Cas. 984; 43 M. 487; 38 M. L. J. 493;

(1920) M. W. N. 435; 27 M. L. T. 219.

(5) 10 A. 411; A. W. N. (1888) 149; 6 Ind. Dec. (N. s.)

276.

(6) 75 Ind. Cas. 336; 18 L. W. 177; (1923) M. W. N. 545; A. I. R. 1924 Mad. 88.

(7) 2 M. 328; 5 Ind. Jur. 243; 1 Ind. Dec. (N. s.)

498.

(8) 11 M. 191; 4 Ind. Dec. (N. s.) 133.

(9) 14 M. 324; 1 M. L. J. 529; 5 Ind. Dec. (N. s.)

227.

in the previous suit whether the *piramba* was partible or not and was decided against the present defendant No. 2 who was defendant No. 6 in the previous suit. Sir Arthur Collins, C. J., and Handley, J., held that the "present defendant No. 1 and the other co-sharers may be said to claim under the plaintiffs in that suit by Explanation V of s. 13 of the Code of Civil Procedure" and, therefore, the decision in the previous suit adverse to the 2nd defendant's title was *res judicata* and conclusive against him in the present suit.

It is argued by Mr. Ramachandra Ayyar that these cases do not touch the point as *Godimella Rangamma v. Panchangam Narasimhacharyulu* (3) was a case of *Agraharamdars* and the case in *Srooman Madabushi Gopalacharlu v. Emmani Subbamma* (4) was also a case of *Agraharamdars* and to such cases the provisions of s. 30 could not be applied and, therefore, they are not authorities for the contention as to *res judicata*. His argument is that s. 30 is applicable only to cases where there are numerous parties who cannot all be conveniently brought before the Court, but where parties are not too numerous they should all be made parties to the action as no one is authorised to file a suit or defend one on behalf of another, and, therefore, the provisions of Explanation VI must be confined to cases covered by O. I. r. 8, and also to cases where persons are by law entitled to represent a class or authorised by persons to represent them before the Court. Explanation VI of s. 11 of the present Code is: "Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating." This Explanation is a reproduction of Explanation V of the Codes of 1877 and 1882 with the addition of the words "of a public right." These words were added on account of the enactment of the new s. 91 of the present Code. Where persons litigate *bona fide* in respect of a private right claimed in common for themselves and others, i. e., where persons bring a suit or defend a right common to themselves and others and the litigation is not merely for the benefit of the persons on record but for all the persons who are interested in that common right, all other persons interested in such right shall be deemed to claim under the persons so litigating.

If s. 30 is to govern this Explanation, the Legislature would not have used the words "deemed to claim under the persons so litigating," for when permission is granted under s. 30 to a few persons to sue or defend on behalf of the whole class, every member of that class is a party to the proceeding. The use of the words "deemed to claim," we think, gives a clue to the meaning of the section where persons sue for themselves as well as on behalf of others; though they may not get the permission of r. 8, yet their litigation is for the benefit of the whole class and when that litigation is conducted *bona fide*, there is no reason why the decision in that suit should not bind all the persons for whose benefit it was conducted. It has been held in a number of cases that r. 8 is only an enabling provision. It is open to the defendants in a case to bring to the notice of the Court that leave ought to be obtained as was done in *Vasudevan v. Sankaran* (10). But where the defendants do not object to the suit proceeding without the permission under r. 8, the persons for whose benefit the litigation is conducted cannot in case of failure to succeed turn round and say that they are not bound by it, for, if the common right had been established, they would be the first to claim the benefit of that decision.

We shall now deal with the cases relied on by Mr. Ramachandra Ayyar in support of his contention. In *Elayachanidathil Kombi Achen v. Kenatumkora Lakshmi Amma* (11) it was held that if it was sought to make a decree in a suit binding on a *Malabar tarwad*, the procedure laid down in s. 30 of the Code of Civil Procedure, 1877, should be followed if the members are numerous. Ianes and Muttusami Ayyar, JJ., observe at page 206*: "If a *tarwad* does not strictly fall within the denomination of a corporation, s. 30, in cases in which the members of the *tarwad* were numerous, would at all events apply, which, while authorising one of the persons interested to defend by leave of the Court on behalf of all, requires notice of the institution of the suit to be given to all; and a decree in such case, it is presumed, would be a decree against the entire body defending by such person." The question

(10) 20 M. 129; 7 M. L. J. 102; 7 Ind. Dec. (N. S.) 90.

(11) 5 M. 201; 2 Ind. Dec. (N. S.) 140.

*Page of 5 M.—[Ed.]

there was whether a decree which was obtained against the *karnavan* was binding upon the whole *tarwad*. In *Kunnathumillath Vasudevan Nambudri v. Narayanan Nambudri* (12), the same question arose whether a decree obtained against the *karnavan* of a Nayar *tarwad* or of a Nambudri *illam* is binding on the family. Innes, J., held differing from *Varanakot Narayanan Namburi v. Varanakot Narayana Namburi* (7) that "Every member of the *tarwad* is interested in the joint property and ought to be made a party or have notice under s. 30, so that he may have the option of coming in as a party in any suit, the object of which is to affect the property." Kernan, J., who agreed with Innes, J., does not observe that *Varanakot Narayanan Namburi v. Varanakot Narayana Namburi* (7) was wrongly decided but explains the decision on the facts. He observes at page 129*: "I fully assent to the proposition that all persons whose interests are sought to be prejudicially affected by a suit should be parties to it. But there are exceptions to that rule when such interests are considered to be sufficiently represented and protected by parties to the suit." In *Muringa Mangalath Gopalan Nayar v. Kiyaka Kovilagath Valia Tamburatti* (13) Sir Charles Turner, C.J., and Kernan, J., observe that "A practice has prevailed in Malabar whereby the *karnavan* has been recognised as representing the *tarwad* and entitled to sue or defend suits as such representative without the association of the other members of the *tarwad*, who were nevertheless held bound by decrees passed in such suits, unless they showed *malā fides* in their representative. This practice had its origin in convenience, but now that the Code of Civil Procedure, s. 30, contains a special provision to obviate the inconvenience, where a number of persons in the same interest have occasion to assert or defend their rights by suit, it may be doubted how far the practice would be now upheld, and it is advisable that resort should be had to the provisions of s. 30, Civil Procedure Code." In *Ittiachan v. Velappan* (14) it was held that "although the property of a *tarwad* may be attached and sold in execution of a decree when the *karnavan* is sued as representative of the

tarwad, members of the *tarwad* who are not parties to the proceedings and have not been represented in the manner prescribed by the Code of Civil Procedure, are not estopped from showing that the debt for which the decree was passed was not binding on the *tarwad*." The principle of this decision is explained by Muttuswami Ayyar, J., in *Sri Devi v. Keli Eradi* (15). In another case, *Thanakott v. Munippa* (16), the decision in a suit in which some *ryots* of the village claimed the right to use water during the day-time which right was common to themselves and other villagers was held not to bar a subsequent suit for the same relief in assertion of the same right by persons who are not parties to the previous suit. Hutchins, J., held on the facts that in the previous suit, the claim was not on behalf of the others, but it was for damages caused to himself individually, and the suit was not a representative suit under s. 30, nor was it under the law as it existed before the amendment of the Code. Kernan, J., observes at page 499*: "One party having a right in common with others is not at liberty or authorised to sue in his own name to establish the right of the others except by their authority. Explanation V must be read with the provisions of s. 30 and the principles to be found in that section." In *Sri Devi v. Keli Eradi* (15) it was held that the junior members of the *Pathirakat Arikkar tarwad* were entitled to recover property of which the *tarwad* was dispossessed in execution of a decree against the *karnavan* and a senior Anand-ravan on proof that the decree was not substantially correct. The learned Judges explain at page 83† the grounds of the decision of the Full Bench in *Ittiachan v. Velappan* (14). They observe: "It was held by the Full Bench that the intention to implead the *karnavan* as representative of the *tarwad* must appear from the proceedings in the first suit, and that the debt recognised by the decree must be binding on the entire *tarwad*." They observed at page 82†: "The decision in *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi* (7) is a clear authority for the position that Explanation V of s. 13 of the Code of Civil Procedure is not limited to the case of a

(12) 6 M. 121; 2 Ind. Dec. (N. S.) 362.

(13) 7 M. 87; 2 Ind. Dec. (N. S.) 646.

(14) 8 M. 484; 3 Ind. Dec. (N. S.) 331 (F. B.).

*Page of 6 M.—[Ed.]

(15) 10 M. 79; 3 Ind. Dec. (N. S.) 805.

(16) 8 M. 496; 3 Ind. Dec. (N. S.) 339.

*Page of 8 M.—[Ed.]

†Pages of 10 M.—[Ed.]

suit in which the provisions of s. 30 were complied with, and we should follow it if subsequent decisions did not throw doubt upon it." The question whether a *karnavan* could represent the *tarwad* in a properly framed suit is only one of historic interest as it has been definitely settled by the Full Bench, in *Vasudevan v. Sankaran* (10). It was held in that case "a decree in a suit in which the *karnavan* of a Nambudri Illam or a Marumakkatayam *tarwad* is, in his representative capacity, joined as a defendant and which he honestly defends is binding on the other members of the family not actually made parties." Mr. Ramachandra Ayyar relies upon some of the observations of the learned Judges in the case, but the question turned upon the principle of substantive law whether a *karnavan* could represent the *tarwad* so as to bind it. The *karnavan* of a Nambudri Illam or a Marumakkatayam *tarwad* could bind the Illam or *tarwad* when he acts in a representative capacity. Shephard, J., observes at page 139*: "The 30th section is of a permissive character. So far as concerns the principle involved there was nothing new in the provision. It had been acted on before the Code of 1877 came into force [*Srikhanti Narayanappa v. Indupuram Ramalingam* (17)]*." Subrahmanya Ayyar, J., observes at page 142, after referring to the case of Hindu widows with reference to reversioners and other persons having an estate analogous to that of a Hindu widow, "In the cases last mentioned the limited owners possess the representative capacity to sue or defend by virtue of their position. This, as already shown, is eminently true in the case of a *karnavan*. Consequently, he does not require the aid of s. 30 to be a representative, but has the inherent right to act as such, provided, of course, there is in the particular case no conflict between his own interest and that of the family." In *Srinivasa Chariar v. Raghava Chariar* (18) Shephard, J., held that s. 30 was only an enabling provision and a suit was not liable to be dismissed by reason of the failure of the plaintiffs to obtain permission given under s. 30 of the old Code. The omission could be rectified at any stage if objection is taken by the defendants. The above are the cases of the Madras High Court which take a

(17) 3 M. H. O. R. 226.

(18) 23 M. 28; 7 M. L. J. 281; 8 Ind. Dec. (N. S.) 414.

different view from the view in *Godimella Rangamma v. Panchangam Narasimha-charyulu* (3), *Sroomin Madabushi Gopola-charlu v. Emmani Subbamma* (4), *Chevraya Goundan v. Athappa Goundan* (6), *Varanakot Narayanan Namburi v. Varanakot Narayana Namburi* (7) and *Madhavan v. Keshavan* (8).

In *Muhammad Amir v. Sumitra Kuär* (19) it was held by Sir Henry Richards, C. J., and Sir Pramadha Charan Banerji, J., that where a suit had been brought by two persons as members of the public for a declaration that certain property was *wagf* property, and it had been decided that the property in question was not *wagf*, the decision operated as *res judicata* in the case of any other similar suit which might be brought by other members of the public as such claiming a similar declaration. The learned Judges held that the previous litigation was a *bona fide* one and that the plaintiffs were litigating as members of the public and not in the private capacity. In *Baiju Lal Parbatia v. Bilal Lal Pathuk* (20) it was held that s. 30 of the Code was an enabling provision and did not debar the plaintiffs from suing in their own right in that case. Ameer Ali, J., at page 389*, observes: "That section (meaning s. 30) is, as has been already pointed out, an enabling section and must be read, it seems to me, in conjunction with Explanation V to s. 13 of the Civil Procedure Code." In *Shankarlal Purshottam Gor v. Dakor Temple Committee* (21) it was held that C. I. r. 8, Civil Procedure Code, is merely an enabling rule and does not prevent a representative suit being brought in any manner that the law permits.

The principle of s. 30 was given effect to before it was enacted. A representative suit could be brought by a few persons in order to obtain a relief common to them as well as a number of other persons. In *Srikhanti Narayanappa v. Indupuram Ramalingam* (17) it was observed: "Convenience requires that in suits where there is community of interest amongst a large number of persons, a few should be allowed to represent the whole; and if the whole body be represented in the suit, then it is proper that the whole body should be

(19) 24 Ind. Cas. 97; 36 A. 421; 12 A. L. J. 643.

(20) 24 O. 385; 12 Ind. Dec. (N. S.) 924.

(21) 94 Ind. Cas. 47; 28 Bom. L. R. 309; A. I. R. 1926 om. 179.

bound by the decree, though some members of the body are not parties named in the record." The learned Judges Bittleson, Ag. C. J., and Ellis, J., after considering the English practice held that the principle of representation should be applied to the members of a Hindu village community. In *Anandray Bhikajiphadke v. Shankar Dajicharya* (22), West, J., observes at page 328*: "The case of *Jenkins v. Robertson* (23) is instructive in this respect and indicates that it may be consistent with general principles that certain judicial proceedings taken by, or against, a select number as representing a large class may, if fairly and honestly conducted, bind or benefit the whole class." Before s. 30 was enacted, the practice was in vogue, both in Bombay as well as in Madras, for persons to bring a representative suit to obtain relief in respect of a right common to themselves as well as others and the decision in such a suit was held to bind the persons whom they represented provided the right claimed was litigated *bona fide*. The terms of the Explanation VI of the present Code which are the same as the terms of the Explanation V of the old Code except for the addition of the words "public right" are so wide as to include cases where the right common to the plaintiffs on record as well as others is litigated *bona fide* in the interest of the whole class and there is no warrant in any other provisions of the Code to limit it only to cases coming under s. 30 or to cases where persons, either by law or by act of parties, are entitled to represent the others whose names do not appear as parties on the record. It is urged that there is danger in giving a literal interpretation to Explanation VI, for, if a few persons are allowed to sue on behalf of a large community, the community would be bound by the decision in the suit litigated *bona fide*, though the case might not have been placed in all its aspects owing to the ignorance of the plaintiffs or their inability to secure evidence which would really help them. On the other hand, a right which is common to the members of a numerous community should not be litigated for every infraction by a few persons coming forward each time as plaintiffs and thereby harassing the de-

(22) 7 B. 323; 7 Ind. Jur. 613; 4 Ind. Dec. (N. S.) 218.
(23) (1867) 1 H. L. Sc. 117.

*Page of 7 B.—[Ed.]

fendants who are obliged to defend several actions in protecting their rights. It is unnecessary to pursue this speculation any further. As there is a serious conflict of authority on the point, we think a reference ought to be made to the Full Bench of the High Court for a clear decision on the point. We would, therefore, refer the following question to the Full Bench:—

Is Explanation VI to s. 11 controlled by O. I, r. 8 of the Civil Procedure Code, so as to render a subsequent suit filed with leave under O. I, r. 8, by two or more members of the community who claim a right in common to them and the other members of the community and seek to enforce it on behalf of themselves and the community, *res judicata* by reason of a decision given after *bona fide* contest in a previous suit filed without leave under s. 30, Civil Procedure Code, 1877, by some other members of the community claiming the same right and seeking to enforce it on behalf of the community?

This appeal came on for hearing before Sir William Watkins Phillips, Kt., Officiating Chief Justice, Mr. Justice Ramesam and Mr. Justice Beasley on the 7th and 8th of September, 1927, in pursuance of the said Order of Reference to a Full Bench.

The Advocate-General and Mr. K. S. Sankara Ayyar, for Appellant No. 2.

Mr. T. Nallasivam Pillai, for Appellants Nos. 2 to 6 and 8 to 10.

Messrs. T. R. Ramachandra Ayyar, T. L. Venkatarama Ayyar and V. Sambandam Chetti, for Respondents Nos. 1 to 6.

The Court expressed the following

OPINION.

Ramesam, J.—The facts of the case are fully stated in the referring judgment and need not be repeated here. The question referred to the Full Bench is stated as follows:—

"Is Explanation VI to s. 11, controlled by O. I, r. 8 of the Civil Procedure Code, so as to render a subsequent suit filed with leave under O. I, r. 8, by two or more members of the community who claim a right in common to them and the other members of the community and seek to enforce it on behalf of themselves and the community *res judicata* by reason of a decision given after *bona fide* contest in a previous suit filed without leave under s. 30, Civil Procedure Code 1877, by some other

members of the community claiming the same right and seeking to enforce it on behalf of the community?"

As was pointed out at the time of the argument by my Lord the Chief Justice, the word "render" in the second line seems to be a slip for "prevent"; the sentence will then run "so as to prevent a subsequent suit . . . on behalf of themselves and the community being *res judicata* . . ."

The idea is, if O. I. r. 8, does not control Explanation VI to s. 11 and the Explanation has its full effect unhampered by any other consideration, then there is *res judicata*; if O. I. r. 8, controls Explanation VI, that is, effect is not to be given to Explanation VI on the ground that the procedure in O. I. r. 8, is not followed, then there is no *res judicata*. The question referred to us is, which of these two alternatives is to be adopted?

It is true that Explanation V to s. 13 in the Code of 1877 corresponding to Explanation VI to s. 11 of the present Code was introduced for the first time along with other Explanations in the Code of 1877 and s. 30 of that Code corresponding to O. I. r. 8, of the present Code was also introduced for the first time in that Code following the enactment of O. XVI, r. 9, in 1873 in the Supreme Court Rules of Practice in England. Prior to the Code of 1877, that is, in the Act of 1859, there is nothing corresponding to s. 30 of the Codes of 1877 and 1882 and the section relating to *res judicata* was a very general section without the Explanations which appear in the Codes of 1877, 1882 and 1903. But this does not mean that the principles of the law of *res judicata* were changed or underwent an alteration in 1877. In theory the law was always the same and the same principles were always applied; only the expression of that law in the form of a section in the Code as required by Indian conditions underwent alterations as time went on. A representative suit by some persons only on behalf of a large class similarly interested was allowed both in England and India prior to 1877 and if such a suit was *bona fide* litigated, the judgment in it was held to bind persons not actually parties to the litigation. In *Duke of Bedford v. Ellis* (24)

Lord Macnaghten observes as follows:—
 (24) (1901) A. C. 1; 70 L. J. Ch. 102; 83 L. T. 286; 17 T. L. R. 139.

apply the practice of the Court of Chancery to all divisions of the High Court. The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience; for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

Again at page 10*, he observed, "I doubt whether it is accurate to say that in the case of representative suits we have advanced a long way since the days of Lord Eldon. It is, of course, not necessary now-a-days to go to a Court of Law in order to establish legal rights. But in all other respects I think the rule as to representative suits remains very much as it was a hundred years ago. From the time it was first established it has been recognised as a simple rule resting merely upon convenience. It is impossible, I think, to read such judgments as those delivered by Lord Eldon in *Adair v. New River Co* (25) and in *Cockburn v. Thompson* (26) without seeing that Lord Eldon took as broad and liberal a view on this subject as anybody could desire.

Earlier, at page 9*, Lord Macnaghten mentions the case of *Chaytor v. Trinity College* (27) as one of the earliest applications of the rule. The case in *Sewers Commissioners v. Gellatly* (28) is a good example (*vide* Daniel's Chancery Practice, Vol. I, page 175). When, in the year 1866, it was held by the Madras High Court that the decree in a former suit defining the boundary between two villages was binding on the inhabitants of one of the villages in a later suit though they were not parties to the former suit on the ground that the former

(25) (1805) 11 Ves. Jur. 429; 32 E. R. 1153.
 (26) (1809) 16 Ves. Jun. 321; 33 E. R. 1005; 149 R. R. 671.
 (27) (1796) 3 Anstr. 841; 145 E. R. 1056.
 (28) (1876) 3 Ch. D. 610; 45 L. J. Ch. 733; 21 W. R. 1059.

*Pages of (1901) A. C.—[Ed.]

suit was a representative one [*Srikhanti Narayanappa v. Indupuram Ramalingam* (17)] they were merely following the well established English practice. The learned Judges observe: "This principle of representation is acted upon in the English Courts of Common Law." They refer to *R. v. Inhabitants of Houghton* (20) and proceed: "The same principle is recognised by the English Courts of Equity, when they allow suits to be maintained by a few expressly for themselves and others with whom they have a community of interest, as by some inhabitants of a parish for themselves and the rest." Similarly in *Anandran Bhikaji Phadke v. Shankar Daji Charya* (22); West J. observed at page 328*: "The case of *Jenkins v. Robertson* (23) is instructive in this respect and indicates that it may be consistent with general principles that certain judicial proceedings taken by, or against, a select number as representing a large class may, if fairly and honestly conducted, bind or benefit the whole class." In the last mentioned case which was from Scotland, though it was held that there was no *res judicata* on the ground that the former litigation terminated in a compromise, all the Scotch Lords were agreed that but for that fact the former decision would have barred the second suit as *res judicata*. It appears, therefore, that even prior to 1877 (1873 in England) if there was a properly constituted representative suit and the trial in it proceeded on the footing of representation, the judgment in it may bind in a later litigation persons who were not actually parties to it. The cases falling under Explanation VI after 1877 may be grouped under the following heads:—

1. Where permission has been expressly granted by the Court under s. 30. This is a plain case and it is conceded by both parties that the decision in the earlier suit will bar the later suit as *res judicata*.

2. Though no permission was sought or was given under s. 30, still some of the parties sue or are being sued in a representative capacity. Where a plaintiff sues in a representative capacity he has authority to so represent other persons not parties to the suit under the general law. Where a defendant is being sued in a representative capacity he has similarly authority under the general law to represent other persons

not parties and he is himself willing to conduct the litigation on behalf of such others.

Examples of the second heading easily occur in Hindu Law and Malabar Law. Where the manager of a Hindu joint family sues or is being sued on behalf of the family, where the *karnavan* of a *tarwad* sues, or is being sued on behalf of the *tarwad*, or where a Hindu father sues or is being sued as manager of a sub-branch consisting of himself and his sons, the manager, *karnavan* or the father, as the case may be, acting in a representative capacity will bind others whom they represent. As to the case of a Malabar *tarwad* there is a very large number of decisions of this Court which are quoted in the referring judgment. I do not think it is necessary to refer to them in detail. They begin with *Varanakot Narayanan Namburi v. Varanakot Narayana Namburi* (7) and end with the decision of the Full Bench in *Vasudevan v. Sankaran* (10) in which the matter was finally set at rest. It is unnecessary to discuss these cases because Mr. Ramachandra Ayyar, the learned *Vakil* for the respondents, conceded the correctness of the last Full Bench decision. He concedes that s. 30 is not confined to cases where leave is expressly sought for and obtained but will cover cases where under the law a person like the *karnavan* of a *tarwad* had authority to represent other persons not parties to the suit.

3. Where the trustees of a temple sue or are being sued, for example, the case in *Madhavan v. Keshavan* (8), where the litigation by certain Uralers of a Devaswom was held to bind the other Uralers. But Mr. Ramachandra Ayyar distinguishes this case on the ground that in such cases the idol of the temple is the real party in both suits and there is no question of one party representing another. Though he is able to distinguish the case in *Madhavan v. Keshavan* (8) in this way because it happened to be a case of trustees of a Hindu temple, I doubt whether the said ground of distinction will be available in cases of private trust. In a case where there are a number of trustees (not of a religious institution but) acting on behalf of some *cestui que trust* under some trust deed and only some of the trustees are sued, I fancy the decision would be the same as in *Madhavan v. Keshavan* (8). Both the *cestui que trust* and the other trustees would be bound by a litigation conducted *bona fide* by some only of the trustees and

(20) (1853) 1 Bl. & Bl. 501; 22 L. J. M. C. 89; 17 Jur. 455; 118 E. R. 523; 93 R. R. 264.

*Page of 7 B.—[Ed.]

the distinction suggested by Mr. Ramachandra Ayyar will not be applicable in such a case. So far as the *cestuis que trustent* are concerned it may be said that they claim through the trustees but as to the co-trustees, Explanation VI must be invoked. But apart from the above three categories there may still be a large number of cases which cannot be labelled under a particular heading and in which there may be several persons with similar interest and some only may sue but purporting to sue on behalf of all the others. If in such a case permission of the Court under s. 30 was not sought for by oversight and the Court itself overlooks the necessity for the procedure under s. 30, what is the result of final decree in the case? This is really the point to be decided before us. Mr. Ramachandra Ayyar contends in such a case that the failure to obtain leave under s. 30 is fatal and that the suit cannot be regarded as a representative suit. His contention amounts to this: A suit is representative or not according as leave is given under s. 30 or not in all cases where there is no authority under the general law. I agree with Mr. Ramachandra Ayyar's contention to this extent, namely, that where a person acting in a representative capacity has no authority under the general law, if his litigation is to be a representative one so as to bind others, he must at least get authority from the Court; but this does not necessarily mean that such authority from the Court should be necessarily in the form of an order on a petition filed under s. 30 of the Code of Civil Procedure. If a suit filed by a plaintiff in a representative capacity was allowed to proceed in that character without objection by the defendant and by the Court and if a general issue is framed so as to put in issue the right of the whole class in whom it is alleged to exist and the evidence adduced is of a general character and the findings, the judgment and the decree are also perfectly general in their nature, I do not see why such a judgment should not bind persons not parties to the suit in spite of the fact that no application was filed under s. 30 and no order passed on it. The object of s. 30 in the Codes of 1877 and 1882 and of O. XVI, r. 9, in the Supreme Court Rules was merely to make more definite some kind of procedure which was previously going on for more

than 100 years in England and India. The prior procedure was apparently not regulated by any enactment and was more a matter of practice left to the discretion of the individual Judges. Later on, it took a more definite shape the object being to impose some safeguards and to avoid possible hardships in the working out of the rule of *res judicata* by reason of representative suits. It was supposed that a special notice to the persons having any right where they are not numerous, or a general notice where they are very numerous, and the provision permitting any of them to be made parties would avoid any possible hardship or injustice arising out of the rule of *res judicata* by reason of Explanation VI. But if the exact procedure prescribed in the section is not followed though the suit proceeds in a representative capacity, it does not follow that the character of the suit is altered. All that can be said at the most is that there is an irregularity. It is possible sometimes that the irregularity may be serious; and if there is any reason to think that the serious irregularity has led to collusion or fraud or a grossly negligent conduct of the case, then the Court will hold that the litigation was not carried on *bona fide* and will not hold a later suit barred by *res judicata*. But when there is no ground to suspect that the irregularity was serious or led to collusion or fraud, or by reason of want of publicity the case was conducted in an improper manner, the irregularity is by itself no ground for holding that Explanation VI is not applicable. The irregularity may be an element in considering the question whether the former litigation was conducted *bona fide* [see e. g., *Kumarandy Kudumban v. Venkatasubramania Iyer* (30)]. But in spite of the irregularity, if one comes to the conclusion that the conduct of the litigation was *bona fide*, the irregularity itself does not matter: in other words, I am of opinion that Explanation VI to s. 11 is not controlled by O. I, r. 8, of the Code of Civil Procedure. I may here observe that it is not correct to say that the power of one person to represent others when there is no authority under the general law is based on their consent as was supposed by Kernan, J., in *Thanakoti* (30) 101 Ind. Cas. 58; 52 M. L. J. 641; A. I. R. 1927 Mad. 645.

v. Muniappa (18) where he says: "Unless the other plaintiffs were aware of the suit of plaintiff No. 3 and authorised him to make the claim for them, plaintiff No. 3 would have had no authority to claim on their behalf so as to bind them from afterwards bringing their own suit." I think the real basis of the power to represent in such a case is derived from the action of the Court in permitting the action to go on on that basis. The consent of the others need not be obtained, *Markt v. Knight Steamship Co.* (31). Examples of cases in which similar conclusion was reached are not wanting. In *Godimella Rangamma v. Panchangan Narasimhacharyulu* (3) Sadasiva Ayyar and Moore, J.J., held that one Agraharamdar was bound by the result of a former litigation in which he was represented by another Agraharamdar and the litigation was conducted *bona fide*; but no order was obtained under O. I, r. 8 in that case. *Res judicata* followed because the issue raised a very general question applying to all the Agraharamdars. It might have been prudent for the Court to follow the procedure in O. I, r. 8 in that case. But the fact that they did not follow, did not make it less *res judicata*. The decision in *Srooman Madabushi Gopalacharlu v. Emmami Subbamma* (4) was also a case of Agraharamdars. Wallis, C. J., and Spencer, J., held that Explanation VI applies not only to cases to which the procedure in s. 30 applied but also to other cases and it was in terms wide enough to include accidental slips where no real prejudice has been caused. These two cases were sought to be distinguished by Mr. Ramachandra Ayyar on the ground that the parties there were not numerous and s. 30 could not in strictness be applied. He also argues that *Godimella Rangamma v. Panchangan Narasimhacharyulu* (3) was wrongly decided. These two cases were followed in *Chevraya Goundan v. Athappa Goundan* (6) which was a case of trustees of a temple. In *Chandu v. Kunhamed* (9) it was held in a suit by a mortgagee of one share, that the decision in a previous suit on a general issue whether the *paramba* was partible or not bound the other sharers in a later litigation. It is true that this was overruled by a Full Bench in a later case. But

(31) (1910) 2 K. B. 1021 at p. 1039; 79 L. J. K. B. 939; 103 L. T. 369.

the ground was that the other co-sharers who was sought to be bound when asked to join the plaintiff refused to join and when impleaded as a defendant remained *ex parte* and he was not interested in the decreeing of the prior suit. Several other cases referred to by Mr. Ramachandra Ayyar, such as for instance the decisions in *Srinivasa Chariar v. Raghava Chariar* (18) relying on *May v. Newton* (32) *Walker v. Sur* (33), *Thedla Ranganayakamma v. Maddi Jagayya* (34) and *Baiju Lal Parbatia v. Bulak Lal Pathuk* (20) are not decisions holding that the absent parties were not bound in the later litigation but either granting leave under s. 30 or refusing to grant such leave. Observations occur in these cases discussing the binding nature of the decree without leave being obtained under s. 30, but they are in the nature of *obiter dicta*.

In *Muhammad Amir v. Sumitra Kuar* (19) Richards, C. J., and Banerji, J., held that the decision in a suit by two persons as members of the public for a declaration that certain property was *waqf* was binding upon the other members of the public claiming a similar declaration. All that we have got to see is whether the former suit was allowed by the Court to proceed to the end as a representative suit and whether the suit was considered by that Court in that way. If this test is satisfied, what procedure was actually followed is not strictly pertinent to the matter.

In the present case the learned Judges who referred the matter in the Full Bench observe: "We are satisfied that no permission was applied for orally or in writing and that no permission was granted expressly or impliedly under s. 30 corresponding to O. I, r. 8, Civil Procedure Code, to the plaintiffs to sue on behalf of or for the benefit of all the Vaniyars interested along with the plaintiffs to worship in the Tiruchendur Temple as alleged by the plaintiffs." As I understand this observation, especially the portion of it using the word "impliedly" what the learned Judges meant to say is that no order purporting to be under s. 30, either expressly mentioning the section, or without mentioning it but merely with reference to it, was

(32) (1887) 31 Ch. D. 317; 56 L. J. Ch. 313; 56 L. T. 140; 35 W. R. 363.
(33) (1914) 2 K. B. 930; 83 L. J. K. B. 1188; 109 L. T. 888; 30 T. L. R. 171.
(34) 101 Ind. Cas. 375; A. I. R. 1927 Mad. 666.

passed. But lower down the same page they observe: "From the pleadings, from the issue, from the way in which evidence was adduced and the number of witnesses examined and the contentions of the parties appearing in the judgment we have no hesitation in holding that the suit was brought to assert not merely the title of the plaintiffs but also the right of the Vaniyars to enter the Mahamantapam of the temple and the relief asked for was not one personal to the plaintiffs but one which was common to them as well as to all the Vaniyars. The mere addition of a claim for damages does not change the nature or the character of the suit which was one for the establishment of the right of the whole community of which the plaintiffs were members. That the suit was litigated *bona fide* cannot be disputed. A large number of witnesses were examined; various documents were produced and every attempt was made to prove the case to the hilt." Though no order was passed under s. 30 impliedly or expressly, when we remember that that section was only a section laying down a definite procedure for what was somewhat indefinite prior to 1877 but otherwise really attaining the same object as before, it is still open to the learned Judges to find whether the Subordinate Judge who tried the former suit with reference to the issues, findings, etc., meant to allow the suit to proceed in a representative capacity for the benefit of all Vaniyars. As I think there is no express finding and as it is a question of fact, we have nothing to do with the matter. I only observe that it is open to them to so find if they choose to do so with reference to the pleadings, the issues, judgment and decree.

My answer to the reference is that Explanation VI to s. 11 is not controlled by O. I. r. 8.

Phillips, Offg. C. J.—I agree.

Beasley, J.—I agree.

v. N. V.

Reference answered
in the negative.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 766 of 1927

AND

CIVIL MISCELLANEOUS PETITION No. 2442
OF 1927.

October 25, 1927.

Present:—Mr. Justice Devadoss.

NARAYANAN CHETTIAR AND OTHERS—
DEFENDANTS—PETITIONERS

versus

SUPPIAH CHETTIAR—PLAINTIFF
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17
—Suit for dissolution of partnership—Prayer for
amendment of plaint by including business not
originally included—Cause of action whether changed.

In an action by a partner for dissolution of partnership if the plaintiff comes to know that there is a business carried on for the partnership in some place of which he was not aware at the time of the filing of the plaint, he is entitled to include a prayer by way of amendment for dissolution of that business also. Such an amendment does not introduce any new cause of action. [p. 638, col. 2; p. 639 col. 1.]

Subramania Iyer v Hitchcock (1) and *Lowther v. Heaver* (2), distinguished.

In O. R. P. No. 766 of 1927.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Temporary Subordinate Judge, Devakottah, in I. A. No. 163 of 1927, in O. S. No. 41 of 1925.

In O. M. P. No. 2442 of 1927.

Petition for the stay of all further proceedings in the trial of O. S. No. 41 of 1925 on the file of the Court of the Temporary Subordinate Judge of Devakottah pending disposal of O. R. P. No. 766 1927 on the file of the High Court.

Messrs. T. Rangachariar, V. N. Venkata-varadachari and R. Gopalachari, for the Petitioners.

Messrs. T. M. Krishnaswami Iyer and M. Subbaroya Iyer, for the Respondent.

JUDGMENT.—This is an application to revise the order of the Temporary Subordinate Judge of Devakottah allowing an amendment of the plaint at the instance of the plaintiffs-respondents herein. The plaintiffs and defendants are Nattukottai Chetties and the plaintiffs' suit is for dissolution of partnership and other incidental reliefs. The plaintiffs got leave to amend the plaint more than once and on the third occasion they asked leave to amend the plaint by including a relief as regards a firm at Kolalampur, Straits Settlements. The contention of Mr. Rangachariar for the petitioners, is that

the plaintiffs abandoned their claim, if any, in respect of the firm at Kolalampur and they should not now be allowed to include a claim which they deliberately abandoned and secondly, that this amendment introduces a new cause of action which would materially prejudice the defendants in their defence and, therefore, the amendment should not be allowed. The plaintiffs are father and son. The 1st plaintiff is the brother's son of the 1st defendant. The plaintiffs and defendants are a family of Nattukottai Chetties carrying on business in Burma and other places. The plaintiffs ask for dissolution of partnership of the firm in Burma. I suppose by firms they mean the business in Burma and with regard to the business at Kolalampur they state in paras. 9 and 10 of the plaint that monies belonging to the partnership were utilised at Kolalampur and, therefore, they are entitled to be paid back the amount with interest and certain profits. This allegation was, no doubt, repeated in paras. 9 and 10 which were reproduced in the two amended plaints filed by the plaintiffs. In March, 1927, they applied for leave to amend their plaint by including a relief with regard to the firm at Kolalampur and this amendment the learned Temporary Subordinate Judge allowed. Now the question is whether the plaintiffs abandoned their claim to relief, if any, in respect of the Kolalampur firm. As I read paras. 9 and 10 of the plaint, I cannot find any words in them to show that they abandoned any claim which they had. What they stated in para. 9 of the plaint was "The plaintiffs have no concern or share in the Kolalampur firm referred to in the said reply notice. The plaintiffs believe that defendants Nos. 1, 3 and 4 have set up that firm without the permission of and without any reference to either the 1st plaintiff or anyone else acting for the 1st plaintiff." If the plaintiffs did intentionally or knowingly abandon their claim or any portion of it, no doubt it will not be proper for the Court to allow that claim to be brought into the action very lightly but where the plaintiffs did not give up their claim but only stated that they had no concern with the partnership at Kolalampur, it cannot be said that they gave up anything which they had. The matter is rendered

simple by the fact that the 1st defendant himself in his notice sent so far back as 8th September, 1924, stated that the Kolalampur business was a part of the business of the family of which the plaintiffs were members. No doubt the 1st plaintiff repudiated his share in the partnership by a notice dated 19th November, 1924. He did not give up his right. What he said was that it was not a partnership business belonging to the family, but owing to reasons which it is unnecessary for me to detail, he has now chosen to include a relief in respect of that firm. The question is whether the learned Judge has acted without jurisdiction in granting the prayer for amendment or acted with material irregularity in granting it. I cannot find either of them in the order made by the learned Judge. Issues have not been settled in the case and the case is only in its early stages. That being so, it cannot be said that the defendant would be prejudiced by granting the amendment prayed for. It would be so at a stage when the case is closed or a good deal of evidence on both sides has been adduced. What the defendants contend is that they have by virtue of the notice dated the 19th November, 1924, taken into partnership certain persons and a dissolution of partnership that is being carried on at Kolalampur would materially affect the interests of those partners and, therefore, the amendment should not have been allowed. But this is a matter which will have to be tried in the course of the suit. At present the Court is not in a position to say whether any persons were taken into the partnership subsequent to November, 1924, or what arrangements were made with regard to the partnership assets before that date. That being so, it is unnecessary to speculate as to what has or has not been done subsequent to November, 1924. Mr. Rangachariar relies upon *Subramania Iyer v. Hitchcock* (1) in support of his contention that this granting of this amendment was without jurisdiction. The observations of the learned Judges in *Subramania Iyer v. Hitchcock* (1) do not in any way affect the merits of the case. Each case would depend upon its circumstances and in an action for dissolution of partnership if the plaintiff comes to know that there is a business carried on in some place of which he was not aware at the time of the filing of the plaint, he is certainly entitled to include a

(1) 85 Ind. Cas. 900; 22 L. W. 26; A. I. R. 1925 Mad. 950.

prayer for dissolution of that business. The 1st plaintiff is a young man of 24 years of age and he was not personally aware of what actually went on at Kolalampur. The decision in *Lowther v. Heaver* (2) has no application to the present case. In that case the defendant was personally aware of the re-roofing of the building in his possession and he did not choose to put forward the plea with regard to re-roofing and the learned Judge, if I may say with respect, very properly disallowed the prayer for amendment of the pleading by an inclusion of a plea on the ground of re-roofing. In this case it cannot be said that the 1st plaintiff had any personal knowledge of what was going on at Kolalampur and, therefore, that case cannot apply to the facts of the present case.

The amendment introduces no new cause of action. The cause of action is the same and the only question is what are the businesses that belong to this partnership and if the Kolalampur business is one of the businesses belonging to the partnership, the plaintiffs are entitled to have that business also taken into account when a dissolution is ordered. If it does not belong to the partnership, the plaintiffs will not have any relief with regard to it. The powers of the Court under O. VI. r. 17 are wide. No doubt the amendment should be confined to matters which may be necessary for the purpose of determining the real questions in controversy between the parties, what are the real questions in controversy between the parties here? The main question is what are the partnership assets? and for determining that, all the business of the partnership will have to be taken into account. I hold that the learned Subordinate Judge did not act with material irregularity in granting the amendment prayed for. The civil revision petition is dismissed with costs. The stay petition is also dismissed with costs.

V. N. V.

Petition dismissed.

(2) (1889) 41 Ch. D. 248; 38 L. J. Ch. 482; 60 L. T. 310; 37 W. R. 485.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 3254
OF 1927.

AND

ORIGINAL SIDE APPEAL No. 46 OF 1927.
September 28, 1927.

Present:—Sir William Watkins Phillips,
Kt., Officiating Chief Justice, and Mr.
Justice Reilly.

MANEOKJI RUSTOMJI—DEFENDANT
—APPELLANT
versus

H. H. WADIA AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Letters Patent (Mad.), cl. 15—Order of Single Judge, Original Side, referring back report of Official Referee for further consideration, whether judgment—Appeal, maintainability of.

An order of a Single Judge on the Original Side of the High Court referring back a report of the Official Referee in a pending suit for further consideration is not a judgment within the meaning of cl. 15 of the Letters Patent and is, therefore, not appealable. [p. 640, col. 2.]

Tuljaram Row v. Alagappa Chettiar (1), applied.

Appeal from an order of Mr. Justice Beasley, dated the 6th April, 1927, and passed in exercise of the Ordinary Original Civil Jurisdiction of the High Court, in C. S. No. 73 of 1918.

Mr. K. S. Krishnaswami Iyengar, for the Appellant.

Messrs. King and Partridge, for the Respondents.

JUDGMENT.

Phillips, Offg. C. J.—A preliminary objection is taken to this appeal that no appeal lies because the order appealed against is not a judgment within the meaning of cl. 15 of the Letters Patent. This question was considered by a Full Bench in *Tuljaram Row v. Alagappa Chettiar* (1) and it was there laid down that the test to be applied in deciding whether an order is or is not a judgment within the meaning of cl. 15 is as follows:—

"If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause."

The present order is an order referring

(1) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 697; 4 M. L. T. 453; 21 M. L. J. 1.

back a report of the Official Referee for further consideration and it is contended that the report of an Official Referee is a final order determining the rights of the parties. Mr. Krishnaswami Iyengar, however, had to concede that a Judge is not precluded from varying or discharging such report and that it cannot take effect until it has received his *imprimatur*. It was then argued that the Judge could only alter the report if objection were taken in the manner prescribed by the rules of this Court. Rule 12 of O. XXIII distinctly lays down that at the hearing upon a report, the Court may at once proceed to give judgment in the case or may make such order as it thinks fit. There is nothing in this rule which would imply that the Court can only hear this report when objection has been taken to it; it stands to reason that when the report is submitted, the Court is bound to hear it and to decide whether it shall act in accordance therewith or not, whether the parties file objections or not. Until, therefore, such decision has been arrived at, the report cannot be deemed a final order, for it only receives authoritative power by the order of the Court.

The only other argument adduced was with reference to the case in *Howard v. Wilson* (2) which is referred to by Sir Arnold White, C. J., in *Tuljaram Row v. Alagappa Chettiar* (1) expressing his agreement therewith. That decision related to an order refusing to confirm an award. It has since then been dissented from both in Calcutta and in this Court; but, even apart from that, an award can hardly be said to stand in the same position as the report of an Official Referee. An award is an adjudication by arbitrators who have the power of giving a quasi-judicial decision. The Official Referee has no such power and consequently his report stands on a very much lower footing than an award. In the present case undoubtedly the order of the learned Judge, does not put an end to the suit before him, for it will have to come up again on a fresh report from the Official Referee. He will then proceed to deal with it and pass final orders. No such final order having been passed, this appeal does not lie and must be dismissed with costs.

Reilly, J.—Mr. Krishnaswami Iyengar has tried to persuade us that the combined

effect of r. 1 of O. XXIV and rr. 11, 12 and 13 of O. XXIII of the Original Side Rules is that, when the Official Referee submits his report in any matter, if no objection is raised by any party, the Judge is bound to accept the report, even though there is in it the most glaring mistake or omission which jumps to the eye at the first glance. The rules themselves do not say explicitly that the Judge must accept the Official Referee's report in such circumstances, and I find it very difficult to believe that, if it had been the intention so to tie the Judge's hands, it would not have been stated in the clearest and plainest manner. To my mind there is no such implication in the rules, and, if there were, if through some oversight the Court had by implication put itself in the power of one of its subordinate bound hand and foot, then I think it would be a matter calling for immediate amendment.

But let us suppose that the Official Referee has submitted a report in a suit and the Judge has accepted it either on consideration or, as Mr. Krishnaswami Iyengar has suggested, on compulsion. What is the result? Under r. 13 of O. XXIII the report will then be conclusive evidence of the facts stated in it. But evidence, even the most conclusive evidence which governs the result of a suit is not a judgment. If the Judge accepts the report, he accepts the evidence, and he then has to apply it to the issue between the parties and pronounce judgment. If he does not accept the report but refers the matter back to the Official Referee, that is, he declines to pass judgment at that stage and postpones it to a future date, how can we say that he has pronounced judgment within the meaning of cl. 15 of the Letters Patent as interpreted by the Full Bench in *Tuljaram Row v. Alagappa Chettiar* (1). We might almost as reasonably say that an order of adjournment is a judgment within the meaning of that clause.

I agree that this appeal is incompetent and must be dismissed with costs.

V. N. V.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 173 OF 1925.

September 30, 1927.

Present:—Sir William Watkins Phillips,
Kt., Officiating Chief Justice, and Mr.
Justice Reilly.

V. KRISHNAMACHARIAR

—DEFENDANT—APPELLANT

versus

CHELLAMAL AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

*Hindu Law—Joint family—Manager—Mixing up
of family funds and self-acquired funds, effect of—
Using self-acquired funds for support of family—
Accumulations from mixed funds, nature of.*

Where two separate funds are mixed, one being joint family property and the other separate property, the mingling makes them both joint family property. [p. 641, col. 2.]

Where the manager of a Hindu family having joint family funds in his hands, spends on the maintenance of his family not only the joint family funds but also a considerable part of his self-acquired property, the reasonable inference is that he means to treat that part of his self-acquired property as joint family property and even the accumulations and the remainder of his earnings which have not been kept distinct and separate become joint family property. [p. 642, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of Chingleput dated the 10th November, 1922, in Original Suit No. 48 of 1922.

Mr. C. Narasimhachari, for the Appellant.

Mr. K. S. Krishnaswami Iyengar, for the Respondents.

JUDGMENT.

Phillips, Offg. C. J.—The finding of the lower Court which has been especially attacked in this appeal is a finding that the defendant (appellant) mingled his earnings as Vakil with the income from the admitted joint family property and thereby must be deemed to have thrown his self-acquisition into the common fund. Admittedly there was an income of at least Rs. 280 from the joint family property and this came into the defendant's hands on the death of his brother who was the husband of the first plaintiff. The main contention raised in appeal is that this income from the joint family property was insufficient for the mere maintenance of the defendant, his wife, his mother and four children and that, therefore, he utilised other monies to provide such maintenance and it is argued that there can be no inference from that fact that he intended to make these other monies, or rather his self-acquisition joint family property. This contention has been specifi-

cally negated by the Privy Council in *Rajanikanta Pal v. Jagamohan Pal* (1), where they say, "Indeed, the fact urged on behalf of the respondents that the joint family expenses exceeded all the property which, according to their contentions, was properly joint, in their Lordships' opinion tells against the respondents instead of in their favour." That remark is equally applicable to the facts of the present case. It is contended that beyond the amount of money taken from the defendant's self-acquisition and spent on the joint family there is no inference that the rest of the self-acquisition was similarly treated. This is quite a possible state of affairs and it was open to the defendant to prove it by showing that he did not treat his two sources of income as one and that he treated his self-acquisition as a separate fund and the income from the family property as another separate fund. This he evidently did not do and he has not produced any accounts to show how he has dealt with the two funds in his hands. He says that he keeps no private accounts, but he must keep an account for his profession and even that might have been of some assistance in determining the manner in which the monies have been appropriated. He has admittedly mingled a portion of the one fund with the other thereby raising a presumption that he has treated the whole of that sum as joint family property, and that presumption must be carried further, in the absence of proof to the contrary, that the two funds which have been mingled were treated as bearing one characteristic, namely, that of joint family property. Many cases have been cited by the appellant, but they all embody the same principle that, where two separate funds are mixed, one being joint family property and the other separate property, the mingling makes them both joint family property. The facts of those cases are, no doubt, quite different from what we have before us, but the principle is the same all through. The lower Court's finding on this point must, therefore, be accepted.

The next question that is raised is in regard to arrears of maintenance. The first plaintiff has claimed just over eight years'

(1) 73 Ind. Cas. 252; 50 C. 439 at p. 445; A. I. R. 1923 P. O. 57; 44 M. L. J. 531; 32 M. L. T. 149; 25 Bom. L. R. 683; 37 C. L. J. 515; (1923) M. W. N. 438; 18 L. W. 384; 27 C. W. N. 997; 9 C. & A. L. R. 805; 50 I. A. 173 (P. O.).

arrears of maintenance. She is legally entitled to do so, and in fact, Courts will not disallow the claim, unless abandonment or waiver is expressed or can be implied from the circumstances of the case. There is no plea in the present case that there has been abandonment and although it is curious that the first plaintiff should have kept quiet for so many years without suing for her maintenance, we have the evidence of P. W. No. 11 who is an uncle of the defendant that demands had been made from 1914 onwards but to avoid unpleasantness in the family no suit was filed. Finally the second plaintiff attained an age when she was about to be married and for this purpose the first plaintiff had not sufficient funds and has now come forward not only for her maintenance but also for an allowance for the marriage expenses. That is a very plausible explanation for her not suing earlier, and no waiver of her claim can be inferred from her conduct.

As regards the amount awarded, the Subordinate Judge has taken into consideration the first defendant's annual income, which he calculates at Rs. 1,000, excluding what he earns professionally and has fixed a maintenance of Rs. 30 per mensem for the mother and the daughter. Against this he has set the amount which the first plaintiff has been receiving as interest on an investment of Rs. 4,000. This sum of Rs. 4,000 is made up of Rs. 2,870 the price of the jewels which formed her *stridhanam* property, and Rs. 1,700 her husband's provident fund money which he had evidently kept separate from the joint family estate. In making this deduction he has been decidedly generous to the defendant, and there is no reason to reduce the amount decreed for arrears.

As regards the future maintenance the amount of Rs. 15 allotted to the first plaintiff, the second plaintiff now being married, there is no dispute.

The appeal is, therefore, dismissed with costs.

Relly, J.—I agree with Mr. Narasimhachari's contention that the self-acquired property of a member of a Hindu joint family can only become property of the joint family by his volition and intention. The main question that has been argued before us is whether we can infer from the evidence that the defend-

ant has intentionally made the accumulations of his earnings as a Vakil form part of the joint family property. The defendant became the manager of his joint family in 1914 on the death of his undivided brother. It appears that besides himself at that time there was only one other coparcener, his infant son; but he had also to support from the joint family funds his mother and his brother's widow and daughter, defendants Nos. 1 and 2. It also appears that there was no joint family house: the defendant from 1924 onwards has been living in Cuddappah with his mother, the son who was alive in 1914 and his subsequently born sons and a daughter. It appears that the income from the joint family property was about Rs. 280 a year. Mr. Narasimhachari has pressed strongly upon us that that is an amount obviously insufficient for the maintenance of the defendant and the members of his family whom he was maintaining at Cuddappah, so that the defendant had to use for their support not only the joint family funds in his hands but also a considerable part of his own self-acquired earnings. That statement of Mr. Narasimhachari is in effect very much against his client's case. If the defendant, being the manager of the family and having joint family funds in his hands, spent on the maintenance of the family not only the joint family funds but also a considerable part of his self-acquired property, the reasonable inference is that he meant to treat that part of his self-acquired property as joint family property. As my Lord has pointed out, that test has been mentioned by the Privy Council in *Rajanikanta Pal v. Jagamohan Pal* (1). But Mr. Narasimhachari has suggested that, even if this additional sum used from the defendant's earning for the support of the joint family must be treated as joint family property, still the accumulations and the remainder of his earnings are not affected by that. While it is possible that the defendant might have made a part of his separate earnings joint family property and kept the rest for himself, in this particular case he does not appear to have made any distinction between two parts of his self-acquired property as according to his own story he has kept no accounts. Now the defendant is a Vakil and he must be aware of the importance of accounts in a

case like this as showing whether the manager has kept his earnings separate or has made them joint family property. If he really has kept no accounts, that is a very strong piece of evidence against him. It is not at all unnatural or unreasonable that the defendant, with few members of the joint family to provide for, should have been content to make his self-acquisitions joint family property. The only thing which would make that a little unlikely in this case is that, if he did so, his sister-in-law, plaintiff No. 1, with whom he had a quarrel, would be gaining an interest in the enlarged joint family property to the extent to which it might affect the maintenance which she might get. But it is a part of the defendant's case that in 1914 he entered into a settlement with plaintiff No. 1, by which he supposed that he had finally bought off her claims. If that were so, there would be nothing unnatural in making his self-acquired property joint family property for the benefit of his sons, though it has turned out that plaintiff No. 1 gets some benefit also in this way.

I agree with the judgment pronounced by my Lord in other respects and this appeal should be dismissed with costs.

V. N. V.

*Appeal dismissed.***MADRAS HIGH COURT.**

CIVIL MISCELLANEOUS PETITIONS NOS. 2593 AND 2594 OF 1926.

August 15, 1927.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.AMEECHAND NAGIN DOSS & Co. BY
THEIR AGENT LALLU BHAI HUKUM
CHAND AND OTHERS—PETITIONERS
versus

RAOJI BHAI MOTI BHAI PATEL

AND OTHERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 110—
“Substantial question of law,” meaning of—Point of law
decisive of case, whether substantial.**Every point of law arising in a case which is
decisive of it is not a substantial question of law
within the meaning of s. 110 of the Civil Procedure
Code.**Petition, under O. XLV, rr. 2, 3 and 8
of the Code of Civil Procedure praying
that the High Court will be pleased to
grant a certificate enabling the petitioner**to appeal to His Majesty in Council
from the decision of the High Court in
O. S. A. No. 116 of 1923, preferred
from the judgment of Mr. Justice
Coutts Trotter, in C. S. No. 212 of 1921,
and application under O. XLVII, r. 1 of
the Code of Civil Procedure for review
of the judgment of the High Court, dated
the 1st March, 1926, in O. S. A. No. 116
of 1923, preferred from the judgment of
Mr. Justice Coutts Trotter, in C. S. No. 212
of 1921.**Mr. C. S. Venkatachari, for the Petitioners.**Messrs. M. P. Sundararaja Aiyar and C.
Veeraraghava Aiyar, for the Respondents.***JUDGMENT.**

C. M. P. No. 259 of 1926.

*The judgment of this Court confirmed
that of the learned trial Judge on the
Original Side. The question to be deter-
mined, therefore, is—does the appeal
involve some substantial point of law?
Mr. Venkatachari contends that a point
of law decisive of the case is a sub-
stantial question within s. 110, in other
words, although the point of law may be
obviously untenable, if the decision in the
case turns upon it, that point would be
a substantial point of law. For this posi-
tion he relies upon *Raghunath Prasad
Singh v. Deputy Commissioner of Par-
tabgarh* (1) but we are clearly of the
opinion that it does not support his con-
tention. The case does not fulfil the re-
quirements of s. 109 (a) and (b) and s. 110
and leave is refused. The petition is
dismissed with taxed costs of the respond-
ent.*

C. M. P. No. 2594 of 1926.

*The review petition is not pressed and
is dismissed but without costs.*

V. N. V.

A. N. A.

*Petitions dismissed.**(1) 102 Ind. Cas. 889; 26 L. W. 70; 31 C. W. N. 495;
A. I. R. 1927 P. O. 110; 4 O. W. N. 515; 2 Luck. 93;
(1927) M. W. N. 519; 54 I. A. 126 (P. O.).***MADRAS HIGH COURT.**

SECOND CIVIL APPEAL No. 1332 OF 1924.

April 8, 1927.

Present:—Mr. Justice Devadoss.
BHOGARAJU KANAKAMMA—PLAINTIFF
—APPELLANT
*versus*THE SECRETARY OF STATE FOR INDIA
AND OTHERS—DEFENDANTS—RESPONDENTS.
Madras Irrigation Cess Act (VII of 1865), s. 4

proviso—Ryotwari tenant—Use of water flowing from legitimate source on account of breach caused by natural causes—Ryotwari tenant, whether liable to pay water cess.

A *ryotwari* tenant in possession of *mamool* wet is not liable to pay penal assessment in respect of water which has flowed into his land from a legitimate source through breach caused by natural sources. The question whether the *ryot* had any benefit from the flow of such water or whether the water caused him any damage is quite immaterial. [p. 645, cols. 1 & 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Kistna at Ellore, in Appeal Suit No. 209 of 1923, preferred against that of the Court of the Principal District Munsif, Ellore, in O. S. No. 582 of 1922.

Mr. P. V. Rangaram, for the Appellant.

The Government Pleader, Messrs. B. Satyanarayana and V. Suryanarayana, for the Respondents.

JUDGMENT.—The appellant is a registered *pittadar* of some lands. She brought a suit against the first defendant, the Secretary of State for India in Council, for the recovery of a sum of money collected from her as penal assessment for unauthorised irrigation of her fields with water from a Government channel. The District Munsif gave a decree in her favour; but the Subordinate Judge dismissed her suit on the ground that the water which flowed through a breach aided in the cultivation of her lands. The facts found are that there was a breach in the channel which supplies water to the appellant's fields. That was closed and a few days after its closure it was again breached owing, it is alleged, to cattle passing and re-passing on the portion of the *bund* newly put up and the water that flowed through the breach passed on the appellant's fields. The Subordinate Judge holds the appellant liable to the levy of penal water cess as her lands were benefited by the water which flowed through the breach. His finding on this point is in the following terms:

"It cannot be said that the cultivation of the lands in question was not aided by the Government water which flowed through the breach for 3 or 4 days into them and that ploughing was not facilitated by the said water. Hence I am of opinion that the water which flowed through the breach into the lands in possession of defendants Nos. 2 and 3 aided in the cultivation of the said lands."

The question is whether on this find-

ing a *ryotwari* tenant in possession of what is known as *mamool* wet is liable to pay penal assessment in respect of water which flowed into his land without his doing anything to let the water into it. The channel in which the breach occurred is admittedly the channel which supplies water to the appellant's fields for irrigation. The contention of the first defendant is that the pipe through which water flows from the channel into the appellant's fields was closed for a time by the Revenue Authorities and, therefore, the appellant was not entitled to get water during that time from the channel and the use of the water flowing through a breach was not water to which the appellant was entitled and, therefore, the Revenue Authorities are entitled to levy penal assessment. Does the case of the appellant come within the proviso to s. 1 of the Irrigation Cess Act VII of 1865. The proviso is in the following terms:—

"Provided also that no cess shall be leviable under this Act in respect of land held under *ryotwari* settlement which is classified and assessed as wet; unless the same be irrigated by using without due authority water from any source hereinbefore mentioned and such source is different from or in addition to that which has been assigned by the Revenue Authorities or adjudged by a competent Civil Court as the source of irrigation."

Under this proviso in order to make a *ryotwari* tenant in possession of land classified and assessed as wet liable, he should irrigate without authority water from any source mentioned in the preceding clause of s. 1, and such a source should be different from or in addition to that which has been assigned by the Revenue Authorities or adjudged by a competent Civil Court as a source of irrigation to such a land. If water flows from the source which is the source of water for the irrigation of his land, he cannot be held liable to pay penal water rate. If he takes water or uses water from a source which is not assigned by the Revenue Authorities or adjudged by a competent Civil Court as a source of irrigation to his land then he may be liable for penal assessment. But where he uses water from a source which is the legitimate source of irrigation for his land, then he would not be liable for penal assessment unless he takes water at a time when he is not permitted to take

water or when he is not entitled to take the same. When water flows from the legitimate source of irrigation without any act or illegal omission on his part can he be liable? In this case the water flowing from the breach flowed over the fields situated between the breach and his lands and after flooding them, the water seems to have overflowed the ridges of his neighbour's lands or percolated through them. The water flowed through the breach only for 3 or 4 days. Whether he had any benefit from the flow of such water or whether the water caused any damage to him by preventing the field from drying up during the period during which it should be allowed to dry up is not a necessary question for considering whether the appellant is liable to penal assessment or not. Where water standing in a neighbour's field overflows the ridges of that field and flows into another man's land, the latter cannot be held liable for penal assessment for he could not have prevented the overflow. No doubt if he actively aids or does something to let water into his field at a time when he is not entitled to that water, he may be said with some show of reason that he has taken water unauthorisedly. But in this case it is quite clear that the water which flowed through the breach first filled the neighbouring fields and then entered the appellant's field.

The learned Government Pleader has admitted that water of the channel flows through a pipe inserted in the *bund* to the fields belonging to the appellant and his neighbours. It follows that the channel is the legitimate source of irrigation to the appellant's fields. It appears that water flowing through a breach not caused by him or at his instance filled his neighbour's fields, then overflowed their ridges and finally flowed into the appellant's fields. On these facts it is not possible to hold that the appellant is liable to pay penal assessment. The proviso clearly says that no cess shall be leviable in respect of *mamool* wet unless the land is irrigated without due authority from a source different from that to which he is entitled. A person cannot be said to irrigate his fields if water collected in his neighbour's fields overflowed the ridges and then filled his lands. There may be cases where water flowing in such manner might flow for a long time and thereby enable one to cultivate his field at a time when he is not entitled to water

but the flow of water for a short time, say for a day or two through a breach or sluice which is closed but which gives way owing to natural causes cannot make a *ryotwari* tenant in possession of land classified and assessed as wet liable to pay penal assessment. The learned Government Pleader relies upon *Secretary of State for India v. Swami Naitheswarar* (1), for his contention that if water flows into a man's fields even without his volition or anything being done on his part to get water he is liable to pay water cess to Government. The facts of that case are distinguishable from those of the present. That was a case of *inam* lands. The *inamdār* was not entitled to the use of water. He did make use of the water which flowed into his lands and raised crops. It was held that he was liable to pay water cess. If a person who is not entitled to water from a Government source gets water owing to a breach or owing to overflowing of the water *bunds* and raises crops with the help of such water, or uses the water which comes into his lands to which he is not entitled and raises crops, then he would, no doubt, be liable to pay water rate to Government. But the case of a *ryotwari* tenant in possession of lands classified and assessed as wet is different. The case in *Kopalli Krishna Row Garu v. Collector of Krishna* (2) is also distinguishable from the present. In that case the plaintiffs irrigated from two pipes instead of one which was the authorised source of irrigation. Though there was nothing to show that the second pipe was inserted at their instance, it was held that they were liable to pay water rate. There the finding was that the water from the second pipe to which they were not entitled was used for irrigation and as they were not entitled to the use of water from the second pipe. It is upon that finding that a Bench of this Court held that they were liable to pay water rate.

The expression "unless the same be irrigated by using water" must be given its proper meaning. A person cannot be said to irrigate his land if for a few hours water overflows his neighbour's fields and then falls into his lands. Supposing the Revenue Authorities closed a certain sluice which is the source of irrigation to a man's land and owing to natural causes, the

(1) 6 Ind. Cas. 199; 34 M. L. J. 21; 7 M. L. T. 407; 20 M. L. J. 766; (1910) M. W. N. 495.

(2) 22 Ind. Cas. 692; 28 M. L. J. 210; 1 L. W. 191.

sluice gave way and for a day or two water flowed into his land without any act on his part, he cannot be said to irrigate his lands by using water without due authority. In order to bring the *ryotwari* tenant in possession of lands classified as wet within the meaning of the section, he must do something in order to let water into his lands or must raise or attempt to raise a crop with the help of the water from a source to which he is not entitled or at a time when he is not entitled to get water from his legitimate source. What seems to have happened in this case is that the Revenue Authorities not being able to fix the blame upon any one in particular with regard to the breach of the channel thought it best to assess everyone into whose fields the water from the breach flowed. On the facts of this case, I have no hesitation in holding that the 1st respondent is not entitled to levy penal water rate from the appellant. I, therefore, set aside the decree of the Subordinate Judge and restore that of the District Munsif with costs here and in the Court below, to be paid by the 1st defendant.

V. N. V.

Appeal allowed.

A. N. A.

MADRAS HIGH COURT.

CIVIL REVISION: PETITION No. 1112 OF 1925.

August 24, 1927.

Present:—Mr. Justice Tiruvenkatachariar.

RANGASAMI AIYANGAR—DEFENDANT

—PETITIONER

versus

SOMASUNDARAM CHETTIAR—

PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 21 (2)—Acknowledgment by co-obligors—Successive endorsements by each co-obligor on different occasions, sufficiency of—Ratification of prior endorsements by conduct.

Where nothing more appears than that one of several co-obligors has made a payment, or an acknowledgment of liability, such payment or acknowledgment will not save limitation against the other obligors of the debt. It has to be shown that he made such payment or acknowledgment not only on behalf of himself but also as the duly authorised agent of his co-obligors. Such authority, however, need not be express; it may be inferred from the conduct of several co-obligors. [p. 647, cols. 1 & 2.]

Where each one or several obligors of a bond, one after another, made a series of endorsements of payment on the bond on different dates:

Held, that the conduct of the parties was sufficient to warrant the conclusion that each had the implied authority to bind the other by his endorsement. [p. 647, col. 2.]

Petition under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Karur, in S. O. S. No. 626 of 1925.

Mr. K. S. Krishnaswami Aiyangar, for the Petitioner.

Mr. N. Rajagopalachariar, for the Respondent.

JUDGMENT.—The defendant is the applicant. The suit was brought upon an oral agreement entered into between the parties on or about the 18th May, 1925, by which the defendant agreed to pay Rs. 55 to the plaintiff in satisfaction of his liability to the plaintiff under a promissory note which had been executed in plaintiff's favour by the defendant and some others jointly on the 31st July, 1915, for Rs. 300. The plaintiff's case is that the executants of the promissory note including the defendant made several payments towards the amount due on the note and after giving credit for such payments there remained some balance due to the plaintiff and that four of the executants of the note agreed each to pay a certain amount to the plaintiff severally in discharge of their joint debt and that in accordance with such arrangement the defendant promised to pay the plaintiff Rs. 55 the suit amount. The defendant in his pleadings denied the oral agreement as true. He contended also that, even if proved, it was invalid under s. 25 of the Indian Contract Act as the debt due under the prior promissory note was barred by limitation and, therefore, the agreement by the defendant to pay a barred debt will be valid only if it is in writing. The learned District Munsif found the oral agreement as true. He also found that the defendant's liability under the prior promissory note, Ex. A, was not barred by limitation and upon this finding he gave a decree for the plaintiff for the amount claimed. In this petition both the findings are contested by the defendant. As regards the factum of the agreement it is a question of fact and the finding of the District Munsif cannot be questioned in this petition. The only point which is pressed on his behalf is that so far as the defendant is concerned the prior promissory note had become barred by limitation and that, therefore,

the oral agreement which is sued on is not enforceable having regard to s. 25 of the Contract Act. The prior promissory note is Ex. A, dated the 31st July, 1915. It was executed by six persons of whom the defendant is one, being the second executant of the promissory note. There are three endorsements of part-payment made on the promissory note. The first is dated 12th June, 1916, and it evidences a payment of Rs. 250. That payment was by Ramaswami Dikshitar the first of the executants. The second endorsement is dated the 11th June, 1919, for the payment of Rs. 2 and it is signed by another executant Venkataramana Ayyar. The third endorsement which is dated the 24th May, 1922, was for a payment of Rs. 5 towards interest and it was signed by the defendant and three others. It will be seen that each of the successive endorsements was made within the period of limitation prescribed for a suit on the note and that the oral agreement on which the present suit is brought was made within three years from the date of the last endorsement on the note. The contention which is urged on behalf of the defendant is that the prior endorsements made on the note (A-1 and A-2) which were not made by the defendant but by some of his co-obligors cannot operate as against him to save the promissory note from the bar of limitation either under s. 19 or s. 20 of the Limitation Act, and his own endorsement of payment of interest having been made long after the period of limitation for a suit on the note had expired, does not fulfil the requirements of those sections and cannot, therefore, save limitation as against him. The District Munsif overruled that plea and, in my opinion, he was right in doing so. Under ss. 19 and 20 of the Limitation Act, part-payment or acknowledgment of a debt must, in order to save the debt from limitation, be made by the person liable to pay the debt or by his agent duly authorised in this behalf. Section 21 further provides that nothing in ss. 19 and 20 shall render one of several joint contractors chargeable by reason only of a written acknowledgment signed or of a payment made by or the agent of, any other or others of them. Where nothing more appears than that one of several co-obligors has made a payment, or an acknowledgment of liability, such payment or acknowledgment will not save limitation against the other obligors of the debt. It has to

be shown that he made such payment or acknowledgment not only on behalf of himself but also as the duly authorised agent of his co-obligors. Such authority, however, need not be express; it may be inferred from the conduct of several co-obligors. In this case there were three successive endorsements. The second endorsement A-2 was made more than three years after the date of the pro-note and at a time when in the absence of authority on the part of the co-obligor who made the first payment the suit as against the rest would be barred. It must be held that the person who made a second endorsement did by his conduct ratify the prior payment of Rs. 250 which had already been made and the payment of which was endorsed on the pro-note on the 12th June, 1916. So also when the third endorsement was made on 24th May, 1922, by the four executants including the defendant the only reasonable inference to be drawn from their conduct is that they held themselves as still bound under the promissory note by reason of the two prior endorsements evidencing part-payments which had already been made to the plaintiff therefor. Of the four persons who have signed the endorsement A-3, Ramaswami Dikshitar had made the first payment which was endorsed on the 12th June, 1916, and another, namely, Venkataramana Ayyar made the second payment which was endorsed on the 11th June, 1919, and the defendant and another for the first time signed in the last endorsement A-3 which purports to be for payment of interest. On these facts it must be held that the defendant and the other co-obligor who for the first time made a payment for interest and signed the endorsement A-3 adopted the previous payments as made on their behalf also; the persons who made those payments and endorsed them on the note must be held, therefore, to have been duly authorised in that behalf by the defendant for the purposes of ss. 19 and 20. In a similar case it was so held by Hannay, J., see *Annimalai Pattar v. Natesa Iyer* (1). I am, therefore, of opinion that as against the defendant the promissory note, Ex. A, was not barred at the date of the oral agreement on which the suit is brought. It follows, therefore, that the

(1) 25 Ind. Cas. 927; (1914) M. W. N. 792.

oral agreement is not void under s. 25 of the Indian Contract Act.

The applicant wants to raise a new ground, namely, that the oral agreement sued on cannot be set up as it amounts to a variation of the written contract embodied in Ex. A and as proof of such agreement effected only orally is barred under s. 91 of the Evidence Act. This point was not raised either in the lower Court or even in the grounds of the application and it is raised for the first time now. The plaintiff's case is that the joint and several liability of the executants under the promissory note for the balance due on it was split up with the consent of all parties into a several liability on the part of each of the executants to the plaintiff. I do not see how this arrangement is obnoxious to s. 91 of the Evidence Act. Further I am not prepared even if the point is arguable to allow the plaintiff to raise such a technical plea for the first time at this stage of the case. The application is dismissed with costs.

Y. N. V.
A. N. A.

Petition dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 467 OF 1926.

October 27, 1927.

Present:—Justice Sir Kumaraswami Sastri, Kt., and Mr. Justice Wallace.

MITTADAR ARUMUGAM CHETTIAR—

PLAINTIFF—APPELLANT

versus

DEVARAYA CHETTIAR AND ANOTHER—

—DEFENDANTS—RESPONDENTS.

Practice—Dispute in Appellate Court as to what took place in trial Court—Contradictory affidavits by Pleaders on both sides filed long after event—Procedure.

Where a dispute arises before an Appellate Court, as to what took place in the trial Court in respect of a certain matter and there is a direct contradiction between the affidavits of the Pleaders on opposite sides, and the affidavits are filed after a long time has elapsed, the proper procedure to adopt would be to rely upon the note of the Judge made at the time and presume that it correctly represents what took place. [p. 649, col. 1.]

Appeal against an order of the Court of the Subordinate Judge, Salem, dated the 27th September, 1926, and passed in A. S. No. 201 of 1925, (A. S. No. 352 of 1925 on the file of the District Court, Salem),

preferred against the decree of the Court of the Additional Munsif, Salem, in O. S. No. 422 of 1924.

JUDGMENT.—This is an appeal against an order of remand. The suit was filed for an injunction and other reliefs. When the case came on before the District Munsif, the parties agreed to abide by the oath of the plaintiff and the question is what the nature of that agreement was. The note of the District Munsif is as follows (page 5): "25th August, 1925. On the application of both the parties the suit is advanced to 31st August, 1925. Defendants' Vakil challenges the plaintiff to take plain oath in open Court that the allegations in the plaint are true and the allegations in the written statement are not true. Plaintiff's Vakil accepts the challenge and says that the plaintiff will take oath on 31st August, 1925. Suit adjourned to 31st August 1925." We find in the diary the following entry as to what took place, "Defendants' Vakil challenges plaintiff to take oath. Plaintiff took oath. Decreed for plaintiff."

An appeal was filed by defendants on the ground that what was agreed to was not the order as referred to in the Judge's note but that each allegation in the plaint and each allegation in the written statement were to be put to the plaintiff and that he should affirm on oath that his allegations are true and the allegations of the defendants are false. It is also contended in the affidavits filed in the Appellate Court that the case was adjourned for the defendants' Pleader to formulate questions and that the oath was to be taken in respect of each question so formulated. The plaintiff's Vakil filed an affidavit denying any such agreement and stating that what took place was what was agreed to and what took place in Court is evidenced by the Judge's note. We may point out that although the defendants were present when the oath was administered, there is nothing on record to show that they took any objection; they filed no affidavit in the Munsif's Court, stating what took place was not what they agreed to and asking for a re-consideration of the view and even in the Appellate Court they file no affidavit as to what took place then. It is the Vakil who states that the defendants came to him afterwards and represented that in spite of their objections the oath was taken by the plaintiff.

The Subordinate Judge had before him the note of the Judge and the proceedings in Court and the affidavits filed by the Pleaders on each side, the Pleader for the plaintiff contradicting the allegations made by Pleader for the defendants. We also find that these affidavits were put in more than a year after the disposal of the suit in Court. Having regard to these facts, the question is whether the Subordinate Judge was justified in accepting the affidavit of the Vakil for the plaintiff, and in reversing and remanding the suit for disposal on the merits. We think that in cases like this where there is a direct contradiction between the affidavits of the two Pleaders and where the affidavits are filed after a long time has elapsed, the proper thing to do would be to rely upon the note the Judge made at the time and presume that what took place in the presence of the Judge who must have been aware of the facts and the nature of the agreement was what was agreed to between the parties. The Judge had no interest or motive in supporting the allegations of one side or the other and we must presume he acted properly in administering the oath in accordance with what the parties agreed to. We are unable to uphold the decision of the Subordinate Judge.

It is argued by the respondents that even in the Subordinate Court the defendants agreed to abide by the oath which the plaintiff would take if it was according to their version of what the agreement was and the plaintiff refused to take the oath. We do not think this is a ground for drawing any adverse inference against the plaintiff. If the agreement as to the oath was as stated by him, the plaintiff was not bound to take an oath in a different form and we think the remand was not justified. We allow the appeal and set aside the order of remand. The decree of the Munsif will, therefore, stand. The respondents will pay the appellant's costs of this appeal and costs before the Subordinate Judge.

V. N. V.

A. N. A.

*Appeal allowed.***MADRAS HIGH COURT.**

REFERRED CASE No. 20 OF 1925.

July 21, 1927.

Present:—Mr. Justice Madhavan Nair and
Mr. Justice Ourgenven.

BHADRI NARAYANA AND OTHERS

—PETITIONERS

*versus***NAGALDINNE SRINIVASA RAO**

AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVI, r. 1—Reference in matter subject to appeal, whether lies.

Under O. XLVI, r. 1, Civil Procedure Code, a reference can be made to the High Court by a Subordinate Court only in suits or appeals in which the decrees are not subject to an appeal.

Case referred under O. XLVI of the Civil Procedure Code by the District Munsif of Nandyal for the decision of the High Court on the following questions in I. P. No. 3 of 1920 on the file of his Court, *viz.*,

(1) Whether the second petition under s. 35 is not maintainable in view of the dismissal of the first application under the same section when the amount found due was not questioned but is sought to be deposited.

(2) Whether the sales in favour of the petitioners in the connected petition by the Receiver in insolvency are valid and require to be confirmed though they received back the money with interest and had not applied within 21 days thereafter.

(3) What is the effect of the order of this Court setting aside the sales held by the Receiver in view of the Appellate Court's order reversing the order of this Court annulling adjudication.

Mr. B. Somayya, for the Petitioners.

Mr. S. Ranganatha Iyer, for the Respondents.

ORDER.—No reference lies in this case. The insolvency proceeding in which this reference has been made is subject to appeal under O. XLVI, r. 1 of the Civil Procedure Code. A reference can be made only in suits or appeals in which the decrees are not subject to an appeal. The reference being not according to law, the papers are returned.

V. N. V.

Papers returned.

MADRAS HIGH COURT.

CIVIL APPEAL No. 414 of 1925

AND

APPEAL AGAINST ORDER No. 429 of 1925.

September 13, 1927.

Present:—Mr. Justice Wallace and

Mr. Justice Tiruvengkatachariar,

A. RANGASWAMY PILLAY—DEFENDANT

—APPELLANT

versus

C. R. P. KUPPUSWAMY DOOKSHATAR

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Construction of deed—Provision for payment of interest every year and principal some years hence and for payment of whole amount on default—Default in payment of interest for first year—Payment of interest and portions of principal under default clause—Option of mortgagee to sue—Demand by mortgagee whether can be inferred—Cause of action for suit on mortgage—Limitation.

A mortgage-bond provided that interest on the mortgage amount was payable on or before a fixed date every year and the principal, after 5 years, and that in default of payment of principal or interest on such due dates, interest was to be added on to the principal and paid 'whenever the mortgagee required' without regard to the date fixed in the bond. It was found that the mortgagor paid soon after a default in the payment of the interest, not only the interest payable under the default clause but also portions of the principal amount which under the primary clause was payable only at the end of 5 years:

Held, (1) that the stipulation gave only an option to the mortgagee to call in at once the principal amount and interest due on the mortgage-bond without reference to the period stipulated for payment; [p. 651, col. 2.]

(2) that, from the payments made, a reasonable presumption could be drawn that when the default occurred the mortgagee elected to exercise the option and pressed for payment of the entire amount, *viz.*, the principal and interest due on the bond and that the payments were made in consequence of such demand; [p. 653, col. 1.]

(3) that the creditor having so exercised the option, the cause of action to sue on the mortgage arose from the date of default. [*ibid.*]

Ramadh Bibi Ammal v. Kandasami Pillai (1), *Narna v. Ammani Amma* (2), *Netta Karuppa Goundan v. Kumarasami Goundan* (3) and *Pancham v. Ansar Hussain* (4), referred to.

Appeal against a decree of the Court of the Subordinate Judge, Cuddalore, in O. S. No. 16 of 1924, and appeal against an order of the Court of the Subordinate Judge, Cuddalore, dated the 6th March, 1925 refusing to set aside the *ex parte* decree passed against defendants Nos. 4 and 22 in O. S. No. 16 of 1924.

Messrs. K. V. Krishnaswamy Aiyar and E. Jagadisa Aiyar, for the Appellant.

Messrs. A. Krishnaswamy Aiyar, M. Patanjali Sastri and R. Somasundaram Aiyar, for the Respondents.

JUDGMENT.—This appeal is prefer-

red by the fourth defendant in a mortgage suit brought to enforce the mortgage security for the recovery of the amount due to the plaintiff as assignee of the mortgage from the mortgagees. The mortgage-bond is dated the 22nd January, 1908, and it was for the sum of Rs. 6,000. The material portion of the bond to which reference has to be made in connection with the questions arising in this appeal is as follows: "As the total sum of Rs. 3,000 has been received by us as per particulars mentioned above, we shall pay before the 22nd January of each year the interest arrived at on the said amount at the rate of $\frac{3}{4}$ per cent. per mensem and pay the principal sum within a period of 5 years from this date. In default of payment of interest or principal on such due dates, we agree to your adding to the principal sum the interest due each year from the date of default and recovering the total amount with interest at the said rate, without regard to the due date for (payment of) principal whenever you require, by proceeding against us and the under-mentioned hypotheca."

The plaintiff's case as alleged in the plaint is that towards the suit mortgage-bond, the following payments were made Rs. 3,347-8-0 on the 15th June, 1909, towards the principal and interest, Rs. 800 on the 15th June, 1909, towards principal and interest and Rs. 250 on the 4th November, 1909, towards interest but the balance of principal and interest was not paid. The mortgagee assigned the mortgage-bond in plaintiff's favour for Rs. 7,600, on the 25th November, 1922. The plaintiff says that a sum of Rs. 8,420-14-0 was due on the mortgage at the date of the suit, and he prays for a decree for the sale of the mortgaged properties to recover the said amount with subsequent interest and costs. The cause of action for the suit is stated to have arisen on 22nd January, 1913, *i. e.*, on the expiry of the period of 5 years provided in the mortgage-bond, and the plaint was presented on the 30th January, 1924. The plaintiff has impleaded as defendants the legal representatives of the mortgagor as well as subsequent alienees of different portions of the mortgaged properties.

The fourth defendant among other pleas raised the plea of limitation. In para. 4 of his written statement he says that as the mortgagors failed to pay interest due for the first year the mortgagee

made a demand on the mortgagors to pay the entire amount of principal and interest according to the conditions stipulated in the bond and pressed for payment of the same. Thereupon payments towards the principal and interest were made to the mortgagee as admitted in the plaint itself; and the suit is, therefore, barred by limitation, as the cause of action, therefore, arose in 1909.

The sixth defendant also raised a similar plea in para. 4 of his written statement. It was he who paid to the mortgagee Rs. 3,347-8-0 on the 15th June, 1909, and endorsed payment of the same on the bond.

With reference to the above plea, the third issue, *viz.*, is the plaintiff's suit barred by limitation? was framed. The suit after several adjournments came on for trial on the 4th March, 1925. But on that day neither the fourth defendant nor the sixth defendant appeared and the trial of the suit proceeded against them *ex parte*. The learned Subordinate Judge held that the suit was not barred by limitation. He also disposed of the other issue in the case and passed a decree for the plaintiff for the amount claimed.

The main point pressed before us in this appeal is that the lower Court erred in holding that the suit was not barred by limitation. On behalf of the appellant it is contended by his learned Vakil that upon the terms of the mortgage-bond already set out, the cause of action for purposes of limitation began to run as soon as there was default in the payment of interest for the first year and that the stipulation on the part of the mortgagors that they agreed to pay the entire amount of principal and interest without due regard to the due date whenever the mortgagee required the amount did not render a demand on the part of the mortgagee a condition precedent to his enforcing that right. The argument is that the words "whenever you require" has the same meaning as the expression 'on demand' which is a term of art meaning immediately or forthwith. This contention which appears to have been the only one put forward before the Subordinate Judge was overruled by him. He observes as follows: "It will be seen by a reference to Ex. A that it is only a privilege given to the mortgagee to claim the mortgage amount if interest is not paid at the end of every year. He may exercise that privilege or not. That being so, it cannot be said

that the mortgagee is bound to claim the amount before the period fixed." In our opinion the learned Subordinate Judge has taken the right view that the stipulation in question gives only an option to the mortgagee to call in at once the principal amount and interest due on the mortgage-bond without reference to the period stipulated for payment, if there is default. There is, no doubt, some conflict of authority on the point between this Court and some other High Courts and it may also be observed that some of the earlier decisions of this Court may support the appellant's contentions but later decisions of this Court with which we agree and which the Subordinate Judge has followed support the view that a stipulation so worded only gives the mortgagee an option which is open to him to exercise or not as he chooses; and the time will not run against him unless he exercises the option [see *Ramadh Bibi Ammal v. Kandasami Pillai* (1), *Narna v. Ammani Amma* (2) and *Netta Karuppa Goundan v. Kumarasami Goundan* (3).] We may before leaving this point refer to a recent decision of the Privy Council in *Pancham v. Ansar Hussain* (4) which was an appeal from the Allahabad High Court. Their Lordships considered this question and their observations rather tend to show that they do not approve of the view taken by the Allahabad High Court in two Full Bench cases in *Gaya Din v. Jhuman Lal* (5) and *Shib Dayal v. Meharban* (6) and they are inclined towards the view adopted by this Court in the later cases. These observations are, no doubt, *obiter* and the appeal was disposed of on some other point, but as stated in their Lordships' judgment itself they were made in view of the conflict of authority which exists on the point between the several High Courts.

It is next urged on the appellant's behalf that there is satisfactory evidence in this case that the mortgagee did exercise the option in 1909 and that, therefore, the cause

(1) 51 Ind. Cas. 724; 9 L. W. 479; (1919) M. W. N. 82; 25 M. L. T. 154.

(2) 35 Ind. Cas. 418; 39 M. 981; 4 L. W. 77; 20 M. L. T. 174; (1916) 2 M. W. N. 125; 31 M. L. J. 865.

(3) 22 M. 20; 8 M. L. J. 167; 8 Ind. Dec. (N. S.) 15.

(4) 99 Ind. Cas. 650; 53 I. A. 187; A. I. R. 1926 P. C. 85; 24 A. L. J. 736; (1926) M. W. N. 520; 24 L. W. 241; 48 A. 457; 31 O. W. N. 324 (P. C.).

(5) 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510.

(6) 69 Ind. Cas. 981; 45 A. 27; 20 A. L. J. 819; A. I. R. 1923 All. 1 (F. B.).

of action for the suit accrued when he did so. This question was separately not argued before the Subordinate Judge. It was probably due to the fourth defendant as well as the sixth defendant being absent at the final hearing. The facts on which reliance is placed in support of this contention are (1) the admitted payment of Rs. 773-12-0 for interest and Rs. 2,573-12-0 towards principal on the 15th June, 1909; (2) payment of Rs. 800 by adjustment of account on the same day; and (3) payment of Rs. 250 on the 4th November, 1909. The 2nd and 3rd payments are not endorsed on the bond. As regards the alleged payments not only there is no dispute but they are also referred to in the assignment of the mortgage in plaintiff's favour, Ex. B dated the 25th November, 1922.

Taking first payment made on 15th June, 1909, it will be seen that interest which was paid represents the interest due on the entire amount of the mortgage-bond up to the 15th June, 1909, interest being calculated on the basis of there having been a default at the end of the first year. In addition to all interest due up to that date Rs. 2,573-12-0 was also paid towards the principal. This seems to be a strong evidence of the mortgage amount being treated by the mortgagee as having fallen due on the date of that payment. Otherwise it is difficult to understand why interest which would not be due till the end of the 2nd year, viz., till the 23rd January, 1910, was paid up to the 15th January, 1909. Besides the aforesaid payment there was also another payment of Rs. 800 to the mortgagee on adjustment of accounts on the same day. As that amount was not paid by the sixth defendant it is only reasonable to presume that the adjustment of the account was between the mortgagee and the mortgagors all of whom are now dead. This adjustment also by itself is good evidence of the mortgagee having elected to exercise the option conferred on him in case of default in payment of interest and the same observation also applies to the further payment of Rs. 250 which also may be presumed to have been made by the mortgagors themselves.

The plaintiff's (1st respondent's) Vakil has endeavoured to meet the appellant's contention based on the above payments. His argument is that on the construction of the default clause in the mortgage-bond, the mortgagee becomes at once entitled to pay-

ment of enhanced interest as provided in the bond. The operation is so to speak automatic and requires no exercise of operation on his part. That option is confined only to the mortgagee calling in the principal amount together with interest due till the date of his exercising the option. In other words, that there are two independent covenants in the bond one of which relates to the payment of enhanced interest which operates automatically on the happening of the default and the other requires the exercise of the option given to the mortgagee. In support of this contention the learned Vakil for the respondent relies on the case in *Ramadh Bibi Ammal v. Kandasami Pillai* (1). But on a reference to the terms of the mortgage-bond in that case which is set out in that report clearly shows that in that case there was a separate covenant for interest and a separate covenant conferring on the mortgagee the option to call in the entire amount of principal and interest, and they have been so construed by the learned Judges who decided that case. This contention cannot, therefore, be accepted.

The respondent's Vakil next contends that payments relied on were voluntary payments and not payments made pursuant to any demand. He draws our attention to the evidence of P. W. No. 1 the agent of the mortgagee who says he was present when the sixth defendant made the payment on the 15th June, 1909. Plaintiff's witness No. 1 further says that the payment was voluntarily made by Subbiah Pillai (6th defendant). It is not quite clear what the witness meant thereby. He does not say that there was no previous demand at any time by the mortgagee and it was merely to oblige the mortgagors the mortgagee received payment before the time provided in the bond; nor does he speak to the other two payments. This is the only evidence in support of this contention. The mortgagors and mortgagee being dead no stress can be laid on the fact that there is no oral evidence on either side as to whether there was a demand or not by the mortgagee in 1909. We have, therefore, to see what is the reasonable inference to be drawn from the conduct of the parties themselves as evidenced by the admitted payments. It seems to us hardly likely that the mortgagors (who were evidently in embarrassed circumstances) would have

voluntarily without any demand or pressure on the part of the mortgagee paid, either interest at the enhanced rate, which provision comes into operation only when default has been made, or the sums paid by them towards the principal amount long before the due date fixed in the bond if there was no default. On the other hand, it seems to be a much more reasonable inference that when the default occurred the mortgagee elected to exercise the option and pressed for payment of the entire amount, viz., the principal and interest due on the bond and that the payments were made in consequence of such demand. The fact that all interest according to the enhanced rate up to the 15th June, 1909, when interest for the second year was not due, was paid and a further amount was paid towards the principal shows that the whole amount was treated as due immediately. The adjustment of Rs. 800 which was also made on the same day also points to the same conclusion. At any rate all the payments are good evidence from which the Court may well presume that the mortgagee in exercise of the option made a demand on the mortgagor for the payment of the mortgage-money. This view received support from the case of *Brown v. Rutherford* (7) cited by the appellant's Vakil. In that case it was held by the Court of Appeal reversing the decision of the Vice Chancellor that the endorsement of payment of interest on the promissory note which was all the evidence in the case, imported that a demand had been made for the payment of interest. The presumption, no doubt, is one of fact and not of law but on such a question it is only right that the Court should draw such inference as is probable having regard to the common course of human conduct as laid in s. 114 of the Evidence Act. For debtors will pay more by way of interest if they can avoid it and voluntarily accelerate the date of the payment of principal amount together with the enhanced interest except on demand by the creditor. If we find them doing so it is only reasonable to infer that there has been pressure put upon them by the creditor. We are, therefore, of opinion that there is sufficient evidence in the case to show that the creditor has exercised the option and that, therefore, the cause of action for the suit arose in 1909

and that under Art. 132 this suit is barred by limitation.

On this finding it is unnecessary to go into the other questions which were argued before us which relate to the order in which the mortgaged properties should be sold. The suit must be dismissed on the ground that it is barred by limitation, but we do not think that this is a case in which the appellant should have his costs. He failed to appear at the trial for no sufficient reason. If he had appeared and the point had been argued before the learned Subordinate Judge it is quite probable his decision might have been the other way and the appeal would have been quite unnecessary. Civil Miscellaneous Appeal No. 429 of 1925 is preferred by the fourth defendant against the order of the Subordinate Judge refusing to set aside the *ex parte* decree against him. We see no sufficient ground for allowing this appeal and we dismiss and in the circumstance without costs.

V. N. V.

A. N. A.

Appeal allowed;

Civil Miscellaneous Appeal

dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 59 OF 1927.

October 19, 1927.

Present:—Justice Sir Kumaraswami Sastri, Kt., and Mr. Justice Wallace.

BOROJO CHARCHI—APPELLANT

versus

ODHIKARI BASUDEBE DAS—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48, O. XXI, rr. 90, 91—Execution sale—Auction-purchaser's right to recover sale amount from decree-holder on sale being set aside—Cause of action, when arises—Limitation—Execution application with relief different from earlier, whether can be continuation of previous application—Auction-purchaser's right to recover purchase-money from decree-holder—Conditions.

Where a sale in execution of a decree is set aside or becomes infructuous, the decree-holder is liable to re-pay the purchase-money if called upon by the purchaser to do so but not otherwise and the cause of action for the decree-holder to proceed against his judgment-debtor does not, therefore, arise till he is compelled to pay the money to the auction-purchaser. [p. 655, col. 1.]

Ramireddi Venkata Appa Rao v. Lakkojee Chintu Ayyanna (1), relied on.

An application for execution of a decree cannot be said to be a continuation of an earlier application.

(7) (1880) 14 Ch. D. 687; 49 L. J. Ch. 654; 43 L. T. 105; 28 W. R. 802.

where the later application is for reliefs entirely different from those of the earlier one. [*ibid.*]

Unless the auction-purchaser can prove fraud or any other abuse of the process of the Court, the sale in his favour would be absolute under O. XXI, r. 91, Civil Procedure Code and it will not be competent for him to file a suit against the decree-holder to recover the purchase-money. [p. 655, col. 2.]

Mundlapati Jagannadha Rao v. Rachapudi Basawayya (4) and *Muthukumarasamia Pillai v. Muthusami Thevan* (3), followed.

Appeal against the decree of the District Court, Ganjam, in A. S. No. 8 of 1926, preferred against the order of the Court of the District Munsif, Aska, dated the 3rd July, 1925, in E. P. No. 532 of 1924, in O. Ss. Nos. 1215 of 1908 and 366 of 1917.

Mr. P. Somasundaram, for the Appellant.

Mr. C. Sambasiva Rao, for the Respondent.

JUDGMENT.—This appeal arises out of an order passed by the District Judge reversing the decision of the District Munsif in an application to execute the decree passed in O. S. No. 1215 of 1908 which was filed on 11th January, 1924. The facts are, the decree-holder in O. S. No. 1215 of 1908 filed an application (No. 157 of 1913) to execute his decree and obtained satisfaction of the decree by the sale of the properties which were charged for the decree. The auction-purchaser, according to the statement of account we find in the judgment, got possession, cultivated the land sometime but was dispossessed by a third person who claimed a title to the properties. We may state here that the suit was not on a mortgage, but that there was a consent decree, the defendant having given these properties as a security for the decree amount. Finding that he was dispossessed, the purchaser filed a suit to establish his title to the property but was unsuccessful. As he could not get possession, the purchaser filed O. S. No. 366 of 1917 to recover the purchase-money which went in satisfaction of the decree and to that suit he made the present respondent a party. The respondent, however, was exonerated and a decree was passed against the other party. The appellant had to pay the decree amount and after he paid the amount he applied to execute the original decree on the ground that it was not satisfied and sought to attach and sell other properties of the respondent. Before the District Munsif the pleas that were raised by the respondent were that the execution application is barred because limitation started from the date of the decree in O. S. No. 366 of 1917 and not from the date when he actually paid the amount

of that decree. The other objection taken was that the present application is barred under s. 48 as it was over 12 years. The District Munsif held that limitation began to run from the date when the appellant actually paid the amount and also held that s. 48 was not a bar, and there is no discussion as regards the applicability of s. 48 as he held that the subsequent application was a revival of the original application. The District Judge reversed the decision of the District Munsif on the ground that the three years began to run from the date of the decree passed in favour of the auction-purchaser and that it was the duty of the present appellant to have paid the amount then and not to have waited till the auction-purchaser pressed for execution and that the application was, therefore, barred. In that view it was not necessary to consider s. 48.

It is argued for the appellant that the judgment of the District Judge is wrong and that the starting point would be from the date when in execution of the decree he was compelled to pay the amount, because if for any reason the decree-holder did not execute his decree, there was no damage which the appellant could suffer. He could not then say that he has suffered damage because he had to re-pay any money which he got in satisfaction of the decree in the original suit. We think that the observations in *Ramireddi Venkata Appa Rao v. Lakoojee China Ayyanna* (1) support the argument of the appellant. At page 211* the learned Judges observe:

"When the sale is set aside, the decree-holder is liable to re-pay the purchase-money if called upon by the purchaser to do so, but not otherwise. His position in this respect is analogous to that of the bankers in the case of *Torab Ali Khan v. Nilruttun Lal* (2) who had paid out money to a wrong person: it was held that their cause of action against that person for recovery of the money did not arise before they were compelled to pay the true owner: till then it could not be said that they were damaged by the action of the defendants. 'Until the money was paid the plaintiffs did not suffer any loss. The mere demand by the heirs of Asgar Hossain (the real owner) did not give the plaintiffs a cause of action against the defendants, nor did

(1) 30 M. 209; 17 M. L. J. 194.

(2) 13 C. 155; 6 Ind. Dec. (N. S.) 602.

the institution of the suit. The demand might have been abandoned, or the suit dismissed.

"So here the judgment-debtor's action in getting the sale set aside did not injure the decree-holder until he was compelled to refund the purchase-money to the purchaser, and till then he had no right to call upon the judgment-debtor to pay his debt a second time."

We think that these observations apply with equal force to a case like the present where matters simply rested in a decree obtained against him which might or might not be executed. We think that the District Judge was wrong in holding that the mere passing of a decree cast on the appellant the duty of paying the money and applying for execution of his own decree on peril of his decree being barred, if he did not do so within 3 years.

Mr. Sambasiva Rao for the respondent did not seriously support the judgment of the District Judge on this question. He, however, raised two points and seeks to support the judgment on the other grounds. The first point raised is that O. XXI, r. 91 makes the sale absolute and binding if not set aside by the auction-purchaser within 30 days and that in the present case the auction-purchaser not having done so, the decree in his favour was a decree which was not a proper decree to have been passed, and that as his client was exonerated, it is open to him to take the point that the original satisfaction recorded stands good as the sale has not been set aside in 30 days as required by the Civil Procedure Code and the Limitation Act. He also argues that s. 48 is a bar to the present proceedings. We do not think that in a case like this where the subsequent application is for entirely different reliefs, it can be treated as a continuation of the original application. To do so would be to allow the party to treat any application made subsequently as a continuation of the original application.

If the respondent wants to contend that s. 48 is a bar to the present application as a fresh application for execution and not merely as a continuation of the previous application, the appellant would be entitled to contend that by reason of fraud or any other reason which the law allows, s. 48 would not apply.

As regards the contention that O. XXI, r. 91 bars any relief, the objection was not

raised in the Courts below. Having regard to the decisions in *Muthukumarasamia Pillai v. Muthusami Thevan* (3) and *Mundlapati Jagannadha Rao v. Rachapudi Basa-wayya* (4), we think the question is one which should be gone into as it is clear that unless the appellant can prove fraud or any other abuse of the process of the Court, the sale would become absolute and it will not be competent to the auction-purchaser to file a suit to recover the purchase-money. We think the proper course will be to set aside the order of the District Judge as it was passed on the grounds which we cannot support and remit the case to the District Munsif for decision as to whether O. XXI, r. 91 applies to the facts of the present case so as to bar the application for execution now presented and whether the present execution application is in time and not barred by s. 48, Civil Procedure Code. It will be open to the parties to adduce fresh evidence in support of their contentions on either of these points.

As regards costs, as the appellant has substantially succeeded and as we are sending back the case on a point which was not taken in the Courts below, the respondent will pay the costs of the appeal here and in the lower Appellate Court and the costs in the first Court will abide and follow the result.

V. N. V.

Case remanded.

(3) 100 Ind. Cas. 522; 25 L. W. 232; 52 M. L. J. 148; 38 M. L. T. 84; A. I. R. 1927 Mad. 394; 50 M. 639.

(4) 104 Ind. Cas. 614; (1927) M. W. N. 224; 26 L. W. 212; 53 M. L. J. 255; 39 M. L. T. 121; A. I. R. 1927 Mad. 835.

MADRAS HIGH COURT. SECOND CIVIL APPEAL No. 686 OF 1924.

October 13, 1927.

Present:—Mr. Justice Devadoss.

THALIYIL MANAYIL PARA-
MESHWARA TIRUMUMPA

— PLAINTIFF—APPELLANT

versus

VALIA NARAYAN TIRUMUMPA

— DEFENDANT—RESPONDENT.

Malabar Law—Nambudiris—Succession to self-acquisitions of male member—Wife and children or tavazhi, whether entitled to succeed in preference to tarwad—Custom excluding tarwad, proof of.

Their Lordships upheld a finding that there was no special custom among the Payyanoor Nambudiri families in Malabar by which the self-acquisition of a

male member dying intestate devolves upon his wife and children or on his *tavazhi* in preference to the *tarwad*.

Second appeal against the decree of the District Court, South Kanara, at Mangalore, in Appeal Suit No. 338 of 1922 presented against that of the Court of the District Munsif, Kasargad, in Original Suit No. 51 of 1921.

Mr. Sivarama Menon, for the Appellant.

Mr. Kutti Krishna Menon, for the Respondent.

JUDGMENT.—Mr. Sivarama Menon for the appellant wants to contest the correctness of the decision in *Govindan Nair v. Sankaran Nair* (1). That decision was followed by me and Mr. Justice Spencer in *Vazhayil Abuyakkar v. Kunhikuttyali* (2). I am not prepared at this stage to refer the appeal to a Bench on the ground that the decision in *Govindan Nair v. Sankaran Nair* (1) should be re-considered.

There is another point in the appeal which requires consideration. The parties belong to a class of Nambudiris who have adopted to some extent the Marumakkathayam Law. The appellant asked the lower Court to take evidence on the question of custom obtaining in the class of Nambudiri families to which the parties belong of the self-acquisition of a male member devolving upon the *tavazhi* and not upon the *tarwad* in case he dies intestate. This point was neither raised in the pleadings nor in the trial Court and the District Judge who heard the appeal did not think it necessary to call for a finding upon the alleged custom. Considering the fact that this class of Nambudiris has adopted to some extent the Marumakkathayam Law, the question is whether the whole of the Marumakkathayam Law is applicable to them. It is stated that the males in the families contract lawful marriages. Seeing that there is some departure from the ordinary incidents of Marumakkathayam Law in the case of these Nambudiris, I think it would be best in the interests not only of the parties to this litigation but in the interests of the whole of this class of Nambudiris to call for a finding on the alleged custom. The appellant will pay the costs of this inquiry in any event to the respondents, as he did not raise the point in the trial Court. The District Judge will,

(1) 2 Ind. Cas. 183; 32 M. 351; 6 M. L. T. 106; 19 M. L. J. 350.

(2) 74 Ind. Cas. 27; 16 L. W. 768; 31 M. L. T. 389; A. I. R. 1923 Mad. 153.

there, record a finding on the following issue:—

"Is there a custom in the Payyanoor Nambudiri families by which the self-acquisition of a male member dying intestate devolves upon his wife and children and in the absence of wife and children upon the *tavazhi* and not as in the case of ordinary Marumakkathayam families upon the *tarwad*."

Time for return of findings is two months and seven days for objections.

In compliance of the order of the Court calling for a finding upon the issue referred to the District Judge of South Kanara submitted the following

FINDINGS.—I am directed by the High Court to submit a finding on the issue:—

"Is there a custom in the Payyanoor Nambudiri families by which the self-acquisition of a male member dying intestate devolves upon his wife and children; in the absence of wife and children upon the *tavazhi*, and not as in the case of ordinary Marumakkathayam families upon the *tarwad*?"

* * * * *

I find, therefore, that it is not proved that there is a custom among the Payyanoor Gramam Nambudiri families by which the self-acquisition of a male member dying intestate devolves upon his wife and children.

The next question is whether there is a custom among the Payyanoor Gramam Nambudiris by which the self-acquisition of a male member dying intestate devolves on his *tavazhi*.

* * * * *

On the whole, I have no hesitation in holding that the plaintiff has not proved that there is a custom among the Payyanoor Gramam Nambudiris by which the self-acquisition of a male member dying intestate devolves upon his *tavazhi*, in the absence of his wife and children, I, therefore, find the issue remitted in the negative.

After the return of the finding of the lower Appellate Court the Court, delivered the following

JUDGMENT.—The finding is accepted and the second appeal is dismissed with costs including the costs incurred in the finding proceedings.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 84-B OF 1927.

August 10, 1927.

Present:—Mr. Hallifax, A. J. C.

RAMBHAU AND OTHERS—

DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

WAMAN RAO AND ANOTHER—

PLAINTIFF AND DEFENDANT No. 3—

RESPONDENTS.

Hindu Law—Joint family—Alienation by manager—Legal necessity—Actual enquiry by creditor, whether invariably necessary—Belief as to legal necessity, when sufficient—Absence of legal necessity—Money spent for use of family—Loan, whether binding on family.

In order to make an alienation by the manager of a joint Hindu family, binding on the members, it is not necessary in every case to prove actual enquiry by the creditor as to whether there was legal necessity for it: it would be sufficient if it is proved that the creditor had the belief that there was such necessity provided that it was based on information that could reasonably give rise to such belief, whether that information was obtained by direct or indirect enquiries or in any other way. The question of enquiry into the necessity, or of reason to believe in its existence, can only arise when there is no proof of its existence or proof that it did not exist; then the lender is covered by proof, that he believed it to exist even if it did not. But when the lender is familiar with all the circumstances of the family to which the money was lent, the only way in which the family could be made liable in such a case would be by proof that the necessity did exist. [p. 657, col. 2]

Even in the absence of proof of actual existence of necessity the family would be liable to re-pay the loan, if it is proved that the loan was taken for the family and spent for it, irrespective of the question whether the person borrowing the loan had or had not the authority to borrow it. [ibid.]

Appeal against a decree of the District Judge, Amraoti, dated the 11th February, 1927, in Civil Appeal No. 119 of 1926.

Mr. V. Bose, for the Appellants.

JUDGMENT.—It has been found, and it is beyond all possibility of doubt, that Bhaurao was the manager of the joint Hindu family consisting of himself and the appellants and that they knew he was dealing with the plaintiff and everybody else and was borrowing money from the plaintiff in that capacity. Apart from the false allegation that this was not so, the pleas put forward for them are that there was no necessity for the borrowing, as the family had a sufficient income for its needs and the plaintiff did not satisfy himself by proper enquiries that there was any such necessity.

In a large number of such cases, if no actual necessity for borrowing is proved, the

lender can have had no reason to believe in its existence unless he made enquiries from the borrower at, or shortly before, the time the loan was made. From this the idea has arisen, and is now very common, that it is necessary to prove in every such case, that the lender formally asked the borrower on each occasion whether the money was really required or not, and he replied that it was and explained how and why. Such an enquiry would ordinarily indicate that there had been no proper enquiry at all. The confusion arises out of substituting "enquiry" for "reasons to believe." The matter in issue is not the enquiry but the belief based on information that could reasonably give rise to it, whether that information was obtained by direct or indirect enquiries or in any other way.

But in the present case the lender was familiar with all the circumstances of the family to which the money was lent, and he knew whether the necessity for borrowing arose or not. The question of enquiry into the necessity or of reason to believe in its existence can only arise when there is no proof of its existence or proof that it did not exist; then the lender is covered by proof that he believed it to exist, even if it did not. But he cannot possibly prove that here because, if it did not exist, he was well aware that it did not. The only way in which the family could be made liable in such a case would be by proof that the necessity did exist. As to that it has been found in the lower Appellate Court that the family was in chronic need of cash, and I can see no reason for disturbing that finding even if I were allowed to do so.

But even the question of the actual existence of the necessity does not arise. If a person borrows money for me, without my authority and even without my knowledge and though I have plenty of money of my own already, and I take the money from him and spend it myself, I am surely bound to re-pay it to the lender. That is made clear in more than one section of the Contract Act. Now it is beyond doubt that the whole of the money borrowed by Rambhau for the family was spent on it or by it, whether on necessities or luxuries or even debaucheries. That fact has been practically admitted all through. The only approach to a denial of it is to be found in a pleading in which the word "benefit" appears at the end, though the

meaning of the whole plea is clearly that the family did not benefit by the borrowing, not that it did not receive the money. Even if it had been pleaded that the family did not receive the money, there is no evidence to that effect, and the fact that the manager for a long time openly borrowed the money in its name in the same village, of which nearly a half is now admitted to have been spent on the family, is proof that it did.

But even if we accept the impossible suggestion that Bhaurao went on all that time borrowing money openly in his own village in the name of his family, and spent more than half of it on himself, the appellants are little better off. Their actual plea, if any such plea was ever taken, was, of course, that Bhaurao spent the whole of the money on himself, but it is now admitted that the plaintiff has proved, without the help of the absence of any denial by the appellants, that the family did receive the benefit of a sum of Rs. 2,160, expended on wheatseed, the building of a house, the payment of lease money and the assessment on their land. That leaves Rs. 2,976 shown as borrowed for "cultivation and house-hold expenses" which according to the appellants, Bhaurao spent on himself and they never saw. But Bhaurao re-paid Rs. 2,125, and there is no more evidence of that having come out of family funds than of the Rs. 2,976 having gone into them, so that all that is left of the sum that Bhaurao spent on himself is Rs. 851, and the balance due by the appellants on the account would be Rs. 1309 instead of the Rs. 2,160 the plaintiff says it is.

The appeal is dismissed without notice to the respondents.

G. B. D.

A. N. A.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 396 OF 1926.

November 24, 1927.

Present:—Mr. Findlay, J. C.

MUNNA SINGH RAJPUT—PLAINTIFF—
APPELLANT

versus

NARAIN SINGH AND OTHERS—DEFENDANTS
—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Written document—Surrounding circumstances, admissibility of, to arrive at true meaning.

Section 92 of the Evidence Act does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances by going behind a written instrument. [p. 659, col. 1.]

Oral evidence is admissible to prove that although a document is executed in favour of two persons one of them is solely entitled to the amount due under the document and is, therefore, competent to give a valid discharge. [p. 660, col. 1.]

Second appeal against the decree of the District Judge, Nagpur, dated the 10th April, 1926, in Civil Appeal No. 248 of 1925.

Mr. D. T. Mangalmurti, for the Appellant.

Messrs. K. P. Vaidya and M. R. Indurkar, for the Respondents.

JUDGMENT.—The facts of this case are fully stated in the judgment of the first Court, by which the plaintiff's claim was dismissed. The learned District Judge, in dismissing the appeal, held that it was permissible in the present case to prove that *Musammatt* Gendibai alone was entitled to recover the amount in deposit under the receipt (P-1), and also dismissed the present plaintiff's appeal. He has now come up to this Court on second appeal.

The first matter for decision is whether, in view of the terms of P-1, it was permissible for the lower Courts to hold that Gendibai alone without the present plaintiff was entitled to give a complete discharge for the amount in question. There has been some argument in this Court to the effect that the words of the receipt do not necessarily imply that Gendibai and the plaintiff were co-promisees; I will assume, however, that this was so. It has been urged strongly on behalf of the appellant that, in view of s. 92 of the Indian Evidence Act, it was not permissible for the defendants to prove, or for the Courts to hold, that Gendibai could give alone a valid discharge as regards the amount covered by P-1. Section 92 of the Evidence Act only lays down that in

the case of a written contract, "no evidence of any oral agreement or statement shall be admitted, as between the parties to" the contract "for the purpose of contradicting, varying, adding to, or subtracting from, its terms." In the case of consideration mentioned in such a written document, it is open to the party contesting it to show that there was no consideration, or that the consideration was different from that described in the contract. In the present case, the position of the defendants is that the present appellant joined in the execution of the document at his own request and that he was allowed to do so, being the husband of Gendibai. Their Lordships of the Privy Council in *Baijnath Singh v. Vally Muhammad Hajee Abba* (1) have remarked as follows:

"It is true, as was laid down in *Balkishen Das v. Legge* (2) that under s. 92 of the Indian Evidence Act, as between the parties to an instrument, oral evidence of intention is not admissible for the purpose, either of construing deeds or of proving the intention of the parties. But in the view their Lordships take of the circumstances of this case, the section and the ruling have no application to it.

"The preamble to the Evidence Act recites that 'it is expedient to consolidate, define and amend the Law of Evidence', and s. 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. To these circumstances their Lordships will briefly advert."

The position in the present case seems to me to be precisely analogous to that adumbrated in the second passage from their Lordships' judgment just quoted. If the findings of the lower Courts on the questions of fact involved stand, viz., that this money was, in reality, Gendibai's and that at the time her husband was fully aware of this and never attempted to contest the fact, then it seems to me obvious that, in the circumstances of the present case, it is open to this Court to take into consideration the evidence which has been produced on behalf of the defendant—version

(1) 86 Ind. Cas. 332; 3 Rang. 106 at p. 125; A. I. R. 1925 P. C. 75; 48 M. L. J. 339; 2 O. W. N. 279; 27 Bom. L. R. 787; 3 Pat. L. R. 227; L. R. 6 A. (P. C.) 57; 30 O. W. N. 242 (P. C.).

(2) 27 I. A. 58, 22 A. 149; 4 O. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601; 9 Ind. Dec. (S. S.) 1130 (P. C.).

of the circumstances under which P-1 was executed. I do not think there is any necessity to have recourse, as the learned District Judge did, to the analogy of a *benami* transaction. The analogy may exist, but, at the best, it is a vague and imperfect one. It has, however, been urged before me that the lower Appellate Court was incorrect in holding that the money in question was in reality Gendibai's own property. This money, it has been argued, represents the sale-proceeds of the field of Gendibai's father. Gendibai has a son alive and she is now residing with the plaintiff. It is suggested, therefore, that she has only a life-interest in the money and that, in the circumstances, it is incorrect to hold that the money was Gendibai's sole and absolute property.

A further argument has also been adduced that, in any event, Gendibai having allowed her husband to join as a promisee in the note (P-1), the presumption arises that she had made him a gift *pro rata* of the amount concerned, or had constituted him, so to speak, a partner in the money concerned.

Neither of these arguments seems to me to be of any avail in the present case. We have in the first Court's judgment a careful finding of fact as regards the circumstances under which the present plaintiff executed the receipt, dated the 7th November, 1923, (3 D-1). The astounding story told by the plaintiff in this connection only needs to be read to be disbelieved, although it is not more obviously false than various other pleas of fact offered by him, on which the Subordinate Judge has animadverted with well-deserved severity. Holding, as I do, that this document was executed voluntarily, it is perfectly obvious that the plaintiff cannot now be heard to say that the money was his under the ordinary principles applicable to a Hindu woman, or by gift, or by partnership. Even the very receipt, dated the 21st May, 1923, (1 D-1), was also attested by him. It has, indeed, been suggested on behalf of the appellant that the mere fact that the plaintiff executed the document (3 D-1) implies that he had been interested in the property concerned. I am unable to accept this suggestion. Considering the relations existing between a Hindu husband and a Hindu wife, third parties may well take the precaution of obtaining the husband's

signature on documents like those we are concerned with, and the fact of the appellant's signature being taken leads, in my opinion, to no necessary presumption that he actually had a title to the property in question.

The case, in short, is, in my opinion, clearly one in which, on the principle laid down by their Lordships of the Privy Council in the case quoted above, the Court is bound to go behind the written terms of P-1 and to elucidate the real facts of transaction. On the findings of fact arrived at by the lower Courts—findings which there is not a shadow of ground for disturbing it seems to me inevitably to follow that, in the peculiar circumstances of this case, Gendibai must be held to have been capable of giving a valid discharge for the debt as she professed to do. This being so, the plaintiff-appellant is clearly out of Court and I need hardly add, that, from the equitable point of view, he has never had a shadow of case. The appeal fails and is dismissed. The appellant must bear the respondents' costs. Costs in the lower Courts as already ordered.

G. R. D.

A. N. A.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 154 OF 1927.

October 29, 1927.

*Present:—Mr. Hallifax, A. J. C.*MANSARAM AND OTHERS—DEFENDANTS—
APPELLANTS*versus*

LUNGRAJI—PLAINTIFF—RESPONDENT.

"Ghat"—Long user—Presumption—Persons in use, when liable to be ejected.

The existence and regular use of a "ghat" for a very long time is conclusive proof of the fact that it had its origin in an express grant and the persons in regular use must be held to be at least licensees of the land covered by the ghat, and cannot be ejected by the *malguzar*, unless it be for using it for any other purpose than as a *ghat*.

Second appeal against the decree of the Additional District Judge, Betul, dated the 27th of January, 1927, arising out of the decision in Civil Suit No. 75 of 1926, in the Court of the Sub-Judge, Second Class, Multai, dated the 30th September, 1926.]

Mr. S. A. Ghadge, for the Appellants.

Mr. S. B. Gokhale, for the Respondent.

JUDGMENT.—The learned Judges of the two lower Courts may have had clear ideas of what the "ghat" to which this case refers is like, but it is impossible to get anything but a very vague idea of it from the record. From explanations given in this Court it appears to consist mainly of two stone walls in the bed of a river, parallel to each other and to the stream, about ten feet long and five feet apart, with perhaps lower stone walls at each end. The stones are not cemented or joined in any way, but the structure is permanent; a stone or two may require replacing every year, but otherwise it is unaffected even by heavy floods.

The finding of the lower Appellate Court that the *malguzar*, who was a resident of the village till 1911, knew nothing about this "ghat", which has been in existence and in regular use every year for at least sixty years, is impossible, and it is disproved by the plaintiff's own evidence. In his plaint filed in February, 1926, he made the positive statement that the "ghat" had been constructed in the previous September, which was untrue to his own knowledge. The actual facts are apparent from the evidence of the *Kotwar*, Jairam Mahra (P. W. No. 2) and indeed most of the other witnesses.

The facts are these. For some time before September, 1925, the *malguzar* and most if not all of the other villagers have desired that the "ghat" should be removed for the convenience of a *sadhu* who had come to live near it or wished to do so. In September, 1925, which is the time the *malguzar* falsely states to be that of the construction of the "ghat", there was a *panchayat* in the village at which it was decided that the defendants would have to go, to make room for the *sadhu*. The defendants, however, refused to go, and the *malguzar* filed this suit; apparently on behalf of the villagers, preferring untruth to the truth as a basis for it.

The existence and regular use of the "ghat" for such a long time proves conclusively that it had its origin in an express grant of permission from the *malguzar*. On that it might even be possible to say that the defendants are occupancy tenants of that part of the bed of the river covered by their "ghat", paying no rent for it, though the definition of "tenant" in the Tenancy Act was certainly meant to refer only to land held and used for agriculture.

or purposes subservient to it. But anyhow they are at the least licensees of that land, with a right granted to them by the owner to remain in possession of it free of rent as long as they use it as a "ghat" which is practically the same thing.

The decree of the lower Appellate Court will be set aside and that of the first Court dismissing the suit will be restored.

The plaintiff will be ordered to pay the whole of the costs of both parties in all three Courts. The learned Judge of the first Court was guilty of ordering that a Pleader's fee of one rupee should be paid. The Pleader's fee in this Court will be thirty rupees.

G. R. D.

Decree set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE No. 7
OF 1927.

December 8, 1927.

Present:—Mr. Hallifax, A. J. C., and
Mr. Ghulam Mohiuddin, A. J. C.

COMMISSIONER OF INCOME-TAX—
APPLICANT

versus

MOHOMAD NURULLA KHAN—NON-
APPLICANT.

Income Tax Act (VII of 1918), s. 4—Income from villages in Nizam's Territory brought into Berar, whether taxable.

Income derived from rents realized from tenants of revenue-free villages situated in Nizam's Territory and brought into Berar is taxable under the Income Tax Act.

Reference made by the Commissioner of Income-Tax on 27th January, 1927, under the Income Tax Act of 1920.

Mr. D. N. Chaudhury, R. B., for the Applicant.

Messrs A. V. Khire and W. B. Pendharkar, for the Non-Applicant.

ORDER.—The question of law referred by the Commissioner of Income-tax is stated as follows:

"Whether the rents realized from the tenants of Kosgaon and Dhotra villages situate in the Dominions of His Exalted Highness the Nizam and brought into Dewalghat in Berar are taxable under the Income Tax Act, in view of the

fact that these villages form part of one single *jagir* consisting of four villages which *jagir* was granted revenue-free to the ancestors of Nawab Mohammad Salamullah Khan, Khan Bahadur, O. I. E., and in view of the fact that owing to distribution of territories, two of them, i. e., Kosgaon and Dhotra, happened to go to the Nizam's Territory."

The last phrase is an incorrect statement of fact, as the two villages did not happen to go to the Nizam's Territory but happened to stay there, while the other two happened to go to Berar. But neither that nor any of the other facts stated has anything to do with the question of the exemption from Income-tax of the income derived from the villages and brought into Berar, nor has any other fact or consideration been stated which can be regarded as even relevant to it. The answer is that the income in question is taxable under the Income Tax Act.

G. R. D.

Reference answered.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 561 OF 1926.

November 15, 1927.

Present:—Mr. Kinkhede, A. J. C.

SANDU—APPELLANT

versus

GOPIKA BAI—RESPONDENT.

C. P. Tenancy Act (I of 1920), s. 37—Lessee of malik makbuza—Acquisition of occupancy right—Omission of entry of such right in Settlement Record, effect of.

A person holding the land of a *malik makbuza* as a lessee since before the last Settlement, is not entitled to the status of an occupancy tenant under s. 37 of the C. P. Tenancy Act of 1920, unless he is recorded as an occupancy tenant in that Settlement.

Second appeal against a decree of the Additional District Judge, Khandwa, in Civil Appeal No 43 of 1926 decided on 11th August 1926.

Mr. W. R. Puranik, for the Appellant.

Mr. M. B. Niyogi, for the Respondent.

JUDGMENT.—I think under s. 67 of the C. P. Land Revenue Act, 1917, the Settlement Officer was competent to record the plaintiff as the *malik makbuza* of the land in suit. The defendant was not recorded an occupancy tenant in the papers of the

Settlement of 1913 which preceded the Tenancy Act of 1920, but on the contrary he is recorded as a sub-tenant. He has, therefore, not acquired the status of occupancy tenant under s. 37 of the C. P. Tenancy Act of 1920. The appeal, therefore, fails and is dismissed with costs,

G. R. D.,

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL PETITION No. 81
OF 1927.

December 10, 1927.

Present:—Mr. Hallifax, A. J. C.

KAMOD SINGH—APPLICANT

versus

KHEMKARAN—NON-APPLICANT.

Practice—Pleader's fees—Method of calculation.

The proper Pleader's fee to be allowed in a suit is not the sum calculated to the last pie on the valuation of the suit according to the rates stated in the rules made under the Legal Practitioners Act, but is what is actually paid or what may reasonably have been paid, whichever is less. The rules are a good general guide to the sum that may have reasonably been paid, but no more.

There are several factors to be considered in fixing the Pleader's fee, in addition to the valuation of the suit, and even that must be its real value, not the arbitrary or artificial valuation which is often sufficient for all other purposes.

Reference made by the District Judge, Ohhindwara, dated the 25th November, 1927.

ORDER.—The use of Latin words in legal matters is seldom more convenient than sticking to one or other of the three languages which are prescribed for use in the Courts of the Central Provinces and Berar, and then only slightly, but it gives rise to many inconveniences in many cases. Apart from that, it is hardly consistent to speak of this Court taking action of its own motion in moving it to do so by the submission of records with the suggestion that the taking of that action should be considered.

The idea underlying the application made in the District Judge's Court is that the only Pleader's fee that can be allowed as between party and party is the sum calculated to the last pie on the valuation of the suit according to the rates stated in the rules made under the Legal Practitioners Act. In most cases that was a wholly improper sum to allow under the old rules,

and it is so in many cases under the amended rules. The proper sum is what was actually paid or what might reasonably have been paid, whichever is less. The rules are a good general guide to the sum that might reasonably have been paid, but no more.

The fee allowed in the District Judge's decree was Rs. 152 8, and that calculated according to the rules then in force on the stated valuation of the property in dispute was Rs. 52 8. It was by accident that the common absurdity was avoided of a Judge solemnly stating in the decree that the Pleader's fee which, in his opinion, was paid or ought to have been paid was a sum ending in a number of pies not even making an integral number of pice. It is, however, obvious that neither sum was the proper sum to allow, and indeed that the learned Judge who passed the decree never considered it was or thought about the matter at all. There is then no more reason for reducing the Rs. 152 8 to Rs. 52 8 than for raising the Rs. 52 8 to Rs. 152 8. Indeed if any change ought to be made, the very first would be the removal of the odd Rs. 2 8 at the end.

There are several factors to be considered in fixing the Pleader's fee, in addition to the valuation of the suit, and even that must be its real value, not the arbitrary or artificial valuation which is often sufficient for all other purposes. In this case the dispute was over the right to separate possession of a half of 74 67 acres of land, and the Pleader's fee allowed in this Court was Rs. 200. Before any amendment of the decree of the lower Appellate Court can be possible it must be shown that the sum of Rs. 152 8 is more than was paid or might reasonably have been paid by the plaintiff to his Pleader in that Court, not merely that the arithmetical process by which the Judge nominally (and his Reader actually) arrived at that sum was wrongly applied.

Even if there were any apparent cause for altering the decree, that could probably be done only in a review, and an application for that was time-barred when the present application was presented. But there is no such cause at all, and I decline to interfere.

G. R. D.]

Application rejected.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 13 of 1926.

September 21, 1927.

Present:—Mr. Prideaux, A. J. C.

Seth NAZARALI—APPLICANT

versus

BALA AND ANOTHER—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 46
—Attachment of money—Order by Judge having no jurisdiction over place of attachment, whether legal
—Railway contractor, payments to be made to, whether attachable—Prohibitory order to Station Master, legality of.

No prohibitory order for attachment of money can be made under O. XXI, r. 46 of the Civil Procedure Code unless the Judge issuing such order has jurisdiction over the place where the attachment is to be made.

Payments to be made to a Railway contractor for work done by him are not attachable under the rule as it is neither the salary nor the allowance of a servant of the Railway Company. Nor is the Station Master of the place where the contract work was done, the proper person to whom such an order can be issued.

Revision of an order of the Small Cause Court, Khandwa, dated the 6th March, 1926, in execution proceedings arising out of Civil Suit No. 414 of 1925, dated the 17th March, 1925.

Mr. W. R. Puranik, for the Applicant.

Mr. A. V. Khare, for the Non-Applicants.

ORDER.—The applicant in this case obtained a decree against one Bala for Rs. 218-6-6 including costs. Bala was a contractor for the G. I. P. Railway Company. The applicant applied for execution to the Small Cause Court, Khandwa, and asked for a prohibitory order for attachment of certain money due to Bala by the G. I. P. Railway Company. The applicant obtained the order and it was sent to the Chief Auditor, Bombay, and to the Loco Traffic Manager, Nagpur. The Bombay Office returned it on 27th March, 1925, pointing out, and rightly so, that the attachment obviously fell under O. XXI, r. 46, Civil Procedure Code, and should come from a Judge having jurisdiction in Bombay. Then the prohibitory order was served on the Station Master, Khandwa, obviously a wrong person to address such a document to. The execution proceedings have been struck off as wholly infructuous.

It is fairly obvious that unless the applicant can bring the prohibitory order under O. XXI, r. 48, Civil Procedure Code, he has no case. I am certain that the property in this case, which belonged to a

Railway contractor and consisted of payments to be made to him for work done, is neither the salary nor the allowance of a servant of the Railway Company. It is also clear that the Station Master, Khandwa, was not the proper person to address to in the matter. On the facts I have no hesitation in finding that the execution proceedings have been properly disposed of. I accordingly dismiss this application with costs. The applicant will pay the non-applicants' costs. I fix Pleader's fees at Rs. 15.

G. R. D.

A. N. A.

*Application dismissed.***NAGPUR JUDICIAL COMMISSIONER'S COURT.**

FIRST CIVIL APPEAL No. 106 of 1926.

November 11, 1927.

Present:—Mr. Findlay, J. C.

VIDIABAI AND OTHERS—DEFENDANTS—

APPELLANTS

versus

Mandir Shri SHEOJI THROUGH Sarbharakar, JAIRAMGIR—PLAINTIFF—

RESPONDENT.

Religious endowments—Idol—Property dedicated to idol—Management vested in panchas—No provision for appointment of substitute on death of pancha—Death of pancha—De facto manager's right to sue—Trusts Act (II of 1882), s. 76.

Where a deed dedicated certain property to an idol and appointed a certain number of panchas for the management of the property but failed to make any provision for the appointment of a new pancha if any of the panchas died and did not lay down that others would be incapable of acting unless a fresh one was appointed:

Held, that the *de facto* manager had a right to file suits on behalf of the idol relating to the management of the property dedicated to the idol. [p. 664, col. 1.]

Sheo Ramji v. Sri Ridhnath Mahadeoji (1), followed.

First appeal against a decree of the Sub-Judge, First Class Seoni, dated the 26th July, 1926, in Civil Suit No. 15 of 1926.

Mr. W. R. Puranik, for the Appellants.

Messrs. M. R. Boble and M. D. Khandekar, for the Respondent.

JUDGMENT.—The plaintiff, idol of Mandir Shri Sheoji of Mauza Mohgaon (Seoni), filed the present suit against the three defendants-appellants for a declaration that it was entitled to have the partition of the said village effected and to have separate possession of a 4-annas share thereof together with all rights appurtenant thereto, and the defendants have now

come up to this Court on appeal. The pleadings of the parties and the facts of the case are fully stated in the judgment of the lower Court and I proceed at once to dispose of the questions which have been agitated in this appeal.

On the appeal coming on for hearing, the Counsel for the appellants did not press the objection with regard to limitation in view of the fact that the order, dated the 26th May, 1922, of the Deputy Commissioner (*cf.* copy P-4) shows that the latter officer considered he was acting under s. 165 of the Land Revenue Act.

The first point pressed on behalf of the appellants was that Jairamgir, as the *sarbarakar* of the temple, could not alone file the present suit. In this connection, reference has been made to the so-called trust deed and it is suggested that there must be four *panchas* duly appointed before the present suit could be filed by them. I am unable, however, to accede to this proposition. The deed in question is perhaps an irregular and faulty one. *Musammam* Sonabai gifted the property to the idol but remained manager during her life. Then the four *panchas* named were to manage after her death, but the terms of the deed clearly imply that the deity was to be the owner and that the *panchas* were to be mere managers. The Mutation Record of 1912 (P-2) bears out this view and it is perfectly clear that Jairamgir has been *de facto* manager on behalf of the idol. In those circumstances, I am in agreement with the view taken in *Sheo Ramji v. Sri Riddhnath Mahadeoji* (1) and am of opinion that Jairamgir had power to file the present suit in the form it was filed. There was no distinct provision in the deed constituting the so-called trust that when any *panch* died, another was to be appointed in his place. Even if the *panchas* were to be given the position of trustees—which is extremely doubtful in view of the terms of the deed—s. 76 of the Trusts Act would be a sufficient answer to the appellants' allegation on appeal in this connection. The trust deed does not lay down that, if any of the trustees die, the others shall be incapable of acting until a fresh trustee is appointed. On the contrary, the only provision in this connection laid down therein is that, if all the

panchas are absent (or presumably dead), the existing King should take over the management and make proper arrangements. The first contention urged on appeal, therefore, fails.

The next contention urged is that Sonabai had owned a 5-anna 4-pie share of the village and had gifted the 4-anna share without *khudkasht* to the temple and that the remaining 1 anna 4 pie share with *khudkasht* had been given to Parasadgir and has now fallen into the share of the present defendants appellants. In other words, it is urged (*cf.* the *jamabandis* D-3, D-4, and D-5) that whatever *khudkast* Sonabai had at the time of the gift to the temple, did not pass thereto, it being admitted at the same time that, if any *khudkasht* land was subsequently created in respect of the 4-anna share, that would pass therewith.

As regards the *sir* land, similarly it is urged that the plaintiff-respondent was not entitled to claim partition with respect to any *sir* lands, as these exclusively belonged to the defendants. In the absence of any distinct pleading or proof that there has been a partition of *sir* and *khudkasht* lands and that these are in the exclusive possession of the defendants-appellants, I do not think this contention can succeed. Even the defendants' witnesses (*cf.* the evidence of D. W. No. 1, Madangopal) professed ignorance as to whether there had been any partition of *sir* and *khudkasht* lands, while Laxmi Chand (D. W. No. 2) definitely said that there had been none. This question, therefore, seems to me to be essentially one for the Revenue Officer to determine in the course of the partition; *cf.* ss. 137 and 175 of the Land Revenue Act. It may conceivably be found that there is no *sir* and *khudkasht* land appurtenant to the share, but *prima facie*, on the record, as it stands, the partitioning officer must have power to determine whether this is so or not. The judgment of the lower Court is somewhat ambiguous in its para. 7 on this point because, in one part thereof, it refers to the fact of there being no bar to the division of the proprietary rights in the *sir* land appurtenant to the 4-anna share, while, in a later part, almost contradictory statements are made as to whether or not plaintiff is entitled to cultivating rights in *sir*. The decree as given in the terms

(1) 71 Ind. Cas. 480; 45 A. 319; 21 A. L. J. 148; A. I. R. 1923 All. 160.

it is, viz., "plaintiff is entitled to have the partition of the entire village effected and to have separate possession over its 4-annas share along with *sir* and *khudkasht*, land appurtenant to that share", is perhaps a faulty one in that it gives rise to the assumption that there is *sir* and *khudkasht* land appurtenant to the share in question. Personally, I think this question must be left an open one for the partitioning officer to determine and it would be premature for the Civil Court to determine it at this stage. Any misunderstanding, which might arise in this connection, will be obviated if the words "if any" are inserted between the words "land" and "appurtenant" in the passage from the decree just quoted. This modification is perhaps unnecessary, but anyhow it is a case of erring on the side of safety.

I accordingly order that the decree be amended accordingly by the addition of words given above. To all intents and purposes, the present appeal has, however, failed and the appellants must bear the respondent's costs therein. Costs will be borne in the lower court as already ordered.

G. R. D.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 333 OF 1927.

December 3, 1927.

*Present:—*Mr. Ghulam Mohiuddin, A. J. C.

KALIKRAM—ACCUSED—APPLICANT
versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 367, 424—Appellate Court—Judgment not giving points for determination or reasons, legality of.

A judgment of an Appellate Court which does not discuss the points urged in the memorandum of appeal and without giving any reasons, holds that a conviction is correct, is not a legal judgment under s. 424 read with s. 367 of the Criminal Procedure Code.

Jairam v. Emperor (1), followed.

Application for revision from a judgment of the Magistrate First Class, Bilaspur, in Criminal Appeal No. 220 of 1927, passed on the 31st October, 1927.

Mr. G. R. Deo, for the Applicant,

ORDER.—Applicant Kalikram Kotwar of Bagnipali was taken to Bilaigarh by Head Constable Muhammad Mobin who

had gone to Bilaigarh in the month of June 1927, to hold an enquiry, in an offence under s. 457, Indian Penal Code. Subaran was staying at the house of Puran, when her ornaments and clothes were stolen. During Police investigation, applicant told Puran that as theft was committed in his house, he would be troubled by Police, and demanded Rs. 10 to save him, saying that he was heard by Police. Puran borrowed Rs. 6 from Likhiram and paid the amount from Budhwa. Puran was taken by Head Constable to Debhra, and Head Constable Muhammad Mobin says that Puran informed him a day after his house was searched, that Kalikram had taken Rs. 6 from him to save him as Police had suspected him. The matter was brought to the notice of the Sub Inspector of Police who made an enquiry about it in the same month, and, after getting necessary sanction, filed this complaint on 30th August, 1927. The applicant has been sentenced to four months' rigorous imprisonment and his appeal has been rejected.

The first ground which has been urged before me is that the appellate judgment, not being in accordance with s. 424 read with s. 367, Criminal Procedure Code, is not legal and *Jairam v. Emperor* (1) is cited in support of this point. I have carefully read the judgment of the lower Appellate Court and the memorandum of appeal filed in that Court on 21st October, 1927, by Mr. Katireat. The judgment of the lower Appellate Court consists of two paragraphs, the first one gives a summary of the facts of the case and the second one consisting of about five lines, without discussing the points urged in the memorandum of appeal and without giving any reasons holds that the conviction is correct. The judgment is not a legal judgment as it does not contain the point or points for determination raised in the memorandum of appeal, the decision thereon and the reasons for the decision. I, therefore, set aside the order of Mr. S. S. Parkhe, Magistrate, First Class passed on 31st October, 1927, dismissing the appeal, direct that he do re-hear the appeal and dispose of it according to law.

G. R. D.

Order set aside.

(1) 15 Ind. Cas. 975; 8 N. L. R. 84; 13 Cr. L. J. 559.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 41-B. OF 1926.

August 29, 1927.

Present:—Mr. Macnair, A. J. C.

BALKISANDAS—APPLICANT

versus.

JAINARAYAN AND ANOTHER—

NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. V, r. 17, O. IX, r. 13—Ex parte decree—Application to set aside decree—Proper service—Burden of proof—Summons affixed to house—Names and addresses of witnesses not given in report—Service, whether proper—Burden, whether shifts—Agent, whether can refuse to accept service.

In proceedings to set aside an *ex parte* decree on the ground that the defendant was not served, the burden of proof of non-service lies on the defendant, if the report of the process-server is according to law. But, under O. V, r. 17 of the Civil Procedure Code it is compulsory that names and addresses of persons, if any, in whose presence the copy of the summons is affixed must be given and if the report of the process-server does not give such names, it is not in accordance with law and does not furnish *prima facie* proof of due service, and it is for the plaintiff to prove that the defendant was duly served.

An agent is not invariably entitled to refuse summons.

In the matter of the Petition of Luchmee Chund (1), distinguished.

Application for revision against an order of the Judge, Small Cause Court, Mehkar, dated the 12th December, 1926, in Miscellaneous Case No. 37 of 1925.

Mr. A. V. Khare, for the Applicant.

Mr. M. R. Pathak, for the Non-Applicants.

ORDER.—The applicant was the defendant in a Small Cause Court suit. On the date fixed for hearing he did not appear. There was a report made by the process-server that his agent had refused to accept the summons and that a copy of the summons had then been duly affixed to the applicant's house. It was held that he was duly served and the case proceeded *ex parte*. The applicant, when he learnt that an *ex parte* decree had been passed against him, applied to the trial Court and produced his agent who deposed that the summons had not been offered to him. The learned Judge disbelieved the evidence of the agent and remarked that the applicant should have called the process-server. The Judge refused to set aside the *ex parte* decree and the applicant applies in revision to this Court.

It is first urged that the non-applicants ought to have proved that the service was proper and should have called the process-server. Had the report of the process-server

been entirely in accordance with law, it would have been for the applicant to prove that he had not been served; but there was a serious defect in the report of the process-server. Order V, r. 17, Civil Procedure Code, lays down that the report shall contain the name and address of the persons, if any, in whose presence the copy was affixed. The applicant is a merchant of Khamgaon, and there must have been persons present at the time of service. The report does not contain the name of any witness and is thus not framed in accordance with law. It does not, in my opinion, furnish *prima facie* proof of due service and it was for the non-applicants to prove, by examining the process-server, that the applicant had been duly served. I direct that the question whether the *ex parte* decree should be set aside should be re-considered in the light of these remarks.

It has also been urged that the agent was not empowered to accept service of summons.

But it appears clear that he was so empowered. Another argument is that an agent, if so empowered, has an option to refuse summons. Reliance is placed on *In the matter of the Petition of Luchmee Chund (1)*. But r. 17 of O. V, of the First Schedule to the Civil Procedure Code lays down the procedure to be followed if an agent of the defendant, empowered to accept summons, refuses to do so: eventually the Judge may declare that the summons has been duly served or order such service as he thinks fit. It is quite clear from this rule that an agent is not invariably entitled to refuse summons. All that the learned Judges of the Calcutta High Court held was that, in the particular circumstances, the agent might be justified in refusing to accept summons: it may be noted that the defendant was a private gentleman and the agent was a Calcutta firm. In the present case the facts are very different and the Court rightly considered that the agent was bound to accept service.

Costs in this case will be costs in the application to the Small Cause Court. Pleader's fee Rs. 20.

G. R. D.

Order set aside.

(1) 8 C. 317; 4 Ind. Dec. (N.S.) 203.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 349 OF 1927.

November 4, 1927.

Present :—Mr. Findlay, J. C.

CHARLES HENRY SMALLEY—

PETITIONER

versus

Mrs. OLIVE MURIEL SMALLEY

—OPPOSITE-PARTY.

Divorce Act (IV of 1869), s. 11 (2)—Proceedings for dissolution of marriage—Dispensing with name of co-respondent, grounds for—Discretion of Courts in India—Unwilling to take the risk, whether sufficient ground.

The Indian Courts do not have the same discretion in divorce proceedings to dispense with the naming of a co-respondent as the English Courts have. The three grounds mentioned in s. 11 of the Divorce Act are the only ones on which leave can be so granted to proceed with a petition for dissolution of marriage.

The mere fact that the petitioner has suspicions against two persons and, in spite of efforts and inquiry, has been unable to obtain substantial proof against either of them and that he is, therefore, reluctant to take the risk of making them co-respondents is not a sufficient ground for dispensing with the naming of the co-respondents under s. 11 (2) of the Divorce Act.

Petition against an order of the District Judge, Nagpur, dated the 29th August, 1927, in Civil Suit No. 3 of 1927.

Dr. Sir H. S. Gour, Kr., for the Petitioner.

ORDER.—The petitioner, Charles Henry Smalley, applies for revision of an order of the District Judge, Nagpur, dated 29th August, 1927, in Civil Suit No. 3 of the same year. By this order, the District Judge declined to issue any citation or to proceed further on Mr. Smalley's petition for dissolution of marriage. In para. 5 of the petition in the lower Court it was alleged that Mrs. Smalley, the respondent, had committed adultery in Darjeeling in the year 1926 with a person unknown to the petitioner. The learned District Judge further examined Counsel for the petitioner with reference to the fact of any co-respondent having been cited, and accordingly the said Counsel is said to have stated orally that the petitioner was aware of the name of the alleged adulterer, but that as he was an officer holding a high position in Government service, he did not wish to disclose it. The learned District Judge held that this reason, as well as the fact that the petitioner having no absolute proof of the adultery, did not wish to cite any particular person as co-respondent, were inadequate ones and he,

therefore, declined to proceed further as stated.

I have had an affidavit filed by the petitioner in this Court and have also examined him further on oath. From the affidavit and the said examination on oath it would appear that there has been some misunderstanding of the real position of the petitioner in this matter. It is now clear apparently that his wife, in the oral confession she is said to have made to him, did not disclose the name of her paramour or paramours. From independent enquiry, however, the petitioner has suspicions against two men, one of whom is a Government official, but he has sworn that his reason for not mentioning their names is that, in spite of efforts and enquiry, he has been unable to obtain any substantial proof against either man and he, therefore, is reluctant to take the risk of making them co-respondents.

It has been suggested on behalf of the present applicant that the remarks of Lindlay and Smith, L. Js., in *Saunders v. Saunders* (1) are applicable in the present case and that the learned District Judge erred in not proceeding further in spite of the failure of the petitioner to name a co-respondent. I do not think, however, that in this matter the Indian Courts have the same discretion to dispense with the naming of a co-respondent as the English Courts have. The three grounds stated in s. 11 of Act IV of 1869 are the only ones on which leave can be granted to proceed with the petition for dissolution of marriage. The second ground therein stated, viz., "That the name of the alleged adulterer is unknown to the petitioner although he has made due efforts to discover it", will not, it seems to me, apply in the circumstances of the present case. The petitioner has apparently knowledge where his wife is now residing and it is almost inconceivable to suppose that, with due effort and enquiry, he would not be able to discover the name of the alleged adulterer or adulterers. It may be remarked in this connection that the English Statute is more widely worded and the co-respondent may be dispensed with on special grounds to be allowed by the Court. Here, on petitioner's own statement, it is fairly obvious that he has

(1) (1897) P. 89; 66 L. J. P. 57; 76 L. T. 330; 45 W. R. 583.

well-grounded suspicions against two men and, if he is not (?) prepared to make due enquiry and, if after such enquiry have been made he is not prepared to mention the name of either man, or of both, the position would be different, but, as the case at present stands, I cannot, on the material before me, hold that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it.

In this view of the case, I am of opinion that the District Judge was justified in declining to proceed further until the petitioner has either satisfied the Court that he is unable to discover the adulterer's name, or, in the alternative, satisfies the Court that, due effort having been made, the name of the adulterer cannot be discovered.

The application is accordingly dismissed.

G. R. D.

A. N. A.

Application dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No 65-B OF 1927.

December 10, 1927.

Present:—Mr. Kinkhede, A. J. C.
RAMKUMAR—PLAINTIFF—APPLICANT
versus

KHUSHALCHAND GANESHDAS

—DEFENDANTS—NON APPLICANTS.

Civil Procedure Code (Act V of 1908), Sch. II, para. 20—Reference to arbitration by next friend of minor—Procedure to be adopted on attaining majority—Award filed by arbitrator—Duty of Court to give notice to parties—Depositions and documents to be filed with award—Want of notice, effect of—Parties not allowed to adduce evidence in support of objection—Decree, whether vitiated—Appeal, competency of—Award on plain paper—Decree, whether can be passed—Stamp Act (II of 1899), s. 27 (g)—Arbitrator's power to call upon parties to furnish stamp paper.

If a reference to arbitration is made by the next friend of a minor during his minority, it is open to the minor on attaining majority to make his own election either to go on with the suit and accept the award, or to repudiate the same wholly or partially. [p. 669, col. 1.]

On such election being made, the title of the suit has to be corrected and thereafter, the proceedings for filing the award and passing a decree in terms thereof or for superseding the reference or remitting the award, etc., has to be commenced. The Court is not entitled to call upon the major plaintiff to file objection to the award unless he is examined to show

his willingness to carry on the litigation to a termination in his name. [*ibid.*]

A Judge is bound to give notice to the parties of the fact of the filing of the award by the arbitrator. He is also bound to see that with the award is filed the depositions and documents, which have been taken and proved before him. Want of such notice is a material irregularity, which makes the judgment and decree liable to be set aside. [p. 669, col. 2.]

Rangasami v. Mutthusami (3) and *Chatarbuji Das v. Ganesh Ram* (4), followed.

Failure to give an opportunity to any of the parties to adduce evidence in support of his objections to the award invalidates a decree and entitles the party to appeal from it. [*ibid.*]

Maharajah Joymungul Singh Bahadoor v. Mohun Ram Marwaree (5), *Ibrahim Ali v. Mohsin Ali* (6) and *Dawoodji & Son v. Sherman* (7), followed.

Until the notice prescribed by para. 10 of Sch. II of the Civil Procedure Code, is given, there is no obligation on the parties to file objections. [p. 670, col. 1.]

Unless and until an award is engrossed on a stamp paper, it has no validity and cannot operate as an award, as the Court will not be justified in looking at it and acting upon it. [p. 670, col. 2.]

The executant of an award being the arbitrator, it is his duty primarily under s. 29 (g) of the Stamp Act, to direct any of the parties to provide him with the necessary stamp and see that he does not deliver or publish his award on a plain paper. [p. 670, col. 2; p. 671, col. 1.]

Appeal against a decree of the Second Class, Subordinate Judge, No. 1, Akola, dated the 7th January, 1927, in Civil Suit No. 217 of 1919.

Messrs. A. V. Khare and W. B. Pendharkar, for the Applicant.

Mr. M. B. Niyogi, for the Non-Applicants.

ORDER.—I think this revision must be allowed. The Second Class Subordinate Judge No. 1, Akola, must understand that there are very grave responsibilities devolving on him by virtue of his office as the Presiding Officer of a Court of Justice. He must bear in mind that there is something like procedure laid down by law for the proper disposal of a case and that he is bound to respect it and cannot act arbitrarily and whimsically as he pleases. The applicant is the widow of the original plaintiff Shrikisan; on his death, she was placed on record as his heir and legal representative (*vide* order-sheet, dated 5th September, 1922). Her age then was 14 as the amendment in the title of the suit shows. The reference to the arbitration was made on her behalf by her next friend as per application, dated 29th October, 1925, when she was still a minor. How far the reference could be made by a minor's next friend without the leave of the Court expressly recorded in the proceedings was a question which had

an important bearing on the validity on the award. Similarly how far the manner in which the enquiry was held by the arbitrator affected the validity of reference and of the award was also a matter worthy of consideration: *cf. Sanyasi v. Venkata Rao* (1).

She attained majority some time in 1926, *i. e.*, during the pendency of the suit and necessarily of the arbitration proceeding. Nobody took care to ascertain just then from her whether she desired to continue the suit, as soon as she attained majority. This necessarily involved the question whether she desired to continue the arbitration proceedings upon the reference made during her minority. There was thus a failure of duty on the part of the next friend within the meaning of r. 9 of O. XXXII, Civil Procedure Code, and it was the duty of the Court to remove the next friend on that account: *cf. Doraswami Pillai v. Thungasami Pillai* (2).

In any case, there was or could be no doubt that at the date of the award which is dated 30th November, 1926, and which was filed into Court on 1st December, 1926, she had attained majority and it was the duty of the Pleader engaged by the next friend to bring the fact to the notice of the Court at once; and then her next friend should have been discharged, after notice as required by O. XXXII, r. 12 (5), Civil Procedure Code. She had the option to make her own election, either to go on with the suit and accept the award, or to repudiate the same wholly or partially. On such election being made, the title of the suit had to be first corrected; thereafter, the proceedings for filing the award, and passing a decree in terms thereof, or for superseding the reference, or remitting the award, etc., had to be commenced. Until the proceedings pending before the Court were regularized and brought into conformity with law, and, plaintiff who had attained majority was properly shown on the record as willing to carry on the litigation to a termination in her own name, I may say, the Court was not justified in calling upon her to file her objections, if any, to the filing of the award.

In fact, it was the duty of the Court to first put the house, so to say, in proper order, as a preliminary to the reception of the award; but the procedure followed by the learned Judge is so materially irregular that the decree passed by him without serving notice and following the proper procedure is vitiated, and it must be set aside. If he had cared to turn his eyes to para. 10 of the Second Schedule he would have at once known the requirements of law which he was bound to comply with. He had to see whether the arbitrator had filed the award into Court "together with any depositions and documents which have been taken and proved before him." He would also have been able to see therein the imperative provision for giving notice of the filing to the parties. Article 158 of the Limitation Act also makes this clear. There is a deplorable dereliction of duty on the Judge's part which constitutes a grave and material irregularity in the exercise of his jurisdiction, and his judgment is, therefore, liable to be set aside for want of such notice: *cf. Rangasami v. Muttusami* (3) and *Chatarbuj Das v. Ganesh Ram* (4).

Even, though the plaintiff made an application to the Court stating that she became major, the Court seems to have taken no notice of her prayer that she wanted to continue the suit as a major plaintiff. This was on 7th January, 1927. By the same petition she requested also for an opportunity to give evidence in support of her objections, but the Presiding Officer ignored the petition. Unmindful of the serious invalidating consequences which his refusal to grant the prayer in the petition would involve, he straight way proceeded to reject it and thinking that he could dispose of the suit by passing a decree in terms of the award, and describing plaintiff as still a minor acting through a next friend, summarily decided the objection as if they were mere questions of law, and, without taking any evidence, made the award the rule of the Court on 7th January, 1927. This seriously invalidates his decree and even an appeal might have lain against it: *cf. Maharajah Joymungul Singh Bahadoor v. Mohun Ram*

(1) 73 Ind. Cas. 470; 47 M. 30; 17 L. W. 71; (1923) M. W. N. 7; 44 M. L. J. 263; A. I. R. 1923 Mad. 301; 32 M. L. T. 32.

(2) 27 M. 377.

(3) 11 M. 144; 4 Ind. Dec. (N. S. 100.

(4) 20 A. 474; A. W. N. (1898) 132; 9 Ind. Dec. (N. S.) 661.

Marwaree (5), *Ibrahim Ali v. Mohsin Ali* (6) and *Dawoodji & Son v. Sherman* (7).

The Judge thus had the satisfaction of having washed his hands off the case and I cannot help remarking that he indeed secured for practically statistical purposes one disposal to his credit in respect of a big complicated suit pending on his file ever since 26th November, 1919. The Judges of Civil Courts must realize that justice cannot be broken on the wheel of statistics in this slip shod manner. The real merit of a Judge lies in his turning out work of good quality and not showing large disposal merely for statistical purposes. I wish the Judge in this particular case had realized this ere long in the course of his sufficiently long tenure of office as a Judge and resisted the temptation to puff up statistics of his Court by such a disposal.

The objections which were filed by Mr. Athavle, Pleader, on plaintiff's behalf on 23rd December, 1926, were, if I may say so, premature and even incompetent, as plaintiff who was then major could presumably not be duly represented by him under the appointment made by her next friend, as that authority had legally come to an end, as soon as plaintiff attained majority and the guardian *ipso facto* ceased to represent her and to act as her next friend for the purposes of the suit, unless the aforesaid Pleader had taken care to obtain a fresh power from plaintiff herself. In short, the whole proceeding was in a state of muddle. If the Judge had bestowed more careful thought to the case and to its special requirements at that stage, in view of the altered state of things, I dare say, he would surely have come to realize the difficulties of the situation, and may possibly not have landed himself or, the plaintiff, at any rate, in still greater difficulties, by making the award the rule of the Court, in his great anxiety and haste to terminate the proceedings by somehow disposing of the objections, and going to the length of even holding that they were barred by limitation. If I may venture to say so, I think, that until the notices prescribed by para. 10 of Sch. II, Civil Procedure Code, were given to the parties, there was no obligation on them to file any objections. How far the several objections raised

to the filing of the award were likely to affect the validity of the award is a matter on which I advisedly refrain from expressing any opinion at this stage. I am drawing the attention of the Judge to the several defects in his procedure and to the requirements of law in the hope that this will enable him to remedy the defects, at least now, if it were possible for him to do so, and thus to bring his proceedings within the strict rules of procedure sanctioned by law, as far as possible.

As I find that the procedure of the Court below is full of material irregularity in the exercise of its jurisdiction, and principally, that of rejecting the plaintiff's application dated 7th January, 1927, was highly irregular, I have no alternative but to set aside the decree, and re-open the proceedings, and remand the case for proper disposal thereof, according to law with advertence to the above remarks. The Court below must now formally ascertain from the plaintiff on what date she attained majority; whether she is willing to continue the suit in her own name, or, is desirous of even abandoning it, either wholly or partially, and if so, to what extent; and further, whether she elects to affirm the arbitration proceedings initiated and conducted in her name by her next friend; and her agents, partly during her minority and partly after she attained majority, and so far as the proceedings after majority are concerned, whether she had, as a matter of fact, expressly authorised anybody to act on her behalf. The notices of the filing of the award prescribed by the Statute must now be given to the parties, and they should be called upon to file their respective objections, if any, to the award, and to the passing of the decree in terms thereof. Before doing so it will be necessary for the Judge to see that a proper and duly stamped award is before him.

In this connection I may draw the lower Court's attention to the fact that the award in question is unstamped. Unless and until it is engrossed on a stamp paper, it has no validity and cannot operate as an award. As it stands at present it has no valid existence, so to say, and the Court could not be justified in looking at it, or in acting upon it, for less, could it pass a decree in terms thereof. The executant of the award being the arbitrator, under s. 29 (g) of the Stamp Act, it was his duty primarily to direct any of the parties to provide him

(5) 15 W. R. 37.

(6) 18 A. 422; A. W. N. (1896) 137; 8 Ind. Dec. (N. S.) 987.

(7) 88 Ind. Cas. 359; A. I. R. 1925 Rang. 238; 4 Bur. L. J. 39.

with the necessary stamp, and to see that he did not deliver or publish his award on a plain paper, and thus save himself from the blame attaching to him of having evaded the Stamp Law. It will, therefore, be necessary for the Court to remit the award to the arbitrator under para. 14 of Sch. II of the Civil Procedure Code to enable him to pass the necessary order for providing him with the requisite stamp paper for re-writing and engrossing the award thereon, and then submitting it to the Court, after publishing the same to the parties, within a time to be fixed by it, for further action.

In the peculiar circumstances of the case I do not think it fit to award costs of one party against the other in this Court, as both parties are to blame for the faulty procedure. Costs in the Court below will follow event.

G. R. D.

*Decree set aside.
Case remanded.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 100 OF 1926.

November 7, 1927.

Present:—Mr. Findlay, J. C.

BALAJI AND OTHERS—DEFENDANTS

—APPELLANTS

versus

BALLABHDAS—PLAINTIFF—RESPONDENT.

*Court Fees Act (VII of 1870), s. 7 ix, Sch. I, Art. 1
—Suit for foreclosure—Appeal against final decree—Court-fees.*

There is no difference in principle between a final decree for sale under O. XXXIV, r. 4, Civil Procedure Code, and one for foreclosure under r. 3 of the Order and anybody desiring to appeal against a final decree for foreclosure must pay *ad valorem* Court-fees as in any other appeal from a final decree.

Appeal against an order of the District Judge, Chhindwara, dated the 2nd July, 1926, in Civil Suit No. 7 of 1924.

Messrs. M. B. Niyogi and G. R. Pradhan, for the Appellants.

Messrs. G. L. Subhedar, M. R. Bobde and G. R. Trivedi, for the Respondent.

ORDER.—The appellants, who were defendants Nos. 1 to 5 in the lower Court, have filed the present appeal against the order of the District Judge, Chhindwara, dated 2nd of July, 1925, granting decree final of foreclosure in favour of the defendant No. 10, Ballabhdas, who is respondent in this appeal. Preliminary decree had been granted on 29th July, 1924, the said Ballabhdas being given a final right to

redeem. The grounds of appeal are that as respondent had made no application under O. XXXIV, r. 3 (2), Civil Procedure Code, the lower Court had no jurisdiction to make the decree final and that no notice to appellants had issued before decree final was passed. The third ground, *viz.*, that the lower Court should have awaited the decision of this Court in Civil Revision No. 201 of 1926 before granting decree above, can be easily disposed of. On the said revision, the lower Court's order of substitution of defendant No. 10 was questioned, but that order necessarily merges in the order for final decree and can only now be questioned in the appeal therefrom.

The respondent has raised a preliminary objection to the effect that *ad valorem* Court-fee should be paid on the petition of appeal, and the decisions in *Bajrangi Lal v. Mahabir Kunwar* (1) and *Jankibai Ramdayal v. Chimna Sadashiv* (2) have been relied on in this connection. On behalf of the appellants it has been sought to distinguish these cases on the ground that they relate to final decrees for sale under O. XXXIV, rr. 4 and 5, Civil Procedure Code, while here we are concerned with r. 3 *idem*. I am unable to see that any difference of principle arises in the matter. The final decree under r. 3 equally stops the litigation and any one desiring to appeal against the connected order must clearly pay Court-fees as in any other appeal from a final decree.

The appellants seek to question the respondent's very right to obtain a decree final and this relief can already be valued in money. I am of opinion, therefore, that an *ad valorem* fee is payable on the petition of appeal and I order accordingly. I allow time until 1st December, 1927, for making up the deficiency in Court-fees and thereafter further orders will be passed.

G. R. D.

Order accordingly.

(1) 21 Ind. Cas. 498; 35 A. 476; 11 A. L. J. 801.

(2) 57 Ind. Cas. 579; 22 Bom. L. R. 811.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 89 OF 1926.

November 24, 1927.

Present:—Mr. Pridaux, A. J. C.

JUGAL KISHORE—PLAINTIFF—APPELLANT

versus

NAGO AND ANOTHER—DEFENDANTS—RESPONDENTS.

C. P. Tenancy Act (I of 1920), ss. 12, 13, 32.

Tenancy holding—Surrender to unauthorized person—Fraudulent transfer—Suit for possession by landlord, whether triable by Civil Court.

A suit for possession of a tenancy by the sole landlord of a *patti* in a village against one who claims to have taken a lease thereof from a person, who had taken a surrender of the field after he had ceased to be a co-sharer of the *patti* is triable by a Civil Court.

The venue in a case is determined by the nature of the claim as brought.

If a document of transfer of non-transferable tenancy land, under the guise of surrender has been fraudulently registered as a deed of surrender, a civil suit by the landlord will lie to set aside such a transfer and to get possession of the land.

Second appeal against a decree of the District Judge, Nimar, dated the 26th November 1925, in Civil Appeal No. 67 of 1925.

Mr. W. R. Puranik, for the Appellant.

Mr. M. R. Patha, for the Respondents.

JUDGMENT.—In this case the plaintiff and defendant No. 2 were owners of *Mauza Raysana* jointly, and on the plaintiff's application his share was divided into a separate *patti* and he became the sole owner of *patti* No. 4 in the village, the partition coming in force on 1st June, 1921. He now sues for possession of field No. 54, contending that the 1st defendant Nago has no right to hold the field and that he had taken wrongful possession of the same from August, 1923. It was said that Ragho, the original tenant of the field, was in possession till 30th January, 1923.

Defendant No. 1 contended that he had taken a lease of the field from defendant No. 2 on the 7th April, 1923, and that he is entitled to possession on the ground that he was duly made a tenant and could not be evicted. Defendant No. 2 admitted that he had taken the field in surrender on 31st January, 1923, and let it out to defendant No. 1 on 7th April, 1923. It was further contended that the plaintiff was not appointed the *lambardar* of the *patti* and that the lease was given by defendant No. 1 in the ordinary course of management and with the consent of the plaintiff. It was further contended that the remedy was to get the transfer by Ragho set aside by the Revenue Court and that the Civil Courts had no jurisdiction.

The trial Court found that Ragho surrendered the field on 31st January, 1923, and that the deed by which the land was surrendered was a transfer, and further that the plaintiff cannot sue in a Civil Court without setting that transfer aside and the suit is not maintainable. The Judge writes:—

"In this case the *patti* of the plaintiff was separated and the plaintiff became the sole owner thereof from 1st June, 1921. Thus the defendant No. 2 had no interest in that from 1st June, 1921, onwards. Thus the surrender in favour of the defendant No. 2 was a transfer in favour of a stranger and the remedy of the landlord for such a transfer made in contravention of s. 12 of the Tenancy Act is to go to the Revenue Court to get the same set aside and get possession of the field."

The Judge further writes that "no suit can lie unless and until the surrender is set aside and no suit for possession can lie in this Court."

On appeal the learned Judge of the lower Appellate Court holds that the Civil Courts have no jurisdiction in the case and that the suit was rightly dismissed. The consideration for Ragho's surrender or transfer to defendant No. 2 was said to be arrears of rent, amounted to Rs. 40.

Now, it is absolutely clear that defendant No. 2 had no right to accept a surrender or transfer of the field for arrears of rent, and he is exactly in the same position as an absolute outsider would be. Can it be seriously contended that, if an outsider resident of another village chooses, to accept a surrender or a transfer from a tenant in another person's *patti* and then gives the land out to another tenant, the owner of the *patti* is debarred from pressing his claim in a Civil Court? I do not think so. The plaintiff here is the sole landlord, and as to what took place between Ragho and defendant No. 2 is no concern of his and is void as against him. Further, had the document been executed as a transfer, registration would have been refused so, that registration was obtained by fraud, which vitiates the transaction. After all, the venue in a case is determined by the nature of the claim as brought: see *Ganpat v. Trimbak* (1). In my opinion, the Civil Courts have a right to try the present suit. I, therefore, set aside the decree of both the lower Courts and remand the case to the trial Court for a fresh decision. Costs will abide the result.

G. R. D.

Decree set aside.

(1) 19 Ind. Cas. 759; 9 N. L. R. 51.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 740 OF 1925.

November 18, 1927.

Present.—Mr. Justice Iqbal Ahmad and
Mr. Justice Kendall.BAIJNATH AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

CHHOTE LAL AND ANOTHER—DEFENDANTS
—RESPONDENTS.*Contract Act (IX of 1872), s. 254—Partnership—Dissolution—Suspension of business, whether amounts to dissolution.*

Though the mere suspension of business of partnership does not necessarily lead to the conclusion that there has been a dissolution of that partnership, yet the cessation of the business coupled with other circumstances may legitimately lead to the inference that the partnership had been dissolved. There is no general proposition of universal application that a partnership cannot be deemed to have been dissolved till all its outstanding have been realised. [p. 673, col. 2; p. 674, col. 1.]

Sathappa Chetty v. Subramania Chetty (1) and *Chunni Lal v. Sheo Charan Lal Lalman* (2), distinguished.

Second appeal from the decree of the First Sub-Judge, Cawnpore.

Dr. K. N. Katju, for the Appellants.

Messrs. S. N. Sen and B. Malik, for the Respondents.

JUDGMENT.—This case has been very ably argued by Dr. Kailash Nath Katju, but notwithstanding his able arguments we remained unconvinced.

The suit of the plaintiffs-appellants for dissolution of partnership and for rendition of accounts has been dismissed by the Courts below on the ground that the partnership, the dissolution of which was prayed for by the plaintiffs, had been dissolved more than three years prior to the institution of the suit giving rise to the present appeal, and as such the suit was time barred. The trial Court after pointing out that "no partnership business was done" after 25th January, 1920, on which date the servants of the firm were dismissed, and the rent of the shops in which the partnership business was carried on was paid, and accounts were finally closed, and that on 20th March, 1920, "every thing was finally disposed of, and the pressing machine had also been removed," and after pointing out the other facts that led to the conclusion that the partners had decided to discontinue the business of partnership and to terminate the partnership, came to the conclusion that the partnership in question was dissolved on or about the end of January, 1920,

and as the present suit was filed in April, 1923, the suit was time-barred.

The lower Appellate Court has affirmed the finding of the trial Court. The lower Appellate Court has observed that the partners "knew that there was loss in the dealings in 1920 and it was, therefore, natural that they thought it prudent to stop the business. In my opinion this amounts to a dissolution of the partnership."

It further pointed out that the trial Court had fully discussed the evidence and then summarised its conclusion as follows:

"(1) The trial Court has rightly held that the partnership was dissolved in *Magh of Sambat 1976*" corresponding to January, 1920.

"In second appeal before us it is argued that the mere fact that the business of the firm was suspended does not necessarily lead to the conclusion that the partnership was dissolved, and it is contended that inasmuch as the price of certain of the commodities purchased by the firm that were sent to Calcutta for sale was not received till about the month of August, 1923, it could not be said that the partnership was dissolved before August, 1920. In support of this contention reliance has been placed by the learned Counsel on the case of *Sathappa Chetty v. Subramanian Chetty* (1) and on the decision of *Chunni Lal v. Sheo Charan Lal Lalman* (2). It is certainly true that the mere suspension of business of partnership does not necessarily lead to the conclusion that there has been a dissolution of that partnership, but the cessation of the business coupled with the other circumstances may legitimately lead to the inference that the partnership had been dissolved. In this case the lower Appellate Court after pointing out that the business was closed has adopted the reasons given by the trial Court for recording the finding that the partnership in question had been dissolved in January, 1920. The decision in the unreported* case referred to above turns on the peculiar terms of the agreement of partnership evidenced by the documents to which reference was made by the learned Judges in the course of their judgments. In the Privy Council decision relied upon by the learned Counsel it was

(1) 101 Ind. Cas. 17; A. I. R. 1927 P. C. 70; 4 O. W. N. 491; 31 C. W. N. 857; (1927) M. W. N. 503; 25 A. L. J. 687; 53 M. L. J. 245; 26 L. W. 265; 39 M. L. T. 232 (P. C.).

(2) 89 Ind. Cas. 122; 47 A. 756; A. I. R. 1925 All. 787; L. R. 6 A. 362 Civ.; 23 A. L. J. 725.

*Since reported as 89 Ind. Cas. 122.—[Ed.]

not laid down by their Lordships as a general proposition of universal application that a partnership cannot be deemed to have been dissolved till all its outstandings have been realised. Having regard to the nature of the particular partnership, which formed the subject-matter of consideration in that case and having regard to the other facts pointed out by their Lordships in the course of their judgment, their Lordships came to the conclusion that the finding of the High Court in that case that the partnership was not dissolved till all the outstandings belonging to the partnership had been realised, was correct.

In our judgment the case before us is not covered by either of the decisions relied upon by the learned Counsel for the appellants and is concluded by the finding of fact recorded by the lower Appellate Court. We dismiss the appeal with costs.

A. N. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 6 OF 1927.

November 7, 1927.

Present:—Justice Sir Cecil Henry Walsh,
Kt., and Mr. Justice Mukerji.

MAJIDAN—DEFENDANT—APPELLANT

versus

SABIR ALI AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—First suit disposed of on findings on several issues—Necessary and unnecessary findings, doctrine of—Subsequent suit on same cause of action—Res judicata on general principles—Addition of new reliefs in second suit, effect of.

A instituted a suit against B for recovery of possession of certain properties which belonged to B's deceased husband alleging that he was the nearest heir of the husband of B. The suit was dismissed by the Court of first instance on the ground that B was not in possession of the properties. On appeal the suit was dismissed on the ground that A had not only failed to show that B was in possession but had also failed to establish that he was the nearest heir of the deceased. A subsequently sued B for the same properties on the same cause of action. He, however, prayed in addition that if B was found to be one of the heirs of the deceased, A might be given possession of his share.

Held, that the suit was barred by *res judicata*. [p. 675, col. 2.]

Per Walsh, J.—The issue whether A was the nearest heir was directly and substantially in issue in the former suit and was *res judicata* as it was heard and decided by the Appellate Court. [p. 675, col. 2.]

Per Mukerji, J.—Although where only one particu-

lar issue is identical in two different suits, one filed after the other, a question would arise whether the decision on the issue arrived at in the former suit would operate or not as *res judicata*, yet, where the two suits are identical, the failure of the first suit must bar the trial of the second suit even if no issues were raised in the former suit, under the general principle that no man can be vexed twice over the same cause of action. [p. 676, col. 1.]

Where the two suits are based on the same cause of action and against the same party, the mere addition of new reliefs in the second suit will not remove the bar of *res judicata*. [p. 676, col. 2.]

First appeal from the order of the Sub-Judge, Muzaffarnagar, dated the 9th September, 1926.

Mr. Kailas Chandra Mital, for the Appellant.

Mr. Panna Lal, for the Respondents.

The material facts appear from the judgment of Mukerji, J.

JUDGMENT.

Walsh, J.—We have come to the conclusion that this appeal must be allowed. There is no question about the parties in this suit being the same as in the previous suit. There is also no question about the relief claimed in this suit being identical with the relief claimed in the former suit. That is clearly shown by the reliefs shown in parallel columns in the judgment of the Munsif. In a suit of this nature it was necessary for the plaintiffs, first, more, as a matter of form, than anything else, to prove that the defendant was in possession; further, that she was a widow claiming to be in possession by virtue of the dower-debt of her deceased husband, and that the plaintiffs were residuary heirs of the deceased husband. It is clear that at the trial of the first suit only one point was decided, namely, that the plaintiffs had failed to prove that the widow was in possession, and on that ground the suit was dismissed. It may often happen that where, as in these cases, there are three or four issues which the plaintiff has to establish, the Judge may choose to decide all of them, or only some of them, or only one of them, even though in his opinion his decision must be fatal to the plaintiff on all of them. In that sense it may be said not to be necessary for him to decide the other issues besides the first, but it may also be said not to be unnecessary, and certainly not incompetent, to decide the other issues. It so happens that in this case there was an appeal, and it so happens also that the appeal in the former suit was heard by the Judge who has decided this case also in

appeal. While agreeing in his disposal of the appeal in the former suit with the view taken by the trial Court, the learned Judge in appeal went on to find that the plaintiffs had also failed to prove that they were the heirs, and also that they had failed to prove that the property belonged to the deceased. No doubt there are cases in which it appears, and must be held, that what one may call the issues on the merits did not arise, or were unnecessary to decide, because the suit has been disposed of on some fundamental preliminary point which puts the plaintiff out of Courts. But the true view, as it seems to me, of a proceeding of that nature is that the issues on the merits do not really arise at all, and that any expression of opinion about them is mere dictum, and the Statute is satisfied by holding that the issues upon which these dicta have been uttered were not "directly and substantially in issue in the former suit."

In our opinion that cannot be said of the present case. There is nothing in the Statute about what is necessary or unnecessary to decide. It is undesirable to import into a section, when the Court's duty is to apply the language of the section to the facts of the case before it, any expression which is not to be found there and the question whether an issue was or was not necessary in a former suit is only a test, and not a statutory provision, to enable the Court to decide what the Statute does require, namely, whether the issue was directly and substantially in issue. In these cases to which I have referred, it may be said that having come to the conclusion that the issue in controversy was not necessary, the Court may go on to hold as a consequence of that, that it was not directly and substantially in issue. But in this particular case the learned Judge had found, and it is a finding of fact, which having been arrived at by an Appellate Court is not open to review in this Court, that he decided as an issue, which was undoubtedly relevant, that the plaintiffs had failed to prove the two matters which are sought now to be raised in this suit. That being so, it seems to me quite clear that the issue now in controversy, namely, as to whether the plaintiffs were the heirs of Qamaruddin, was directly and substantially in issue in the former suit, and was decided adversely to the plaintiffs by a competent Court of Appeal which disposed of the matter. I think the same result is reached by applying Explanation V

namely, that any relief and the issue now in controversy would be part of the relief in the former suit which is not expressly granted by the decree in the former suit is deemed to have been refused. I, therefore, come to the conclusion that this issue, which is now sought to be determined in this suit, was directly and substantially in issue in the former suit and cannot be raised again, having regard to the provisions of s. 11.

The appeal must, therefore, be allowed and the suit dismissed.

Mukerji, J.—I entirely agree with my learned brother that the appeal must be allowed and the suit dismissed as barred by the principle of *res judicata*.

The facts of the case are given clearly in the judgments of the Courts below. Briefly they are these: The respondents before us brought a Suit No. 446 of 1924 against the present appellant on the ground that the property in suit was the property of one Qamaruddin who had married the appellant, that the appellant did not inherit in spite of the marriage, because of the marriage not having been consummated and that the respondents were the nearest heirs to Qamaruddin. The suit was heard *ex parte* and was dismissed by the Court of first instance on the short ground that the present respondents had failed to prove that the present appellant was in possession of the property in suit. Evidently the evidence that was given was of the meagrest kind and did not suffice to prove the several ingredients which were necessary to establish for the success of the plaintiffs. The respondents appealed, but their appeal was dismissed. The learned Appellate Judge held that the evidence not only failed to establish that the present appellant was in possession of the property but it also failed to establish several other matters including the alleged fact that the present respondents were the nearest heirs of Qamaruddin. After the suit had failed the respondents started a fresh suit out of which the present appeal has arisen.

The present suit is for the same property against the same party and on the same cause of action as before. The plaintiffs, however, have added certain reliefs in the present suit which were not to be found in the earlier suit. They added that if the appellant was found to be one of the heirs of Qamaruddin the plaintiffs might be given possession over $\frac{3}{4}$ th of the pro-

perty. Further, they said that if it was found that the appellant was in possession in lieu of dower the plaintiffs might be given possession on payment of the proportionate dower-debt.

The learned Munsif who heard the present suit was of opinion that the two suits were identical and the addition of new reliefs did not improve matters. The learned Appellate Judge was of opinion that so far as the first relief, viz., for possession of the entire property went, the two suits, being identical, the relief was barred as *res judicata*. He, however, found that so far as the relief for 3/4ths of the property or the one conditional on payment of dower-debt was concerned, they were not barred as *res judicata*. His reason was that the finding of the former Appellate Court did not operate as *res judicata* on the title of the plaintiffs.

The learned Judge of the lower Appellate Court did not quote any rulings in support of his judgment but, evidently, he had in his mind some of the cases decided by this Court and the Privy Council in which it was held that where a suit failed on several issues, for the purposes of *res judicata* only that issue was material and substantial which, in logical sequence, came first to be decided. These cases went to hold that the decisions on the other issues were to be regarded as unnecessary for the trial of the suit. In my opinion it is not necessary to express any opinion on the question whether in the circumstances of the present suit it was or was not necessary for the Appellate Court to decide the question of title (among other matters) of the plaintiffs. In my opinion the suit fails on a much simpler ground and it is this.

Section 11, Civil Procedure Code, deals with the trial of a former suit and also with the trial of an issue raised in a former suit. Where only one particular issue is identical in two different suits, one filed after the other, a question would arise whether the decision on the issue arrived at in the former suit would operate or not as *res judicata*. But where the two suits are identical, the failure of the first suit must bar the trial of the second suit even if no issues were raised in the former suit. The principle is well-known, viz., no person can be vexed twice over the same cause of action. The learned Subordinate Judge was of opinion that by the addition of the

new reliefs to the suit the plaintiffs had succeeded in establishing that their second suit was based on a different cause of action. The learned Judge gave, as an illustration, the case where a former suit sought the ejectment of the defendant on the ground that he was a trespasser and it was held that he was not a trespasser but a mortgagee. In such a case a second suit for redemption has been allowed under certain circumstances. But, in my opinion, this case is not at all analogous to the case the learned Judge had in his mind. There is no finding anywhere that the defendant was in possession as a mortgagee. It is not a case similar to the case of *Maina Bibi v. Vakil Ahmad* (1) in which it was held that the second suit by the Muhammadan heirs was not barred as *res judicata*. I once more emphasize the fact that the two suits are identical and so far as the plaintiffs are concerned they have come in the second suit on the self-same allegations on which they instituted the earlier suit. It was never found by any Court that the defendant was in possession in lieu of her dower and that so long as she was in possession she could not be dispossessed. It was the plaintiffs themselves who invented the suggestion that the defendant might be in possession in lieu of dower. In the circumstances, I can find no difference whatsoever between the two suits. The first suit having been heard and dismissed on the merits the second suit must be dismissed as *res judicata* irrespective of the question whether any particular issues are to be treated as having been decided or not. I would, as already stated, allow the appeal and dismiss the suit of the plaintiffs-respondents.

A. N. A.

Appeal allowed.

(1) 86 Ind. Cas. 579; 47 A. 250; 52 I. A. 145; 23 A. L. J. 115; A. I. R. 1925 P. C. 63; 2 O. W. N. 180; L. R. 6 A. (P. C.) 25; 48 M. L. J. 667; 27 Bom. L. R. 796; 30 C. W. N. 673 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 87 OF 1925.

October 19, 1927.

Present :—Mr. Justice Sulaiman and Mr. Justice Banerji.*Musammats* PHULBANS KUAR AND OTHERS.

—PLAINTIFFS—APPELLANTS—

versus—

BHAGDAT SINGH AND ANOTHER.

—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 154, 193—Order remanding case for assessment of revenue and otherwise dismissing suit—Second appeal, whether lies—Order of remand, nature of.

In a suit under s. 154 of the Agra Tenancy Act of 1901, the Assistant Collector held that the defendants were rent-free grantees and liable to resumption and accordingly assessed the rent. On appeal by the defendants the District Judge held that the defendants had been in adverse proprietary possession and declared them to be proprietors under s. 158 of the Act. He accordingly made an order to the following effect: "I would remand the case to the Assistant Collector with instructions to assess revenue on the land; otherwise the plaintiffs' suit stands dismissed with costs".

Held, that the order of the District Judge, in spite of the order dismissing the suit, was one of remand and that consequently no second appeal lay from it. [p. 679, col. 1.]

Even though all the important points in a case have been disposed of and the case has practically been decided on the merits, if something is still left to be done by the Court of first instance, before the suit is finally disposed of, the order can only be an order of remand and not a final decree. [*ibid.*]

Anandgir v. Srinivas (1) and *Rao Adya Saran Singh v. Jagannath (2)*, referred to.

Second appeal from the decree of the District Judge, Allahabad.

ORDER OF REFERENCE.

Boys, J.—This purports to be a second appeal from the Appeal No. 269 of 1923 filed in the Court of the District Judge of Allahabad on the 11th of August, 1923, and decided by him on the 23rd of September, 1924. The question is whether a second appeal to this Court lies or not, and that has to be determined by a decision as to whether the order of the 23rd of September, 1924, is merely an order of remand, is a decree or is a combination of the two, partly a decree and partly an order of remand.

The suit was brought by the plaintiffs as a suit under Chap. X of the Tenancy Act, (Local) II of 1901. The plaintiffs asked for assessment of rent on the defendants. The defendants claimed to be *nankardars* and claimed that that was equivalent to being proprietors. The trial Court, the Assistant Collector, held the defendants to be liable to assessment to rent. On appeal the learned

District Judge held that he was bound by a finding between the parties in a litigation in 1897 that the defendants were *nankardars*. He did not specifically consider, as far as I appreciate his judgment, whether that finding involved their not being liable to assessment to rent. In the suit in question in 1917 the only question was whether they were liable to ejectment, and it was found that they were not so liable. The learned Judge then proceeded to dismiss the plaintiffs' suit with costs on the ground that the defendants were *nankardars*. Did this order stand alone, I should find it myself very difficult to hold that it did not amount to a decree pure and simple.

It happens, however, that under the Tenancy Act in these cases there is a provision for the Court taking a further step if it arrives at a conclusion such as that already quoted by me as having been arrived at in the present case; and that is, that steps be taken to assess the revenue which the defendants may be liable to pay. In this case no dispute arose before the learned District Judge as to whether the defendants could be assessed to pay revenue or not. They expressed their willingness to pay. The learned District Judge then proceeded, after dismissing the plaintiffs' suit with costs, to remand the case to the trial Court with instructions to assess revenue.

The defendants were content but the plaintiffs have filed a second appeal against this order of the District Judge. The appeal is filed against the dismissal of the plaintiffs' suit.

A preliminary objection is taken that no appeal lies; because the order was an order of remand and that no appeal against such an order of remand is provided for in the Tenancy Act, and reliance is placed on the decision reported as *Anand Gir v. Srinivas (1)*. In that case (I quote from the record which I sent for) the order from which an appeal was filed in this Court was as follows:—

"It is ordered that the decree of the lower Court, dated the 13th March, 1916, be set aside and the appeal be allowed to the extent that the plaintiff is entitled to be declared a rent-free grantee of so much of the land in suit as he (*sic*) is entered in revenue papers as occupancy tenant of, and that the suit be remanded to the lower Court for determination of the revenue payable

(1) 47 Ind. Cas. 1008; 16 A. L. J. 711; 40 A. 852.

by the plaintiff-appellant. The appellant do get proportionate costs of this appeal."

That order is on the printed form headed as "decree in appeal" and reference is made in the form to O. XLI, r. 35. The particular printed form on which the order is endorsed can in no way be a decisive factor and the order itself must be looked at. I find it impossible to distinguish that order in any material particular from the order in the present case. It was held in *Anandgir v. Srinivas* (1) that the order of remand following upon what would by itself undoubtedly have been a decree was sufficient to convert the whole order into an order of remand from which no appeal would lie.

I am not aware that this decision has ever been referred to except in *Rao Adya Saran Singh v. Jagannath* (2) in which case their Lordships declined to consider the correctness or otherwise of the decision. Personally I am not able to feel satisfied that the first portion of the order of the District Judge is not definitely a decree, and if that be so, it appears to me that an appeal should be held competent against it. There have been many decisions of the Board one way and the other, though as I have said the matter only appears to have been the subject of one single decision, to which I have referred, in this Court.

I am unable myself to interpret the first portion of the order in question as anything other than a decree. It definitely decides the relations between the plaintiffs and the defendants and the status of the defendants.

If after the trial Court has decided the question of the amount of revenue to be paid by the defendants both parties are agreed that it is a reasonable decision, there would not, on the merits of that decision, be any appeal at all. Nor can it be said that if the parties are debarred now from filing a second appeal, they could later challenge the finding of the District Judge by filing an appeal from the decision of the trial Court in the matter of revenue, even though they were content with that finding, for the finding of the trial Court in the matter of revenue would not raise any question of the proprietary title and an appeal from the finding of the trial Court, the Assistant Collector, would have to be filed in the Court of the Commissioner.

(2) 78 Ind. Cas. 391; 22 A. L. J. 235; 46 A. 323; A. I. R. 1924 All. 561; L. R. 5 A. 49 Rev.

It is clear that no revision, from the order of the District Judge will now lie in this Court in view of the most recent Full Bench. If then the first part of the District Judge's order is not to be construed as a decree, it would seem that it is final for all time and can never be challenged either in appeal or in revision. These are considerations to some extent merely of expediency and it may be argued that if that is the result it is the fault of the Legislature and the Courts are not responsible for such a disastrous result. This is to some extent the view that was taken in *Anandgir v. Srinivas* (1). In the present case I do not, of course, suggest that these considerations are grounds for holding that what is not a decree in the ordinary acceptation of the term, should be twisted into being held a decree. I am definitely of opinion that the order of the District Judge dismissing the plaintiffs' suit with costs and declaring the defendants to be *nankardars* was definitely a decree and as such appealable, notwithstanding that there may be on the same bit of paper an order remanding another aspect of the case to the trial Court.

I am not, however, able to distinguish this case from the decision in *Anandgir v. Srinivas* (1). But I am bound by it, sitting as a Single Judge. The case will undoubtedly, whichever way I decide it, whether in accordance with my own view, or in accordance with the case reported as *Anandgir v. Srinivas* (1), be taken up further in appeal under the Letters Patent. It seems desirable, therefore, to settle the matter forthwith by referring the case to two Judges.

Messrs. Haribans Sahai and P. L. Banerji, for the Appellants.

Dr. M. L. Agarwala and Messrs. N. P. Asthana and N. C. Basu, for the Respondents.

JUDGMENT.—This case has been referred to a Bench of two Judges. This second appeal arises out of a suit brought by certain *zemindars* under s. 154 of the old Agra Tenancy Act. The Assistant Collector held that the defendants were rent-free grantees and liable to resumption and accordingly assessed the rent. On appeal by the defendants, the District Judge came to a contrary conclusion. He held that the defendants have been in adverse proprietary possession of the lands and declared them to be proprietors under s. 158. He went on to hold that the suit ought to be dismissed. But finding that the revenue directed to be

assessed under the section had not been determined he passed an order in the following words:—"I would allow the appeal and set aside the order and decree of the Assistant Collector.....I would remand the case to the Assistant Collector with instructions to assess revenue on the land; otherwise the plaintiffs' suit stands dismissed with costs on the ground that the defendants are *nankardars*." By the word 'otherwise' he clearly meant 'in other respects.' He further remarked that he had no objection to the Assistant Collector postponing the assessment of revenue in case the matter was taken up in second appeal.

It is from this decree or order that this appeal has been preferred. A preliminary objection was taken before the learned Judge before whom this appeal came up first that no second appeal lay. Having regard to the peculiar circumstances of this case the learned Judge was inclined to the view that it would be very hard on the plaintiffs if they are deprived of all remedy. He, however, felt that he was unable to distinguish the present case from the decision in *Anandgir v. Srinivas* (1).

The decree passed by the learned District Judge is couched in unhappy language and it is also clear that it would have been much better and would have saved the parties considerable trouble if the learned Judge had merely sent down an issue to the first Court for the determination of the revenue and not remanded the case. As things, however, stand it is quite clear that the case was not finally disposed of on the 23rd of September, 1924. It did go back to the Assistant Collector's Court and had to be restored to its original number in that Court. It seems to us that an order which does not dispose of a case finally for the time being, (subject of course, to any further appeal), cannot be called a decree which terminates the case. It may be that all the important points have been disposed of and the case has for all practical purposes been decided on the merits; but if something is still left to be done by the Court of first instance before the suit is finally disposed of, the order can only be an order of remand and not a final decree.

This was the view expressed by a Bench of this Court in *Anandgir's case* (1) referred to above. We agree with Boys, J., that it is very difficult to distinguish the present case from that reported case. The Act

has now been amended and the difficulty created by the provisions of the old Act is not likely to arise in future. We are also unable to take a different view from that taken in the reported case which has been followed in numerous cases since then.

We must accordingly hold that the order passed by the District Judge was not a decree, but an order of remand, and that no second appeal lies to this Court, *vide, Zohra v. Mangu Lal* (3).

We prefer to express no opinion as to any future remedy that may be open to the appellants. The appeal is accordingly dismissed, but in view of the peculiar circumstances of this case we do not think that the appeal was a wholly futile one. We direct that the parties should bear their own costs of this appeal.

A. N. A.

Appeal dismissed.

(3) 28 A. 753; 3 A. L. J. 599; A. W. N. (1906) 223.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1288 OF 1925.

July 1, 1927.

Present:—Mr. Justice Boys and Mr. Justice Kendall.

KALLU AND ANOTHER—DEFENDANTS—
APPELLANTS

versus:

RAM DAS—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 115, 116, 132—Vendor and purchaser—Amount reserved for payment of prior mortgage—Failure of vendee to pay—Suit by vendor for recovery of amount reserved—Prayer for enforcing lien—Limitation—Cause of action.

Where a sale-deed merely recites that the vendee should, out of the sale price, pay off a prior mortgage, without giving the vendee the option to pay it off at some future time or to pay it off whenever he pleased, the presumption is that the vendee is to pay immediately, or if not immediately, at any rate as soon as is reasonably possible; and limitation for a suit to recover the amounts so reserved from the vendee begins to run from the date of the sale-deed or at least within a reasonable time therefrom. [p. 681, col. 2.]

Hakim Ali Khan v. Dalip Singh (2) and *Ishri Pershad v. Muhammad Sami* (3), distinguished.

Article 132 of Sch. I of the Limitation Act applies to a relief for enforcement of a hypothecation lien. [*ibid.*]

Second appeal from a decree of the District Judge, Meerut.

Messrs. *Uma Shankar Bajpai and S. S. Shastri*, for the Appellant.

Dr. K. N. Katju, for the Respondent.

JUDGMENT.—This defendants' appeal arises out of a suit "for enforcement of a hypothecation lien.....by sale of the property specified." The only question with which we are concerned is whether Art. 132 of the Limitation Act or whether Art. 116/115 applies, and whether the suit is barred by limitation. The facts are as follows:—

One Dewan Singh, whose heir is the present plaintiff, had two properties, which we will call A and B. On the 19th of September, 1902, he executed a simple mortgage of both the properties A and B in favour of Ramrich Pal.

On the 18th of November, 1905, he sold the property A to the present defendants for Rs. 700 leaving with them Rs. 480 to pay off the mortgage in favour of Ramrich Pal.

On the 20th of July, 1905, Dewan Singh executed another mortgage in favour of Shamsundar, hypothecating the property B. The defendants did not discharge the mortgage in favour of Ramrich Pal, and accordingly properties A and B both remained subject to the mortgage. The excuse of the defendants for their default was that they did not get possession of the whole of the property, but that excuse appears to have been merely a pretext, for the learned Judge of the lower Appellate Court remarks:—

"It is further urged for the appellant that the vendees did not obtain mutation of the whole of the property sold and that consequently the whole claim should not have been decreed. It appears that the vendees for a long time have lain low and have taken no steps to obtain the small area of which they did not get possession."

It is further to be noted that it is not suggested on behalf of the present plaintiff, the mortgagor, that he took any steps whatever to see that the vendees did discharge the first mortgage. So far, therefore, as responsibility for the subsequent confusion can be attributed to either, it would seem that they must both bear it equally.

The next step was taken by Ramrich Pal, the prior mortgagee of properties A and B, by filing a suit, No. 167 of 1911, in which on

the 1st of July, 1911, he obtained a decree for Rs. 1,332-2.

Shamsundar, the puisne mortgagee of property B, then brought a suit, No. 1049 of 1911, on his own mortgage and obtained a decree for Rs. 519-7. Shamsundar next proceeded to pay up the decree of the prior mortgagee and secured for himself a consolidated decree for Rs. 2,229-1-3. He proceeded to execute this decree, and in order to save his property the mortgagor paid, on the 15th of January, 1918, a sum of Rs. 1,000 and on the 15th of April, 1918, a further Rs. 400. A sum of about Rs. 700 odd remained unsatisfied, and Shamsundar proceeded to execute his decree for the balance. In pursuance of this execution the property A was sold at auction, and the defendants, who, it will be remembered, were the purchasers of property A, got the sale set aside on payment of Rs. 758. This did not, however, wholly satisfy the consolidated decree, for in the interval further interest had accumulated and there remained due at the date of the present suit to Shamsundar Rs. 377-13.

The net result was that to pay off the consolidated decree against the properties A and B the plaintiffs, heirs of the mortgagor, had paid a total amount of Rs. 1,400. The defendants had paid Rs. 758, and a balance still remained due of Rs. 377-13.

In the present suit the plaint recites these facts and the plaintiff claims that though he paid Rs. 1,400, only Rs. 707, out of the consolidated decree was due to the mortgagee of property B originally in favour of Shamsundar, and that that is all he should have had to pay, and that the defendants were really responsible for the balance of Rs. 693 which the plaintiff had paid and which he never would have had to pay if the defendants had, according to their original agreement of sale, paid half of the mortgage in favour of Ramrich Pal of properties A and B. Plaintiff further claims about Rs. 301 interest. He also urges that before his property B can be held to be perfectly secure, there is the balance of Rs. 377-13 to which Shamsundar is still entitled as the unpaid balance of his consolidated decree. Plaintiff, therefore, also claims this sum from the defendants, apparently on the allegation that he may himself at any time be called upon to pay it if he desires to save his property.

It will be noted that the sale-deed is dated 1905, and the condition that the vendee was to pay Rs. 480 to discharge the first mortgage had no condition attached to it that the Rs. 480 was to be paid at any particular time, or that the defendants could choose their own time for payment, provided that they were responsible for future interest that might accumulate and provided that they paid off the mortgage in time to save the property from being put to sale—a proceeding which would have resulted in the property also being in danger of being sold which the mortgagor had kept with himself. The plaintiff has not brought his suit till 1922, and it is contended for the defendants that the suit is barred by limitation as coming within Art. 132 of the Limitation Act. For the plaintiff it is contended that Art. 116/115 is applicable.

We will consider first which of the two Articles is applicable and then consider whether the suit would be within time even if the plaintiff's contention were to be accepted that Art. 116/115 was the appropriate Article. It appears to us that the plaintiff's suit is avowedly one to which Art. 132 is applicable. The relief asked for is not for compensation for a breach of contract. It is specifically a suit to enforce payment of money charged upon immoveable property. He specifically asks for "the enforcement of a hypothecation lien by sale" of the property, and that really can only have reference to s. 55 (4) (b) of the Transfer of Property Act. It is true that the plaintiff asks for sale of the property in satisfaction of his claim for a sum of Rs. 1,367-8, a total which he arrives at by adding together a sum which he has had to pay so far to preserve the property, interest thereon and the sum which he may be called upon to pay in the future. It may be that if his relief was properly framed as a claim under s. 55 (4) (b) of the Transfer of Property Act, it should have been a claim for Rs. 480 together with interest to date. The fact, however, remains strikingly apparent in the suit as framed that it was a claim for "enforcement of a hypothecation lien" and not a suit for compensation for breach of contract. On the face of it, therefore, Art. 132 is the most appropriate Article to apply. It requires very little experience of the Limitation Act to know that in many cases, in addition to the obviously appropriate Article, there are other Articles which can

by forced reasoning be, to some extent at any rate, applicable. In our view, however, Art. 132 is clearly the Article applicable to a relief asking for enforcement of a hypothecation lien. (We quote from the relief). This is really sufficient in our view for a decision of the case. Neither of the Courts below has discussed the applicability of Art. 132. They have contented themselves with giving reasons for holding Arts. 116/115 to be applicable. It is, therefore, desirable to say a few words in reference to those Articles. In holding them applicable neither of the Courts has thought it necessary to consider the language of the Articles themselves, but both Courts have contented themselves, with referring to certain rulings. Article 116 merely refers back to Art. 115, and that says that limitation for a suit for compensation for the breach of a contract is to run from the date "(a) when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases." Neither of the two later conditions is applicable here. We should merely have to consider "when was the contract broken." Bearing in mind the terms of the conditions in the sale-deed, which were merely that the mortgage was to be paid off, without giving the vendee the liberty to pay it off at some future time or to pay it off whenever he pleased, provided that he was responsible for future interest and paid it off before the property was endangered, the presumption is that he was to pay it off immediately or, if not immediately, at any rate as soon as was reasonably possible. It matters little whether that period be held to be 24 hours or a week. He clearly, therefore, broke his contract on the 18th of February, 1905, when he undertook to pay off the mortgage, or within a very short but reasonable period therefrom. Compare *Raghubar Rai v. Jai Rai* (1). Incidentally it may be noted that in that case Art. 116 was applied but the pleadings were admittedly not clear, and both sides agreed that the suit was to be considered as one for damages on breach of the covenant.

Even, therefore, applying Art. 116/115 the suit would appear to be barred by limitation. This aspect of the case the Courts have not considered. The trial Court

(1) 14 Ind. Cas. 244; 34 A. 429; 9 A. L. J. 534.

relied on the case of *Hakim Ali Khan v. Dalip Singh* (2). In that case it was held that limitation would run from the date on which the mortgagor or his successor-in-title had to pay the decretal amount. There is nothing in that case to show what were the terms of the contract between the mortgagor and his vendee. Nor is it clear how the suit was framed; nor was there any discussion as to the applicability of Art. 132 or Art. 116/115. In *Ishri Pershad v. Muhammad Sami* (3) the contract between the mortgagor and a subsequent mortgagee who failed to discharge the prior mortgage with the money left in his hands for that purpose was wholly different to that in the present case. In the contract there the mortgagee had undertaken all responsibility for further interest and could pay the prior mortgage at any time he pleased, and it was held that the cause of action, therefore, did not accrue on the date of the contract but arose only when the mortgagor was damnified.

The result is that we set aside the decree of both the lower Courts and dismiss the suit with costs throughout.

A. N. A. Decree set aside.

(2) 19 Ind. Cas. 676; 11 A. L. J. 478.

(3) 60 Ind. Cas. 829; 19 A. L. J. 81.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 2089 OF 1925.

November 16, 1927.

Present:—Mr. Justice Lindsay and

Mr. Justice Banerji.

PARAS RAM AND OTHERS—DEFENDANTS

—APPELLANTS

versus

NEKSAL AND OTHERS—PLAINTIFFS

AND DEFENDANTS—RESPONDENTS.

Agra Pre-emption Act (XI of 1922), s. 10.—Right of pre-emption—Transfer under compromise decree, whether amounts to sale and gives rise to pre-emption.

A transfer which is effected under a decree of a Court, even though the decree is based on a compromise, is not a sale and cannot, therefore, be pre-empted under the Agra Pre-emption Act. [p. 683, col. 1.]

Intizar Husain v. Jamna Prasad (1) and *Abdur Razzaq v. Mumtaz Husain* (2), followed.

Second appeal from the decree of the District Judge, Jhansi, dated the 1st June, 1925.

Mr. S. B. Johari, for the Appellants.

Mr. Gadadhar Prasad, for the Respondents.

JUDGMENT.—We think the judgments of both the Courts below in this case are wrong. The suit was a suit for pre-emption and the transfer in respect of which the right of pre-emption was claimed was described as being a transfer by way of sale. Both the Courts below were of opinion that this transfer was "tantamount to a sale" and, therefore, pre-emption was allowed.

The facts may be stated very shortly as follows: By an arrangement which was made under a compromise decree one Jagarnath became liable to transfer a one-pie share of property which was coming to him, to one Puran to whom the other party to the decree in that compromise suit owed a sum of Rs. 545.

Jagarnath, having got the property and being in a position to transfer this one-pie share to Puran, as he was bound to do under the terms of the compromise decree just referred to, failed to convey it to Puran. Puran then resorted for help to three men, Paras Ram, Achhru and Phundi Lal and it was arranged between them that a suit should be brought against Jagarnath's representatives (Jagarnath having died in the meantime) in order to make them hand over the one-pie share which Jagarnath had been under an obligation to convey. And so there was a suit between Puran and his three associates on the one side ranged as plaintiffs and Jugul Kishore and Har Das the representatives of Jagarnath who were arrayed as defendants. The result of this case was a compromise upon which a decree was passed and the effect of the decree was that the two defendants, the representatives of Jagarnath, were under the duty of handing over a 12 kharants share to Puran and the other three plaintiffs.

The decree passed on this compromise bears date the 29th October, 1923, and the plaintiff Neksal comes into Court and says that he is entitled to pre-empt the transfer which has been sanctioned by this compromise. As we have said, the Court of first instance said that this transfer under the compromise decree was "tantamount to a sale" and that Neksal was, therefore, entitled to pre-empt. This view has also been accepted by the lower

Appellate Court. We do not agree. In the first place, it is clear that under the Agra Pre-emption Act which governs the present case, a right of pre-emption can only be claimed in respect of sale or foreclosure. This is made clear by a reference to s. 10, which defines when a right to bring a suit for pre-emption arises.

The transfers which are pre-emptible being confined to sales and foreclosures we have to consider what the meaning of the term "sale" is in this Act (Act XI of 1922). There is a definition of sale in s. 4 (10), of the Act and it says that "sale" means a sale as defined in the Transfer of Property Act, 1882. The definition of "sale" in this latter Act is contained in s. 54 and bearing in mind that any transfer under the Transfer of Property Act must be an act such as is described in s. 5 of that Act, "transfer" means an act by which a living person conveys property in present or in future, to one or more living persons, or to himself or one or more other living persons, and "to transfer property" is to perform such act. It seems to us to be impossible to apply this definition of "transfer" and of "sale" in the Transfer of Property Act to a decree of a Court and we cannot, therefore, allow the contention that a transfer which is effected under the sanction of a decree of Court can be treated as a sale and can be pre-empted under the Agra Pre-emption Act. There are two Bench rulings of this Court which are referred to in the judgment of the lower Appellate Court. One is *Intizar Husain v. Jamna Prasad* (1). In that case it was distinctly held by a Bench of this Court that a right of pre-emption does not arise upon a transfer effected by virtue of a decree though the decree is passed upon compromise. In this judgment the learned Judges followed another judgment of theirs reported as *Abdur Razzaq v. Mumtaz Husain* (2). The learned Judge of the lower Appellate Court has attempted to distinguish these rulings from the present case, but no valid distinction can be drawn. It is perfectly true that these judgments were delivered before the coming into force of the Agra Pre-emption Act, but that fact cannot make any difference. We are definitely of opinion that a sale which is pre-emptible in this Act must be strictly

a sale as defined in the Transfer of Property Act, 1882, and that a transfer of property which is brought about by a decree of Court cannot for purposes of pre-emption be treated as a sale within the Act.

The result, therefore, is that the plaintiff had no right of suit. We allow this appeal, set aside the decrees of the Courts below and direct that the plaintiff's suit do stand dismissed with costs to the contesting defendants in all three Courts.

A. N. A. Appeal allowed.

ALLAHABAD HIGH COURT.

FULL BENCH.

CIVIL MISCELLANEOUS CASE No. 605 of 1927.

December 2, 1927.

Present :—Mr. Justice Sulaiman,

Mr. Justice Banerji and

Mr. Justice Ashworth.

In the matter of MAKUND SARUP—

APPLICANT.

Income Tax Act (XI of 1922), ss. 2(1) (a), 4.—Usufructuary mortgage and lease back—Rent, whether liable to taxation—Agricultural income, meaning of.

Where a person carrying on money-lending business lends money in the course of such business on the security of lands of which he takes a usufructuary mortgage, and immediately leases those lands back to the mortgagor with a stipulation for fixed annual payments, which amount to a definite percentage on the sum advanced, the annual payments should be excluded from the assessment of the profits and gains of his business as being 'agricultural income' within the meaning of s. 2 (1) (a) of the Income Tax Act, 1922. [p. 684, col. 6; p. 685, col. 1.]

Partington v. Attorney-General (1), commented upon.

Dr. Sir Tej Bahadur Sapru, Messrs. N. P. Asthana and Shiva Prasad Sinha, for the Applicant.

Mr. Uma Shankar Bajpai, for the Crown.

OPINION.

Sulaiman, J.—This is a reference under s. 66, Income Tax Act, 1922. It appears that Munshi Makund Sarup in submitting his income-tax returns for the years 1925-26 and 1926-27 did not include the income derived by him from certain usufructuary mortgages in his favour. The Income Tax Officer on this discovery came to the conclusion that such income was derived from money-lending business and was not derived from landed property and, therefore, liable to income-tax. The assessee appealed to the Assistant Commissioner, who relying

(1) 1 A. L. J. 247.

(2) 27 A. 334; A. W. N. (1903) 63.

upon a Full Bench decision of the Madras High Court in the case of *Subramanya Sasirigal* (reported in Mr. P. R. Srinivasa's Reports of Income-tax cases, Volume II, Part III, page 152) dismissed the appeal. The assessee then requested the Commissioner to refer the question of law which arose in this case to the High Court. The Commissioner has formulated the question for consideration in the following words :

"If a person carrying on money-lending business lends money in the course of such business on the security of lands of which he takes a usufructuary mortgage, and if he immediately leases those lands back to the mortgagor with a stipulation for fixed annual payments, which amount to a definite percentage ($8\frac{1}{2}$ in the case cited above) on the sum advanced, should those annual payments be excluded from the assessment of the profits and gains of his business as being agricultural income within the meaning of s. 2 (1) (a), Indian Income Tax Act, 1922 ?"

The main question underlying this reference appears to be whether if the case is not that of a pure usufructuary mortgage, but one where there is a simultaneous grant of a lease of the mortgaged property to the mortgagor so that the net result is that the mortgagee obtains regular cash payments representing interest on his capital, the latter is exempted from liability to pay income-tax.

Section 3 of the Act in the first place makes all income, profits and gains liable to income-tax, but s. 4 contains an exemption clause which among other matters provides that the Act shall not apply to "agricultural income." New agricultural income is defined in s. 2, sub-cl. (1) (a), as being any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collections by Government and collected by officers of the Government as such. And under cl. (b) agricultural income is also income which is derived from such lands by agriculture. These two clauses undoubtedly indicate that the agricultural income can either be derived by a person who is actually carrying on agriculture or cultivation, or it may represent the rent received by him from land which is used for agricultural purposes though the person who received the rent may not himself be cultivating that land.

It seems necessary to clear the ground by first considering the question whether a pure usufructuary mortgagee is liable to pay income-tax. The learned Advocate for the Crown has laid great stress on the assumption in the reference that the present assessee is carrying on money-lending business and that it was in the course of such business that he has invested his capital, the return of which is his income from these lands. It is, therefore, his contention that his gains are gains of business and not rent. It may be conceded that the profits made by a usufructuary mortgagee even though arising out of the land mortgaged to him, are gains of his business, if he has taken this mortgage in the course of his business as an investment. But this concession does not necessarily involve an admission that such gains of business are not rent within the meaning of s. 2 so as to exempt him from liability to pay income-tax. The money which actually comes into the hands of a pure usufructuary mortgagee may be rent received direct from tenants or may be the profits from actual cultivation. It is, therefore, either rent derived from land which is used for agricultural purposes, or is income derived from land by agriculture. In either case it is agricultural income. It may also happen to be gains of his business, but that does not necessarily take him out of the exemption clause.

I am, therefore, clearly of opinion that in the case of a pure usufructuary mortgagee there is no liability to pay income-tax. The position of such a mortgagee is very much analogous to that of a proprietor who is entitled to have his name recorded in the revenue papers and is for the purposes of Revenue Courts treated as a co-sharer. He is also entitled to sue for arrears of rent, eject tenants and to enter into possession and cultivate the land himself, as the proprietor himself could have done. He is further liable to pay Government revenue which a simple mortgagee is not. His position is analogous to that of a lessee who takes a lease of agricultural lands, say for a fixed period on payment of some *nazrana*. The latter class of transferees cannot be liable to the payment of income-tax. It is thus clear that the income received by a usufructuary mortgagee is really agricultural income, though it just happens to be also a return for the capital invested by him. To hold that he is liable to pay both Government revenue and income-tax would

be imposing a double taxation which is against the policy of the Act.

Coming to the next question whether even if a usufructuary mortgagee is not liable to pay income-tax, a mortgagee who at the same time leases back the mortgaged land to the mortgagor with a stipulation that there would be a fixed annual payment calculated on the basis of rate of interest agreed upon between the parties is in a worse position. It seems to me that to hold that such a person is liable to pay income-tax would amount to holding that the transaction is not that of a usufructuary mortgage but almost a simple mortgage. It is impossible to hold in this case that the transaction was not that of a usufructuary mortgage. No doubt the mortgage-deed and the lease were executed at one and the same date and the cross-references in the two documents indicate that the whole transaction was settled at one time. Nevertheless there are certain distinguishing features which make the position of the present usufructuary mortgagee quite distinct from what it would have been if he had taken a purely simple mortgage. He has under the lease the right to recover rent through the Revenue Court which very often is a speedy remedy. He has also the security of the fixed amounts being paid to him regularly year after year with the option of entering into possession on the default of such payment. If he enters into possession after the ejectment of the mortgagor he is entitled to cultivate lands himself or to let the lands to tenants and receive profits from them. Under these circumstances it seems impossible to hold that the position of the assessee is that of a purely simple mortgagee who is liable to pay income-tax.

With regard to the Full Bench case of the Madras High Court relied upon by the Assistant Commissioner, I need only say that the judgment is very brief and contains no reasons in support of the view urged on behalf of the Crown. The learned Judges appeared to have assumed that the finding of fact arrived at by the Commissioner who had made the reference necessarily involved the result of the reference being answered in the negative. Perhaps they meant to assume that the finding of the Commissioner, that in that case the transaction was merely a device to evade the payment of the income-tax and was not in reality a transaction of the usufructuary

mortgage and the income was not derived from the land but from a business of the vendee, was a finding of fact which could not be disturbed. I am not saying that the remarks of the Income Tax Officer, did in reality amount to a finding of fact. But the learned Judges appear to have treated it as such, and on that assumption held that the answer must be in the negative.

I am, therefore, of opinion that the answer to the question should be in the affirmative, and the annual payments should be excluded from assessment.

Banerji, J.—I agree. I am of opinion that upon the facts of the present case the income which is derived by the assessee is income which comes within the definition of agricultural income in s. 2 (1), Income Tax Act. The mere fact that the usufructuary mortgagee has granted a lease to the mortgagor, in my opinion, does not alter what in law is the effect of the document executed by the mortgagor in favour of the mortgagee. It still remains a usufructuary mortgage and in the case of a usufructuary mortgage, although it would come within the definition of business, it is exempted from the operation of the Act by reason of the definition of agricultural income in s. 4 which says that any income derived from any rent from land which is used for agricultural purposes is exempted from taxation. In my opinion in no case can the profit which the usufructuary mortgagee receives be called anything but rent derived from land used for agricultural purposes.

Ashworth, J.—I concur. The owner of agricultural land who leases land is admittedly not liable to income-tax on the rent received. A usufructuary mortgagee is, for the time being, the owner of agricultural land, and so long as the mortgage subsists, he is in the same position as an owner. The Government Advocate attempted to distinguish the rent paid to an absolute owner from that paid to a usufructuary mortgagee by drawing a very subtle distinction. His argument was that a person purchasing agricultural land must pay the full market price, while a person taking a usufructuary mortgage of that land will never advance the whole market price. Consequently, by reason of the mortgage, he obtains higher profits on the money invested than a purchaser would, and the difference should be regarded as a profit from the business of money-lending. But the price paid for the acquisition of land cannot

affect the character of the land acquired. A usufructuary mortgagee is, like the owner of agricultural land free from payment of income-tax, because the land is liable to land revenue. My researches into the history of land revenue have inclined me to believe that it is in reality a rent claimed by Government but collected under the procedure applicable to a tax. The exception in s. 2, Income Tax Act, however, proceeds on a different assumption. It is clear that the exemption is made on the ground that the owner, temporary or otherwise, of agricultural land should not be liable to two forms of taxations, land revenue and income-tax.

If we concede that a usufructuary mortgagee is not liable for income-tax in respect of the mortgaged land, provided that the land is agricultural, then the question referred to us amounts to this: Does it make any difference when by means of a lease, forming a single transaction along with the mortgage, the mortgagee restores possession to the mortgagor, and himself, in the form of rent, receives sum equal to the land revenue *plus* interest at a definite rate? The answer to this depends on whether the result of the two deeds could have been effected *in toto* by a simple mortgage-deed. My learned brother has shown that this was not the case. The result of the execution of the two deeds is fraught with consequences that would not attach to the execution of a simple mortgage-deed. One transaction differs from the other not merely in form, but in substance.

The Commissioner of Income-Tax has not suggested in his reference to this Court that the transaction of a usufructuary mortgage and a lease was fraudulent, or colourable, or that the legal consequence of the execution of both deeds can be avoided on this ground; but he has referred to a decision of the Madras High Court in which this point is raised.

There can be no doubt that the decision by the Madras High Court was reasonably invoked by the Income-tax Commissioner. It appears, therefore, desirable to examine that decision both to see how far it is on all fours with the present case, and, if so, on what grounds dissent from it should be expressed. The main distinction to my mind between the reference to the Madras High Court and this reference is that there was undoubtedly forwarded to the Madras High Court an expression of opinion, treated by

the Madras High Court as a finding of fact, which is wanting in the reference to this Court. In that reference the Income Tax Commissioner had stated:

"The income received or receivable by the capitalist is not income derived from land, but income derived from the business of money-lending. It appears to me that Taxing Authorities and Courts in such a case as this must look to the substance of the transaction. The source of the petitioner's income is his money-lending business, and the mortgage and lease back are merely devices adopted partly to protect his capital and partly to secure his business from liability to income-tax. It is evident from the drafting of sub-s. (2) (1), Income Tax Act XI of 1922, that the object of the exemption of agricultural income is to avoid subjecting the income from land to double taxation, once in the form of land revenue and once in the form of income-tax."

On this reference the judgment of the Madras High Court was as follows:

"The finding of fact in this case necessarily involves that the question propounded in the reference should be answered in the negative."

Now the question of fact found by the Madras High Court was presumably that the income assessed was not derived from land. If this finding had been stated without reasons, it would clearly have been a simple finding of fact and would have precluded the interference of the High Court. It appears that the Madras High Court treated the reference as containing such a finding of fact, and so it did not discuss the question of law referred to us. In the present reference, on the contrary, all questions that can be raised are left open.

It appears, however, to me desirable to state that if the terms of the reference and the decision of the Madras High Court are rightly reproduced in the publication placed before this Court, what was submitted to the Madras High Court was not merely a finding of fact, but a finding of fact based upon an interpretation of the Income-Tax Act and on a certain proposition of law, from both of which it is necessary to express dissent. The Act does not make the distinction drawn in that reference between income derived from business and income derived from land. The business of money-lending may bring in an income, which is exempt from

income-tax on the ground that it is derived from agricultural land. Nor again can the Taxing Authorities avoid an implication arising from the form of a transaction on the ground that, except for a desire to escape income-tax, the transaction would have taken a different form, which is what is meant in that reference by "looking at the substance of the transaction." It is not unlawful to avoid, by any means not forbidden by law, rendering oneself liable to the payment of income-tax, though it is an offence by false return or by concealment to evade payment of income-tax. In this connexion I would quote the remarks of Lord Cairns on the interpretation of a Taxing Statute:

"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any Statute, what is called an equitable construction, certainly such a construction is not admissible in a Taxing Statute, where you can simply adhere to the words of the Statute." *Partington v. Attorney-General* (1).

For the above reasons I would concur in answering the question propounded in the affirmative.

A. N. A.

Order accordingly.

(1) (1869) 4 H. L. 100; 38 L. J. Ex. 205; 21 L. T. 370.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 530 OF 1927.

November 2, 1927.

Present:—Mr. Justice Dalal.

GUR NARAIN—ACCUSED—APPLICANT
versus

EMPEROR THROUGH KALLU—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 403 (1)
—Rash driving resulting in hurt—Conviction under
Motor Vehicles Act (VIII of 1914), s. 5—Fresh
prosecution under ss. 279, 338, Penal Code, whether
barred.

A motor driver, who drove recklessly and thereby caused grievous hurt to a person, was convicted under s. 5 of the Motor Vehicles Act. He was subsequently

prosecuted under s. 279 of the Penal Code. It was contended on behalf of the accused that the second prosecution was barred under s. 403 of the Criminal Procedure Code:

Held, that though the accused could not be prosecuted for an offence under s. 279 of the Penal Code or for any offence circumscribed by the rash driving, yet his conviction for rash driving could not protect him from prosecution for the consequences of such rash driving under s. 338 of the Penal Code. [p. 688, col. 1.]

Criminal revision from an order of the Sessions Judge, Mainpuri.

Mr. S. N. Chaube, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant, a driver of a motor lorry, was once convicted of an offence under s. 5 of the Motor Vehicles Act VIII of 1914 for reckless driving. The reckless driving resulted in the lorry knocking against the *chabutra* on which one Kallu butcher was sitting and fracturing the bones of his left leg. He is now being prosecuted under s. 279 for rash driving and causing grievous hurt by doing any act so rashly or negligently as to endanger human life and the personal safety of others.

It is submitted here as it was in the Court of Session that the applicant's further prosecution is barred under the provisions of s. 403 (1) of the Code of Criminal Procedure. A person, who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under s. 236, or for which he might have been convicted under s. 237. In my opinion the argument will apply to one set of cases and not to the other. Under s. 235 (1) an accused person may be charged with, and tried at one trial for, every offence which he may have committed, if in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person. Under s. 403 (2), Criminal Procedure Code, the provisions of s. 235 (1) are not made applicable to those different offences committed in one series of acts. In the present case the one series of acts of the applicant consisted of rash and negligent driving and of knocking against human being and thereby causing hurt to him. The learned Counsel for the applicant argued that there

was only one act and not a series of acts. I cannot agree on this point. The one act was the act of rash driving, and even if the applicant's lorry had not knocked against the *chabutra* and had not injured the butcher, he would still have been liable for reckless driving. There was not only one act of reckless driving but a subsequent act of knocking against a man during such rash driving. It is clear to me, therefore, that his conviction for rash driving cannot protect him from prosecution for the consequences of such rash driving either under s. 325 or s. 338 of the Indian Penal Code. The trial is still pending and has not been concluded, so this Court is not in a position to give any opinion as to what offence has been committed. It is true that the provisions of s. 403 (1) would cover an offence under s. 279, because at the former trial on the same fact of rash driving the applicant could have been prosecuted under s. 279 for rash driving on the public road so as to endanger human life. I do not think that the offence of rash driving which is dangerous to the public, and rash driving so as to endanger human life can be separated though these offences are punishable under different Acts. I am of opinion that the applicant could no longer be tried for an offence under s. 279 or any offence circumscribed by the rash driving. As to the result of the rash driving the applicant must stand his trial for the grievous hurt caused to the butcher. It seems to me that the Magistrate took the same view that the applicant could still be tried under s. 338 of the Indian Penal Code. That is the correct view and the trial should proceed under s. 338, Indian Penal Code, and not under ss. 279 and 325, Indian Penal Code. Obviously, the learned Sessions Judge had not noted this point when he wrote a para. of good advice to the trying Magistrate. I dismiss this application in which also reference is made only to s. 338, Indian Penal Code. It would, however, be more proper to give a further order and to state that the applicant may be prosecuted under s. 338, Indian Penal Code, and not under ss. 279 and 325, Indian Penal Code.

A. N. A.

*Application dismissed.***ALLAHABAD HIGH COURT.**

CRIMINAL REVISION No. 724 OF 1927.

December 21 and 22, 1927.

Present:—Mr. Justice Dalal.

JAGANNATH AND ANOTHER—ACCUSED—

APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 156, 165—Investigation by Police—Entry into house of stranger to verify truth of statements received during investigation, legality of.

The only authority which a Police Officer making an investigation has to enter a house without a search warrant is when he has reasonable grounds for believing that anything necessary for purposes of an investigation into any offence which he is authorised to investigate, may be found in any place within the limits of the Police Station of which he is in charge. He has no power to make promiscuous entries into houses simply to satisfy himself as to the truth of an allegation made by a complainant, or an accused or a witness during investigation. [p. 689, col. 1.]

Criminal revision from an order of the Sessions Judge, Jhansi.

Dr. N. C. Vaish and Mr. K. O. Carleton, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—I cannot agree with the learned Judge of the lower Appellate Court that a Sub-Inspector while he is holding an investigation on a charge of house trespass in the house of A, has the right to enter the house of A's neighbour B. One Baldeo was caught at night in the house of Ohheda Lal, a neighbour of the applicants, who are father and son. Baldeo's explanation to the Police appears to have been that he was carrying on an intrigue with the applicant Jagannath's wife and the applicant Sunder Lal's mother and was caught as he was escaping from the house of the applicant through the house of Ohheda Lal. The Sub-Inspector thereupon, desired to enter the house of the applicants to satisfy himself whether Baldeo's story was true in so far as the possibility of scaling the partition wall from the side of the applicant's house was concerned. The applicants protested and threatened to shoot the Sub-Inspector. Under s. 156 of the Code of Criminal Procedure the local limits within which an officer-in-charge of a Police Station may investigate a cognizable case are defined. No provision is made there of an indiscriminate power of such an officer to enter houses in the neighbourhood of the place where

a cognizable offence may have been committed. The only authority which a Police Officer making an investigation has to enter a house without a search warrant is when he has reasonable grounds for believing that any thing necessary for purposes of an investigation into any offence, which he is authorised to investigate, may be found in any place within the limits of the Police Station of which he is in charge. Obviously the search indicated here is for stolen property or for some document or for some tangible object, such as may be summoned to be produced by a Court under s. 94 of the Code of Criminal Procedure. The word 'thing' is specifically mentioned and that would not include a configuration of a wall, or the inspection of any place inside a house for purposes of investigation. The provisions of s. 165 are so strict that before entering a house the Investigating Officer has to specify in writing the thing for which search is to be made and also the ground of his belief that such a thing would be found in the house which he desired to enter. A promiscuous entry into houses is not permitted to an Investigating Officer simply to satisfy himself as to the truth of an allegation made by a complainant or an accused person or a witness. I hold, therefore, that the Sub-Inspector in desiring to enter the house of the applicants was not acting in the discharge of his duty as such public officer.

I would have altered the conviction to one under s. 352 and maintained the sentence, if the Sub-Inspector had merely been acting in ignorance of law, but there have been differences between this Sub-Inspector and the applicants, and by reason of those differences the Sub-Inspector's conduct was not only ill-advised but provocative. About two months previously the applicants had sued the Sub-Inspector for defamation for defaming the wife of Jagannath and the mother of Sunder Lal. The suit I am told was pending in July last when the Sub-Inspector desired to enter the house of the applicants. It will be natural in circumstances for the applicant to suspect that the Sub-Inspector had merely got up this arrest of Baldeo in order to justify his implication of immorality of the woman. The applicants acted under great provocation. I alter the conviction to one under s. 358 of the

Indian Penal Code and reduce the sentence to the period already undergone by the applicants. If the applicants are on bail they need not surrender.

A. N. A.

Conviction altered.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 643 OF 1927.

December 1, 1927.

Present:—Justice Sir Cecil Henry Walsh, Kt.

OOHACHAL AHIR—ACCUSED—APPLICANT
versus

EMPEROR THROUGH BIJAI AHIR

—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 498—Woman living with accused of her own free will—Refusal to accompany husband—Offence.

Where a woman was living with the accused of her own free will, and refused to go back to her husband and the only evidence against the accused was that he helped the woman in her not being taken away by force by the complainant:

Held, that the accused could not be convicted under s. 498, Penal Code.

Criminal Reference made by the Sessions Judge, Azamgarh.

FACTS appear from the following report of the Sessions Judge:—

REPORT.—The applicant has been convicted under s. 498, Indian Penal Code i. e., for keeping one *Musammatt Jagdei* the married wife of the complainant in his keeping as his mistress.

Musammatt Jagdei was a widow. The complainant says that after the death of her former husband the said woman made a second marriage with him. The woman denies this fact. There is no evidence in this case that the applicant took or enticed away the woman. All that the evidence shows is that the woman herself went to live with the applicant. This being so the chief element which constitutes the offence under s. 498 is wanting. Again my attention has not been directed to any evidence which could prove that the applicant is keeping the woman in his house for the purpose of an illicit intercourse with her. The woman is not willing to go with the complainant and all that the evidence on the record shows is that the applicant also helped the woman in her not being taken away by force by the complainant. In this way the utmost that can be said against the applicant is that he is in a way detain-

ing the woman. It has, however, been held in the ruling reported in the case of *Lachman Chamar v. Emperor* (1) that there can be no detention where the woman is living with a man of her own free will and refused to go back with her husband. The evidence on the record does not, in my opinion, prove the offence under s. 498, Indian Penal Code, with which the accused has been charged and the conviction of the accused does not appear to be proper. Let the record be sent to the learned Magistrate for an explanation as to why the case should not be referred to the Hon'ble High Court with a recommendation that the conviction and the sentence passed on the applicant be set aside.

The Assistant Government Advocate, for the Crown.

ORDER.—I am inclined to agree with the Sessions Judge. It does not much matter because the sentence has been served, but I formally accept the reference and set aside the conviction.

A. N. A. *Reference accepted.*
(1) 56 Ind. Cas. 209; 18 A. L. J. 311; 31 Or. L. J. 417.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 613 OF 1927.

December 6, 1927.

Present:—Mr. Justice Dalal.

AMINULLAH—ACCUSED—APPLICANT
versus

EMPEROR—OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), ss. 211, 307—Lease by Municipality—Prosecution of lessee for disobedience of notice under s. 211, before determining tenancy, legality of—Mere resolution of Municipality, effect of—Duty of Municipality to give notice terminating lease, necessity of—Criminal Procedure Code (Act V of 1898), ss. 250, 439—Criminal revision—Jurisdiction of High Court to award compensation.

A Municipal Board leased certain plots on a roadside. Subsequently, the Board passed a resolution that the roadside should not be leased and that the lessees then in possession must be told to quit. The Executive Officer of the Board promptly issued a notice to the lessees under s. 211 of the U. P. Municipalities Act treating them as trespassers encroaching on a public road, and the applicant, one of the lessees, was prosecuted for disobedience of the order:

Held, that the notice under s. 211 was illegal inasmuch as the applicant was at the time of the notice a lessee whose lease had not been validly determined, and not a trespasser, and that the applicant could not be prosecuted for disobedience of such notice. [p. 691, col. 1.]

Quere.—Whether it is open to the High Court in criminal revision to award compensation to the accused under s. 250 of the Criminal Procedure Code. [p. 691, col. 2.]

Dr. K. N. Katju, for the Applicant.

Mr. S. N. Mukerji, for the Municipal Board.

Mr. Wali-ullah, Assistant Government Advocate, for the Crown.

ORDER.—This revision reveals some very high-handed proceedings on the part of the Municipal Board of Cawnpore. The facts are admitted. The applicant Aminullah was allotted one of the plots given to stall-holders along the side of a public road from Collectorganj up to the LaTouch Road crossing. The terms of the lease have not been disclosed to this Court, but taking them to be most favourable to the Municipality they may be from month to month, terminable at the end of a month. The Municipality passed a resolution that this roadside should not be let out in future to stall-holders and that the present stall-holders should be told to quit. The Municipality was entitled to pass such a resolution and it was the duty of its Executive Officer to give proper notice under s. 111 (h), Transfer of Property Act. The Municipality would then have been able, on the expiration of the legal notice, to determine the lease. What the Executive Officer did was promptly to issue a notice under s. 211 to the lessees to remove themselves, treating the lessees as trespassers making an encroachment on a public road. This practically means, and when brought to the point by the Court, Mr. Saila Nath had to admit, that according to the Municipality all the leases terminated automatically and the lessees became trespassers as soon as the resolution was passed that the Municipality no longer wanted the roadside to be occupied by these lessees. This point of view is, in my opinion, entirely wrong. Reliance is placed on bye-law 15 which has been properly notified and published in the Government Gazette. It is quoted in the judgment of the District Magistrate as below:

"No person shall build, keep a stall or otherwise interfere or encroach upon any land which is the property of His Majesty or of the Board or which is under the control of the Board unless permission to this effect has been duly granted by or on behalf of His Majesty or the Board, and no person shall continue to do so after such permission

has ceased to be in force or has been withdrawn."

The argument here is that as soon as the resolution was passed the permission to occupy the roadside had ceased to be in force and had been withdrawn. No such illegal claim by a Municipality can be countenanced. A lease can terminate only according to law and the Municipality is not outside the provision of the Transfer of Property Act. Obviously the last words mean the ceasing of permission or the withdrawing thereof according to law and not at the sweet will of the members of the Municipality. If this claim were permitted it would follow that one day the Municipality might grant a registered lease of a plot of land on a roadside for five years to a certain person, and next day the lease would terminate on a resolution being passed by the Municipality withdrawing the permission to occupy the land. A Municipality is as much bound by law as an individual person. When the notice under s. 211 was issued the applicant was a lessee of the Municipality according to law and was not a trespasser and was not encroaching on any street. The notice under s. 211 was, therefore, illegal and there could be no prosecution under s. 307, Municipalities Act, in consequence of breach of that notice.

It was next argued by Mr. Saila Nath that the applicant became a trespasser and encroached on the street at the termination of the notice. This argument completely gives away the case of the Municipality. If the applicant became a trespasser at some date subsequent to the one on which the notice under s. 211 was issued, then obviously, on the date when the notice was issued, the applicant was not guilty of any encroachment and the notice was certainly illegal. It was incumbent on the Municipality to issue a proper notice as required by the Transfer of Property Act. If such a notice was not complied with it was open to the Municipality to treat the applicant as a trespasser and his possession of the roadside as an encroachment, and to issue a notice under s. 211. On the date when this particular notice was issued the time had not arrived for the termination of the lease nor had the applicant become a trespasser or one who encroached upon the land. On that date the applicant was fully justified in occupying the plot of land that he did and was a lessee of the Municipality. The prosecution was

harsh and illegal. I wondered whether it would be possible to compensate the applicant by taking action under s. 250, Criminal Procedure Code. It seems doubtful, however, whether this Court has jurisdiction to pass an order for compensation when the matter comes up in revision. As to the accusation being vexatious I have not the slightest doubt.

I set aside the conviction and sentence and direct the fine, if any recovered, to be refunded. The order regarding stay of the structure is withdrawn. I explained to Dr. Katju that that matter was not before the Court for decision and he accepted the view. The only matter before the Court was whether the conviction of the applicant under s. 307 was legal or not.

A. N. A.

Conviction set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 175 of 1927.

April 19, 1927.

Present:—Mr. Justice Iqbal Ahmad.
MUHAMMAD HASAN AND ANOTHER—

APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 424—Mischief—Cutting of branches of trees—Knowledge of likelihood of loss—Offence.

The cutting of the branches of a tree belonging to another with the knowledge that the cutting is likely to cause wrongful loss or damage to the owner amounts to mischief punishable under s. 426 of the Penal Code. [p. 692, cols. 1 & 2.]

Criminal revision against an order of the Sessions Judge of Allahabad.

Mr. A. M. Khwaja for the Applicants,

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicants Mohammad Hasan and Mujai were convicted by a Magistrate of the First Class under s. 426, Indian Penal Code, and Mohammad Hasan was ordered to pay a fine of Rs. 51 and in default of payment of fine to undergo six months' simple imprisonment and Mujai was sentenced to a fine of Rs. 15 and in default of payment of fine to undergo three months' simple imprisonment. The conviction and the sentences have, on appeal, been upheld by the learned Judge.

I am far from holding that the judgment of the learned Sessions Judge is satisfactory

in every respect, and it appeared to me at one stage of the argument of the learned Counsel for the applicants that the judgment is not in accordance with the requirements of s. 367 (1), Criminal Procedure Code, and that in view of the decision reported as *Sunehri v. Emperor* (1), I must set aside the decision of the learned Sessions Judge and remand the case back to him with a direction to record a proper judgment in the case. But, on a further consideration, I have come to the conclusion that the judgment of the learned Sessions Judge, though not entirely satisfactory, complies with the requirements of s. 367 (1), Criminal Procedure Code.

The points that appear to have been argued before the learned Sessions Judge were as to whether or not the branches of the complainant's trees had been cut and if they were cut did the applicants before me cut those branches. On both points the learned Sessions Judge has recorded a finding adverse to the applicants. The learned Judge has further noted that he had been through the record, and I must take it that his findings on the points noted above are based on a consideration of the entire evidence in the case. The case is a petty one and already much public time has been wasted over it. The findings of the learned Sessions Judge conclude this application which must be rejected.

But out of respect to the arguments addressed at the Bar I must notice certain points that were argued in support of the application, though, in my judgment, there is no substance in either of these points. The first point argued was that, there being no finding by the learned Sessions Judge that the branches were cut with intent to cause wrongful loss or damage to the complainant, the conviction of the applicants under s. 426, Indian Penal Code, was bad in law. In advancing this argument the learned Counsel overlooked the fact that if the branches were cut at the instance of the applicants with the knowledge that the cutting of branches was likely to cause wrongful loss or damage to the complainant, the offence of mischief was complete. It has been further argued that it appeared from the statement of two of the prosecution witnesses that the applicants did not actually cut the branches of the complainant's trees but that those branches had

been cut by the certain persons at the instance of the applicants. He argues that the applicants not having cut the branches could only be convicted of abetting mischief and inasmuch as they were not charged under s. 426/109, Indian Penal Code, they ought to have been acquitted. I am unable to accede to this contention. The point does not appear to have been argued in either of the Courts below, and it was within the province of the learned Sessions Judge to act upon the testimony of the other witnesses for the prosecution and to come to the finding that he has recorded in the case. On those findings the applicants have been rightly convicted and the sentences passed are appropriate. The application is rejected.

A. N. A.

Application rejected.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1395 of 1927.

November 16, 1927.

Present :—Mr. Justice Lindsay

and Mr. Justice Banerji.

RAM RACHHA TEWARI—

DEFENDANT—APPELLANT

versus

GIRJA DAT PANDE AND ANOTHER

—PLAINTIFF AND DEFENDANT—

RESPONDENTS.

Agra Pre-emption Act (XI of 1922), s. 5—Record of custom in mauza, whether applicable to all tolas—'Tola', 'arazi', meanings of.

Where a *wajib-ul-arz* records the prevalence of a custom of pre-emption in a *mauza*, the custom must be taken to apply to all the *tolas* of the *mauza*. [p. 693, cols. 1 & 2.]

The word '*tola*' does not ordinarily mean a subdivision of a *mauza* in the language of the Revenue Law but denotes a portion of a village or town which is inhabited by a particular class. [p. 693, col. 1.]

The term '*arazi*' means plots of land which, though included within the area of *mauzas* and *mahals*, are held on a distinct tenure from, and convey no title to rights or interests in, other parts of the *mauzas* and *mahals*. *Arazidari* lands do not constitute a separate revenue unit by themselves. [p. 693, col. 2.]

Second appeal from the decree of the Second Additional Sub-Judge, Gorakhpur, dated the 22nd April, 1927.

Mr. P. L. Banerji, for the Appellant.

JUDGMENT.—This pre-emption appeal is up for admission under O. XLI, r. 11. The question in the Courts below was whether the plaintiff had a right of pre-

(1) 67 Ind. Cas. 202; 19 A. L. J. 921; 23 Cr. L. J. 378.

emption under s. 5, Agra Pre-emption Act. It was pleaded by way of defence that there was no such right inasmuch as no custom recognizing pre-emption had been recorded in respect of the area in which the property sold was situate.

The first Court held in favour of this defence. The lower Appellate Court held that there was a record of custom and that the plaintiff held a right under s. 5, Agra Pre-emption Act.

It appears that the lands in dispute are included in a very large *mauza* called Dhimsa in the Gorakhpur District. This *mauza* contains a number of *tolas*, and it is said that the lands with which we are concerned are situated in a *tola* named Bharpur. The case for the defence is that this *tola* Bharpur is a 16-annas unit and that as no Record of Rights is shown to have been prepared in respect of it—a record showing the prevalence of a custom of pre-emption—therefore, the plaintiff was out of Court.

The lower Appellate Court, however, was of opinion that all these *tolas* were included in one *mauza*, *Mauza* Dhimsa, and as the *wajib-ul-arz* of Dhimsa was produced and contained a record of custom it must be taken that this custom applied to all these sub-divisions which are described as *tolas*.

We may mention in the first place, that the word "*tola*" does not ordinarily mean a sub-division of a *mauza* in the language of the Revenue Law. *Tola* ordinarily denotes a portion of a village or town which is inhabited by a particular class.

There is on the record a judgment in a previous case which was fought out under the old law of pre-emption. This case related to one of those *tolas* in *Mauza* Dhimsa called *tola* Dubauli and we notice in the Munsif's judgment that this *tola* Dubauli was admitted before him to be what he calls an *arazidari* village of full 16 annas and which he thought was quite separate from *Mauza* Dhimsa. These *arazidari* holdings are very common in one part of the Gorakhpur District and it was necessary a few years ago for the Pre-emption Bench in this Court to describe the nature of these *arazidari* holdings. The matter is fully discussed in the judgment of the Pre-emption Bench reported as *Surwan Prasad Tewari v. Basdeo Narain Singh* (1). There

(1) 74 Ind. Cas. 124; A. I. R. 1923 All. 129; 45 A. 237; 21 A. L. J. 65.

the definition of Mr. Reid, formerly a Settlement Officer of Azamgarh, was referred to according to which the term "*arazi*" means plots of land which, though included within the area of *mauzas* and *mahals*, are held on a distinct tenure from, and convey no title to rights or interests in other parts of the *mauzas* and *mahals*. It is quite clear from this definition that *arazidari* lands do not constitute a separate revenue unit by themselves. They are lands included in a *mahal* or *mauza* lands which are held on a peculiar tenure.

We would not, therefore, expect to find any separate Record of Rights drawn up in respect of these various *tolas* which are included within the ambit of this very large village called Dhimsa. We think the plaintiff is entitled to rely upon the custom recorded in the *wajib-ul-arz* of Dhimsa. That is the custom which governs the whole of this area including the area in which the land in dispute is situate. We are satisfied that the judgment of the lower Appellate Court is correct and that the plaintiff had a right of pre-emption under s. 5, Agra Pre-emption Act. The appeal is dismissed under O. XLI, r. 11.

A. N. A. Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 67 OF 1927.

December 19, 1927.

Present:—Justice Sir Cecil Henry Walsh, Kt., and Mr. Justice Iqbal Ahmad.
Thakur LAL SINGH—DEFENDANT—

APPELLANT

versus

JAGRAJ SINGH AND OTHERS—PLAINTIFF
AND DEFENDANTS—RESPONDENTS.

Hindu Law—Debts—Mortgage-decree against father—Suit by sons to set aside decree—Sons whether bound to prove illegality of debt—Absence of necessity, effect of—Suit against karta and junior members—Decree, effect of—Presumption as to nature of suit

Per Walsh, J.—When the *karta* of a joint Hindu family together with the other members of the joint family is sued, it must be taken that he enjoys the dual capacity which he enjoys in the family, that is to say, he is sued both as the *karta* representing the family and managing the family, and as a member of it, having an undivided interest. [p. 694, col. 1.]

The proposition laid down by the Judicial Committee in *Brij Narain Rai v. Mangla Prasad Rai* (2) that if the managing co-parcener is the father and the reversioners are the sons, he may, by incurring debts so long as it is not for an immoral purpose, lay the

estate open to be taken in execution proceeding upon a decree for payment of that debt, is applicable to decrees on mortgages as well as simple money-decrees. [p. 695, col. 2; p. 696, col. 2.]

Per *Iqbal Ahmad, J.*—The answer to the question whether a Hindu son is entitled to challenge a decree obtained against his father for sale of the joint family property without asserting and proving that the debt secured by the mortgage was incurred for illegal or immoral purposes must depend upon the question whether or not the father was sued as *karta* and manager of the joint family. If he was, the answer must be in the negative. If he was not, the answer must be in the affirmative. [p. 696, col. 2; p. 697, col. 1.]

The proposition that once the joint ancestral property has passed out of the joint family in execution of a decree for the father's debt his sons cannot recover that property unless they show that the debt in respect of which the decree was obtained was a debt incurred for illegal and immoral purposes has reference only to simple money debts which the father is under a personal obligation to pay and simple money-decrees obtained against the father for recovery of such debts. In the case of a debt incurred on the security of the family property by the father, when the mortgagee has not sued for recovery of the debt within six years of the date of accrual of the cause of action, and has thus allowed his right to a simple money-decree against the father to become time-barred, the personal obligation of the father disappears, and the mortgagee is then only entitled to recover the debt by sale of the mortgaged property, and in such case the sons labour under no pious obligation to discharge that debt for the simple reason that the debt is not due from their father. Consequently, if the mortgagee has obtained a decree for sale of the joint family property without impleading the sons or without suing the father in his representative capacity, the sons are entitled to challenge the validity of that decree on the ground that they being no parties to that decree are not bound by the same, and in such a suit, unless the mortgagee succeeds in proving that the debt secured by the mortgage was for legal necessity, the sons will be entitled to avoid the decree. [p. 697, cols. 1 & 2.]

Sahu Ram Chandra v. Bhup Singh (1), *Brij Narain Rai v. Mangla Prasad Rai* (2), *Ali Ahmad v. Sohan Lal* (3) and *Gauri Shankar v. Jang Bahadur Singh* (4), referred to.

When the manager of a joint Hindu family is impleaded as a defendant to the suit, the presumption is that he is sued in that capacity. But if, along with the manager, certain other members of the family are joined as defendants to the suit, the presumption must be the other way. [p. 699, col. 1.]

First appeal from an order of the District Judge, Aligarh, dated the 25th February, 1927.

Mr. N. P. Asthana, for the Appellant.

Messrs. T. A. K. Sherwani, A. M. Khwaja and Panna Lal, for the Respondents.

JUDGMENT.

Walsh, J.—This case gives rise to a question of some difficulty, which appears to be an open question so far as this Court is concerned, at any rate in recent years since the comparatively modern decisions

of the Privy Council. The suit is brought by a minor to set aside a mortgage-decree. Defendant No. 1 obtained a decree for sale on a mortgage executed by Bhagwant Singh and Imrat Singh, who are assumed for the purpose of this decision to have been, or to have represented, the two branches of a joint Hindu family. It is assumed that they were brothers, and that one of them was the *karta*. Imrat Singh died before the decree and his two sons became parties as his sons, Bhagwant Singh, being still alive, was also a party, but the minor son of Bhagwant Singh, namely, Jagraj Singh, the present plaintiff, was not a party. There is no evidence that the mortgagee even knew of his existence. So far as I can understand the matter it is immaterial which of the two brothers was the *karta* at the time of the mortgage, or which defendant was acting as the *karta* at the time of the decree. When the *karta*, together with the other members of the joint family is sued, it must be taken that he enjoys the dual capacity which he enjoys in the family, that is to say, he issued both as the *karta* representing the family and managing the family, and as a member of it, having an undivided interest.

The present plaintiff, who, as I have pointed out, was no party to the suit, has brought this suit for a declaration that the mortgaged property is not liable to be sold in execution of the decree on the ground that it was ancestral property of the family to which he belonged, and that there was no legal necessity for the loan for which the mortgage was given. The Subordinate Judge dismissed the suit on the ground that it did not lie in the absence of an allegation that the mortgage was made for a debt tainted with immorality. The District Judge overruled this decision and remanded the case as having been wrongly disposed of upon a preliminary point. The difference between the two learned Judges, which has been argued before us, centres round the following controversy: It is admitted that a mortgagee, in order to substantiate a suit upon his mortgage, has to prove that the debt was incurred for legal necessity. It is admitted, on the other hand, that if a decree has been obtained upon a mortgage by the mortgagee, or upon a simple money debt by a creditor, and as the result of either of these decrees the ancestral property has, by sale, passed into the hands of

a third party, the absent son or a minor son, who was not represented, cannot recover the property in the hands of a third person without alleging that the debt for which it was incurred was tainted with immorality or, in other words, without showing that the pious obligation of a Hindu son to discharge his father's debts does not apply to this transaction, because there is no pious obligation to pay debts tainted with immorality. But there is a stage midway between these two contingencies, what may be described as a *tertium quid*: what is the legal position of a son who was no party to the suit where the debt or legal obligation has passed into a decree but no execution proceedings have taken place upon the decree, and no part of the ancestral property has passed into the hands of a third person? A subsidiary branch of the same question arises very frequently in these Provinces where the mortgagee himself purchases at the sale, because in one sense the mortgagee adds the capacity of purchaser to that of decree-holder, although he is in fact the same individual.

The view of the Subordinate Judge is based upon two *dicta* of the Privy Council. It must be said, by the way, that these *dicta* are, if the expression may be used, not precisely on the level of what is ordinarily intended to be understood by the expression *obiter dicta*, but are expressions of opinion by the highest tribunal made with the intention and desire of providing guidance to the Courts in India. They must, therefore, be accepted as authorities binding upon the Courts in India for all practical purposes with the same force as a Statute. The only question is whether they are properly understood, and to what circumstances they are intended to be applied. In the case of *Sahu Ram Chandra v. Bhup Singh* (1), Lord Shaw, who delivered the judgment of their Lordships, said as follows:—

"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard

to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head."

The argument, which we are asked to accept on behalf of the respondent in support of the District Judge's decision, which is under appeal, is that there is a slight verbal variation from what their Lordships intended to convey, and that the expression "a decree in execution of the mortgage has been obtained" should be read as though the words were "a decree enforcing the mortgage has been executed by sale." It is true to say that the illustration immediately following the passage just quoted certainly deals with the more limited meaning of the passage suggested to us in arguments as the right interpretation. It is equally true to say that, where a decree remains unexecuted and merely places in the hand of the creditor a higher right in which his original right has been merged, with an immediate possibility of obtaining execution, certainly no right of any third person has sprung up against the estate.

The next pronouncement of the Privy Council, which arises for interpretation in its bearing upon this controversy, is the opinion of their Lordships delivered by Lord Dunedin in the more recent case of *Brij Narain Rai v. Mangla Prasad Rai* (2), and particularly the five propositions, laid down expressly by their Lordships for the guidance of the Courts in India, in the closing passages of Lord Dunedin's opinion. The second proposition is the relevant one. It runs as follows:—

"If the managing co-parcener is the father and the reversioners are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt."

The first observation upon that passage is that precisely the same criticism may be made upon it as upon the passage cited from Lord Shaw's opinion, namely, that it does not contemplate a right of a third party which has sprung into existence.

(1) 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W. N. 693; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 O. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.).

(2) 77 Ind. Cas. 689; 46 A. 95; 51 I. A. 129; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; A. I. R. 1924 P. C. 50; 33 M. L. T. 457; 26 Bom. L. R. 500; 11 O. L. J. 107; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.).

In that respect it is consistent. The creditor's claim rests still "upon the hypothesis stated" in a mere decree. There is no third person. Nonetheless, a son absent from the suit cannot challenge the decree without alleging, as the Subordinate Judge held in this case that he ought to allege, the existence of some immorality tainting the debt. It is further to be observed, and this certainly strikes me as an important observation, that whereas their Lordships, in the opinion delivered by Lord Dunedin in *Brij Narain's case* (2), were careful to review and to correct a solemn and important dictum contained in Lord Shaw's judgment in the case of *Sahu Ram Chandra v. Bhup Singh* (1) with which they did not agree, they never referred to, and, therefore, did not attempt to review or correct, the important passage also contained in the opinion which I cited above. It may certainly be said that under the circumstances it would not be a violent presumption to suppose that, having studied it and re-considered it, they saw no reason to dissent from it.

The real objection made in argument by the experienced Advocate, who has argued this case on behalf of the respondent, to our applying the second proposition from Lord Dunedin's opinion to this case, is that the second proposition in terms deals only with a simple money debt and a simple money-decree, and in this relation, above all, there is a fundamental difference between the considerations applicable to a simple money-decree and to a mortgage-decree, because a mortgage-decree, being no more than the enforcement of the original contract, and being necessarily and fundamentally concerned with the original alienation of the joint estate, it is, therefore, that one ought to guard oneself with particular care against extending the second proposition to a wider area than that to which it was applied. I recognize the difficulty. Unaided, I recognize, that I might experience considerable difficulty in making up my mind on which side of this dividing line the true intention and interpretation intended to be conveyed by the Privy Council really lies, but I am not altogether unaided. It happens that there are two cases by single Judges cited in argument before us, both by learned and experienced Judges, on this point. Mr. Justice Piggott, for whose judgment I have the most profound respect, in the

case of *Ali Ahmad v. Sohan Lal* (3), gave elaborate reasons for holding the view which I think is consistent with the view of the District Judge in this case. But that was in 1914 before the more recent pronouncements of the Privy Council had been made. Since then Mr. Justice Daniels in the case of *Gauri Shankar v. Jang Bahadur Singh* (4) sitting in Oudh, and it is true, following previous decisions in Oudh, but obviously, basing himself more upon the recent decision of the Privy Council in *Brij Narain's case* (2) came to a conclusion, in accordance with that of the Subordinate Judge in this case. If he had not touched the difficulty raised by Mr. Panna Lal, on behalf of the respondent, that the second proposition in the case of *Brij Narain Rai v. Mangla Prasad Rai* (2) is in express terms confined to a simple money debt, I think I might have yielded to the doubt which that argument raised in my mind. But the final passage of Mr. Justice Daniels' judgment gives reasons, based upon a Madras High Court decision, which has been impliedly approved by the Privy Council, for holding that there is no real distinction between the two cases of a simple money-decree and a decree for a debt secured by a mortgage in relation to this troublesome controversy. I, therefore, prefer the view of the Subordinate Judge. I think the weight of authority is in favour of it. I agree with his view with some hesitation. The question must often arise in the near future, and I can quite understand that, if another two Judge Bench, in a case of higher pecuniary value than this case, has reason to think that this decision requires further consideration, it may well be thought a topic worth the decision by a fuller Bench than two Judges; but for the purpose of to day I am satisfied that we ought to allow this appeal and restore the decree of the first Court.

Iqbal Ahmad, J.—I agree in the order proposed, but I prefer to base my decision on grounds other than those assigned by my learned brother.

In my judgment, the answer to the question whether a Hindu son is entitled to challenge a decree obtained against his father for sale of the joint family property without asserting and proving that the debt secured by the mortgage was incurred for

(3) 24 Ind. Cas. 6; 12 A. L. J. 613.

(4) 79 Ind. Cas. 1008; 27 O. C. 124; 10 O. & A. L. R. 49; 11 C. L. J. 246; A. I. R. 1924 Oudh 394.

illegal or immoral purposes must depend upon the question whether or not the father was sued as *karta* and manager of the joint family. If he was, the answer must be in the negative. If he was not, the answer must be in the affirmative.

It is well settled that a Hindu son is under a pious obligation to discharge his father's debts that are not tainted with immorality, and it is equally well settled that once the joint ancestral property has passed out of joint family in execution of a decree for the father's debt, his sons, by reason of their obligation to pay their father's debts, cannot recover that property unless they show that the debt, in respect of which the decree was obtained, was a debt incurred for illegal or immoral purposes: *vide Suraj Bansi Koer v. Sheo Persad Singh* (5). But it appears to me that these propositions of law have reference only to simple money debts which the father is under a personal obligation to pay and simple money-decrees obtained against the father for recovery of such debts, and that a distinction must be drawn between a simple money debt and a decree for such debt on the one hand and a debt secured by a mortgage of the family property and a decree for sale of such property on the other. So far as simple money debt or a decree for such debt against the father is concerned, the father is under a personal obligation to discharge that debt or that decree, and the sons labour under a pious obligation to discharge the liability of their father. But in the case of a debt incurred on the security of the family property by the father, when the mortgagee has not sued for recovery of the debt within six years of the date of accrual of the cause of action, and has thus allowed his right to a simple money-decree against the father to become time-barred, the personal obligation of the father disappears, and the mortgagee is then only entitled to recover the debt by sale of the mortgaged property, and in such case the sons labour under no pious obligation to discharge that debt for the simple reason that the debt is not due from their father.

If I am right in the distinction that I have drawn between a simple money debt and a decree for such debt and a mortgage-debt and a decree for sale, then, in my judgment, the principle underlying the

decision in *Suraj Bansi's case* (8) cannot be applied to the case of a decree for sale on the basis of a mortgage of the family property. In the case of a suit brought by a creditor against the father for recovery of simple money debt, all that he has to prove, in order to entitle him to a decree, is that he advanced the debt, and it is not necessary for him to prove the purpose for which the debt was incurred. On the other hand, in a suit for sale of the family property the mere fact that the mortgagee advanced the debt does not entitle him to a decree, unless and until he succeeds in further proving that the debt was advanced for family necessity. Because of their pious obligation to discharge their father's debts the sons cannot impugn the validity of a simple money-decree to which they were no party, on the ground of the absence of legal necessity for incurring the debt. But in the case of a decree for sale, when the personal remedy against the father has become time-barred, the sons are under no such obligation and, therefore, if the mortgagee has obtained a decree for sale of the joint family property without impleading the sons or without suing the father in his representative capacity, the sons are entitled to challenge the validity of that decree on the ground that they being no parties to that decree are not bound by the same, and in such a suit, unless the mortgagee succeeds in proving that the debt secured by the mortgage was for legal necessity, the sons will be entitled to avoid the decree.

If the father in a suit for sale is sued as manager of the family, i. e., in his representative capacity, then, no doubt, the decree will bind all the members of the family and the omission of the father to put the mortgagee to proof of legal necessity will disentitle the other members of the family from challenging the validity of the decree on any ground whatsoever, for the simple reason that in the eye of the law, all the members will be deemed to have been represented by the father in the suit. But if the father has not been sued in his representative capacity, I see no ground for holding why the sons, who were not impleaded as parties to the suit, should not have the right to call upon the mortgagee-decreeholder to prove the existence of legal necessity for incurring the debt secured by the mortgage before he can enforce that decree.

(5) 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 O. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 795 (P. C.).

by sale of the family property. To hold that the decree obtained by a mortgagee for sale of the family property against the father alone, when the father was not sued as manager of the family, is binding on the sons and the sons can only avoid that decree by proving that the mortgage-debt was contracted for immoral purposes, would be in effect to hold that the mortgagee, simply by his omission to implead the sons and to sue the father in his representative capacity, can absolve himself of the burden of proving legal necessity as a condition precedent to a decree for sale of the family property, and can shift the burden of proof from his shoulders on to those of the sons, and I can discover no justification for such a proposition of law. The view that I take is the view that was taken in the case reported as *Ali Ahmad v. Sohan Lal* (3), and if the view taken by Mr. Justice Daniels in the case of *Gauri Shankar v. Jang Bahadur Singh* (4) is at variance with the view that I have taken, I respectfully dissent from that decision. In the last mentioned case the learned Judge supported the conclusion arrived at by him by reference, amongst others, to the case of *Arumugham Chetty v. Muthu Koundan* (6) and to a passage to be found in the judgment of their Lordships of the Judicial Committee in the case of *Sahu Ram Chandra v. Bhup Singh* (1). I am unable to discover anything in the Madras case that lends countenance to the view that a Hindu son is debarred from calling into question the validity of a decree for sale of the joint ancestral property to which he was not a party, and which was not obtained against the father as manager of the family, on the ground that the debt secured was not incurred for legal necessity. The passage quoted from the judgment in *Sahu Ram Chandra's case* (1) at first sight appears to support the conclusion arrived at by the learned Judge, but in view of the decision of their Lordships in the case of *Brij Narain Rai v. Mangla Prasad Rai* (2) I am unable to hold that their Lordships ever intended to lay down the proposition of law enunciated in *Gauri Shankar's case* (4).

The passage referred to by the learned Judge is as follows :

(6) 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96.

"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head."

After making these observations their Lordships refer to the case of *Suraj Bansi Koer v. Sheo Persad Singh* (5) and to the case of *Chandra Deo Singh v. Mata Singh* (7). In connexion with the observations referred to above, it is worthy of note that in neither of these two cases it was held that when a decree for sale of the family property is obtained by the mortgagee against the father alone, who was not sued as manager of the family, the sons cannot assail the decree by alleging that that mortgage-debt was not for family necessity. It is further clear that the question which I have now to decide was not the question that formed the subject-matter of decision in the case of *Sahu Ram Chandra's case* (1) and I am, therefore, forced to the conclusion that the observations of their Lordships with respect to the binding nature of the mortgage-decree were *obiter dicta*. However, those *dicta* of their Lordships are entitled to the greatest respect, and were it not for certain observations to be found in *Brij Narain's case* (2) I would have been prepared to hold that their Lordships took the view that was taken by Mr. Justice Daniels in the case referred to above. But in the view of the observations of their Lordships in *Brij Narain's case* (2) I have no hesitation in holding that their Lordships never intended to decide, or to lay down as a general proposition of universal application, that after the passing of a decree for sale the members of the joint family who were no parties to the suit for sale of the family property cannot challenge that decree without proving that the debt secured by the mortgage was contracted for immoral purposes. In *Brij Narain's case* (2) their Lordships are reported to have observed—*vide Brij Narain Rai v. Mangla Prasad Rai* (2):

"There are, however, some observations in *Sahu Ram Chandra's case* (1), which are not necessary for the judgment, but which their

(7) 1 Ind. Cas. 476; 31 A. 176; 6 A. L. J. 263.

Lordships are bound to say that they do not think can be supported."

Having regard to these observations of their Lordships I am not prepared to hold that their Lordships ever intended to lay down that the mere fact of a decree for sale having been passed precludes a Hindu son, who was not a party to the decree, from challenging that decree except on the ground that the mortgage-debt was for illegal or immoral purposes. The second proposition of law laid down at page 104*, in *Brij Narain's case* (2), appears to be restricted to the case of a simple money-debt incurred by, and a simple money decree obtained against, the father and has no reference to a decree for sale, and that proposition is based upon the obligation of Hindu sons to pay debts due from their father.

But, notwithstanding all that I have said, it appears to me that this appeal must succeed. The mortgage was executed by two persons named Bhagwant Singh and Imrat Singh. Imrat Singh died before the mortgage was put into suit, and his two sons were made parties to the decree. Bhagwant Singh, the father of the present respondent, was admittedly one of the defendants to the suit. If Bhagwant Singh and Imrat Singh were separate, and if Bhagwant Singh and the plaintiff-respondent were the only members of the joint family constituted by them, the presumption must be that Bhagwant Singh was the manager and *karta* of the family. If he was the manager of the family, it must be presumed, unless the contrary is shown, that he was sued in his representative capacity, and the decree obtained against him must bind his son, the plaintiff-respondent. On the other hand, if Imrat Singh was also a member of the joint family with Bhagwant Singh, the presumption must be the other way. When the manager of a joint Hindu family is impleaded as a defendant to the suit, the presumption is that he is sued in that capacity. But if, along with the manager, certain other members of the family are joined as defendants to the suit, the presumption must be the other way, because, if the manager was being sued as representing the family, there could be absolutely no reason for joining some other members of the family as defendants in the suit. In the present case, if the plaintiff-respondent wanted to rely on the fact that

Bhagwant Singh was not sued as manager of the family, it was up to him to state the facts clearly, and to prove that some persons, other than Bhagwant Singh and the plaintiff-respondent, were members of the joint family in question and were arrayed as defendants in the suit in which the decree was passed. This was not done in either of the Courts below, and, therefore, the ordinary presumption, that the father represents the family, must hold the field. In this view of the case the decision of the Subordinate Judge was correct and ought to be restored.

A. N. A.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 130 OF 1925.

December 2, 1927.

Present:—Mr. Justice Lindsay
and Mr. Justice Banerji.

JAI NARAIN SINGH—PLAINTIFF—
APPELLANT

versus

MUNNA LAL AND OTHERS—DEFENDANTS
—RESPONDENTS.

Hindu Law—Co-widows—Alienation of husband's estate by one without consent of the other, legality of—Reversioners, whether bound by such alienation.

Under the Hindu Law a co-widow can, for legal necessity, alienate her husband's estate in her possession without the consent of the other co-widow. [p. 702, col. 1.]

Bhugwandeem Doobey v. Myna Base (2) and *Thakurmani Singh v. Dai Rani Koeri* (3), referred to.

Observations in *Valluru Appalasuri v. Sasapu Kannamma Nayuralu* (1), dissented from.

First appeal from the decree of the Second Additional Sub-Judge, Aligarh, dated the 3rd December, 1924.

Mr. P. L. Banerji, for the Appellant.

Dr. K. N. Katju, Messrs. S. K. Dar and Panna Lal, for the Respondents.

JUDGMENT.—The appellant in this case is an unsuccessful plaintiff who brought a suit in the Court of the Subordinate Judge of Aligarh for the purpose of avoiding a certain sale in execution of a decree.

The decree under which this sale took place had been passed against a widow, *Musammat Lachhmin Kuar*, on the basis of two mortgages executed by her, and the case for the plaintiff, who claimed to be the reversioner, was that these two mortgages had been executed by *Musammat Lachhmin Kuar* without any legal necessity and that consequently neither they nor the decree which was obtained upon them bound the estate in his, the plaintiff's, hands. A number of defendants were impleaded, one of them being the auction-purchaser. The defendants, second party are said to be persons who have taken transfers from the defendants, first party.

The Subordinate Judge dismissed the plaintiff's suit, being of opinion that the mortgages just referred to had been executed for legal necessity and were binding upon the estate. This finding of the Subordinate Judge is challenged here in appeal and there has also been raised before us a question of law which, though not raised distinctly before the Subordinate Judge, has been allowed to be argued before us.

Before coming to the points which have to be determined it is necessary to set out a few facts regarding the history of the property in question and of the family to which it belonged. It is admitted that the property belonged at one time to a man named *Tej Singh* who died on the 28th January, 1873. *Tej Singh* left surviving him two widows, *Musammat Lachhmin Kuar* and *Musammat Chhattar Kuar*. Of these the former died on 24th November, 1911, and the latter on 8th April, 1922. Admittedly, after the death of the last surviving widow, the plaintiff-appellant is the nearest male heir of *Tej Singh*.

Tej Singh had a brother named *Jawahir Singh*, and the documentary evidence on the record shows that immediately after the death of *Tej Singh* the estate which had been in *Tej Singh*'s possession was seized by *Jawahir Singh*. The case which *Jawahir Singh* put up was that he and *Tej Singh* were members of a joint Hindu family and that he, *Jawahir Singh*, was entitled to all the property by survivorship.

The two widows of *Tej Singh*, *Lachhmin Kuar* and *Chhattar Kuar*, thereupon brought a suit in the Court of the Subordinate Judge of Aligarh (O. S. No. 146 of 1873) for

recovery of property belonging to *Tej Singh*. The case for the widows was that *Tej Singh* was separated in his estate from his brother *Jawahir Singh* and that they, as widows of *Tej Singh*, were entitled to possession. The suit was decreed by the Subordinate Judge, copy of whose judgment is on the record at pages 36 to 44. An appeal was taken to the High Court and the judgment of the Subordinate Judge was affirmed. The High Court dismissed *Jawahir Singh*'s appeal on 19th July, 1875.

It will thus appear that after the death of *Tej Singh* these widows were involved in litigation which must have been expensive and it also appears from the record of the suit filed in 1873, that *Tej Singh* at the time of his death was indebted to a large extent. *Jawahir Singh* in that suit had raised a plea that *Tej Singh* had incurred debts.

There can be no doubt that after the widows thus obtained possession of the estate of their husband they came to an arrangement by which they partitioned the property for the purpose of convenient enjoyment, but it is necessary to state here that the only property that was left to these widows was a 10 *biswas* share in a village called *Dhori*.

[Their Lordships dealt with a sale deed of 2nd May, 1898, which referred to this arrangement and continued:—]

To come now to the two mortgages with which we are particularly concerned in the present case. They are respectively of the dates 19th January, 1895 and 12th January, 1897. The first of these mortgages executed by *Lachhmin Kuar* was in favour of one *Chhattar Mal* who subsequently assigned his interest to *Chhattar Singh*. In this document, at page 51, it is stated that Rs. 300 have been taken from the mortgagee in order to pay the revenue due for the *kharif* instalment for 1302 *Fasli*. It is also recited that a sum of Rs. 50 had been received by *Musammat Lachhmin Kuar* previous to the execution of the deed. By this document four *biswas* out of five *biswas* in the possession of *Musammat Lachhmin Kuar* in *Mauza Dhori* were mortgaged by way of security. The second mortgage executed by the same lady in favour of *Chhattar Singh* on 12th January, 1897, was for Rs. 500. In this document it is stated that she had received Rs. 271 in cash for food, and that the balance, Rs. 229, had been borrowed in order

to pay the land revenue due for the *khari* instalment.

[Their Lordships here discussed the evidence as to necessity and proceeded:—]

We hold, therefore, that the alienations made by *Musammam Lachhmin Kuar* were for necessity, and we also hold that *Musammam Ohhatar*, her co-widow, was a consenting party to these alienations.

We come now to the point of law which was raised here and which, as we have said, was not raised in the Court below. Indeed, the point is not taken in the memorandum of appeal, but the question being one of law we thought it proper to hear the learned Counsel on both sides.

Mr. Peary Lal put forward the argument that the alienation made by *Musammam Lachhmin Kuar*, even if it was found to have been made for legal necessity, could not bind the reversioners unless the co-widow joined in the alienation. We have already indicated our opinion that from the circumstantial evidence it must be taken that *Musammam Ohhatar Kuar* was a consenting party to this alienation although it is certainly true that she did not join in executing the two mortgage-deeds of 1895 and 1897 respectively.

In support of his argument Mr. Peary Lal relied on a recent ruling of the Madras High Court which is reported as *Vallun Appalasuri v. Sasapu Kannamma Nayuralu* (1). In this case the learned Judges, after reviewing all the authorities which deal with the legal position of co-widows, have set out six propositions which they have deduced from the previous authorities. Mr. Peary Lal relies on the fifth and sixth of these propositions. The fifth proposition is thus stated at page 486* of the judgment:

"Except for the limited purposes mentioned above, that is, during the lifetime of the alienee in a partition of the first kind or during the lifetime of all the co-widows in a partition of the second kind, there can be no alienation by a widow of her interest; and whether there is necessity or not, an alienation by one co-widow cannot bind the reversioner."

The sixth proposition is stated in the following language:

"If an alienation for necessity is to bind the reversioners, all the co-widows must join in it."

We are not prepared to accept either of these propositions as stated. We have examined for ourselves all the case-law on this subject beginning with *Bhugwandeem Doobey v. Myna Bae* (2). It must be taken as well established that two co-widows succeeding to the estate of a deceased husband take the property as co-parceners in the strictest sense, and as such the general rule regarding alienation would be that there could be no alienation by one without the consent of the other.

The cases fell into two classes. In some of them the contest has been between the alienee of one co-widow and the surviving co-widow. In others there has been a claim put forward by the reversioner against the alienee after the death of both the widows.

It is necessary to keep these two classes of cases distinct. We need not enter into a decision of the cases in so far as they relate to claims by the survivor of two co-widows against the alienee of the other co-widow. We are dealing here with a claim made by the reversioner after the death of both the widows. Where there is a single Hindu widow the reversioner is bound by any alienation made by her of her husband's estate for legal necessity. It follows, therefore, that if there are two widows and they both join in a sale or mortgage to raise money for legal necessity, the reversioners are bound, and they are bound because of the existence of a necessity which justifies the alienation. How then does the case stand where the two widows have separated for purposes of conveniently enjoying the estate left by the husband? Is it to be said that if one of the widows, acting under the pressure of legal necessity, is obliged to alienate a portion of the estate in her possession the reversioner is not to be bound? It seems quite clear that the existence or non-existence of legal necessity cannot depend upon the consent of the other widow. Take the case of two co-widows, one of whom has three daughters whom she is obliged to marry; her co-widow has no daughters. Or take again the case of one co-widow who is in easy circumstances and who can depend upon her own relations for support in a time of distress, while the other widow has no such resources at her disposal. Is it to be said that be-

(1) 90 Ind. Cas. 881; 49 M. L. J. 479; A. I. R. 1926 Mad. 6; 22 L. W. 287; (1925) M. W. N. 622.

*Page of 19 M. L. J.—[Ed.]

(2) 11 M. I. A. 487; 9 W. R. P. C. 23; 2 Suth. P. C. J. 124; 2 Sar. P. C. J. 327; 20 E. R. 184.

cause the widow who is well-to-do refuses her consent to an alienation made by the other widow in circumstances which render the alienation necessary the estate is not to be bound? We do not think that any authority for such a proposition is to be deduced from the reported cases. It is, no doubt, true that co-widows succeeding to the estate of their husband are undivided co-parceners and the general rule, of course, is that one co-parcener is not entitled to alienate without the consent of the other. It is also true that no arrangement made by the widows for the separate enjoyment of portions of the estate can destroy their legal position as co-parceners. But is it correct to say that in no case can a co-parcener alienate without the consent of the other? The Hindu Law does not say so, and in this connexion we would refer to a passage in the *Mitakshara*, Ch. I, s. 1, cls. 27 and 28. Clause 27 deals with the general law regarding the rights of disposal by one co-parcener, but cl. 28 declares an exception on that general rule and lays down that even a single individual may conclude a donation, mortgage or sale of immoveable property during a season of distress for the sake of the family and especially for pious purposes.

If that is the Hindu Law to be applied to the case of co-parceners there can be no reason in principle why it should not be applied to two co-widows who, according to all the decided cases, are co-parceners in the strictest sense, and it seems to us, therefore, that if there are two co-widows enjoying their husband's estate as co-parceners, one of them can, under the exception to the rule we have just quoted, conclude a donation, mortgage or sale of immoveable property during a season of distress "for the sake of the family and especially for pious purposes." That being so, we are not prepared to accept the argument that, even where legal necessity exists, an alienation by one co-widow will not bind the estate unless the other co-widow joins in the alienation. The proposition has, in our opinion, been laid down far too broadly and the exception contained in the *Mitakshara*, Ch. I, cl. 28, has not, in our opinion, been kept in mind. In the course of the discussion one case has been referred to, *Thakurmani Singh v. Dai Rani Koeri* (3).

That, in our opinion, supports the conclusion at which we have arrived. In that case it was held that a mortgage by one widow without the consent of the other was binding on the reversioner to the extent that the debt secured by the mortgage was incurred for legal necessity.

Holding, therefore, that there was legal necessity in this case and being of opinion that *Musammatt Lachhmin Kuar* was entitled for legal necessity to alienate this property without the consent of her co-widow *Musammatt Chhatar Kuar*, we are of opinion that the estate is bound. But, as we have said, it must be taken that *Musammatt Chhatar Kuar* did consent to this alienation, and while it is true that she did not actually join as a party in the two mortgages executed by *Musammatt Lachhmin Kuar*, we hold that it was not necessary for the purpose of binding the estate in the hands of the reversioners that she should do so.

The appeal, therefore, fails and is dismissed with costs.

A. N. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 543 OF 1925.

November 16, 1927.

Present:—Mr. Justice Ashworth.

BHAGWATI SARAN—PLAINTIFF

—APPELLANT

versus

DEO SARAN SINGH—DEFENDANT

—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 164—Co-sharers—Suit for profits—Lambardar's liability—Negligence, whether can be based merely on short collections—Negligence, when question of law—Liability for collections of sir and khudkasht—Presumption—Death of Lambardar—Son's liability.

Negligence on the part of a Lambardar cannot be based merely on short collections. [p. 703, col. 2.]

It is always a question of law what sort of evidence is admissible to prove negligence, and pre-

sumably what sort of evidence is admissible to disprove an initial presumption or inference of negligence. [p. 704, col. 1.]

There is a strong presumption against a *Lambardar* being responsible for the collection of the rent due from the private tenants of the co-sharers holding *sir* and *khudkasht*. [*ibid.*]

A son cannot be made liable for the debts incurred by his father in a personal capacity such as a *Lambardar*, nor can he be made liable for negligence shown by the father in that personal capacity, unless he has personal assets of the father in hand. [p. 704, col. 2.]

Second appeal from the decree of the District Judge, Benares.

Mr. A. Sanyal, for the Appellant.

Messrs. S. N. Sen and R. C. Ghatak, for the Respondent.

JUDGMENT.—These second appeals arise out of two suits for profits brought by the plaintiff-appellant against one Matabadal, *Lambardar*, under s. 164 of the Tenancy Act. During the pendency of the suit Matabadal died, and the name of his son, Deosaran was substituted as defendant on the allegation that he was the legal representative of his father Matabadal Singh, *Lambardar*. Both suits were decreed by the Assistant Collector on the basis of gross collection, there being a finding that the *Lambardar* had shown negligence in collection. This finding was based on the fact that his collection resulted in there being Rs. 200 for division among the co-sharers, whereas collection of the total sum recorded as rental would have made no less than Rs. 2,565 available for division. It was also found by the trial Court that the deceased *Lambardar* Matabadal had filed about half a dozen suits for arrears of rent but that these two had been withdrawn by his son, presumably at a later date when the son was appointed *Lambardar*. The Assistant Collector also decreed against the defendant profits on the basis of what the *Lambardar* could have collected from tenants of the *sir* and *khudkasht* land of particular co-sharers.

In appeal, the District Judge of Benares held that the evidence did not justify a finding of negligence and that there was no sufficient evidence to show that the *Lambardar* was the agent of the co-sharers generally for the collection of rent in respect of *khudkasht* and *sir* lands. He accordingly reduced the decree to a decree based on actual collections from the lands other than *sir* and *khudkasht*.

The plaintiff has appealed. The first ground of appeal argued before me is that the lower Appellate Court invoked evidence which was not relevant to the matter in order to rebut the allegation of negligence. Reference is specifically made to the District Judge's remark that collection was difficult because of the pendency of partition proceedings. It is urged that the partition proceedings had not commenced during the years in respect of which this suit was brought. To this objection there are two replies. The District Judge has not stated that partition was pending during the years in respect of which the claim was brought. His point is that at the time of writing his judgment in appeal "there is a partition pending." He goes on to say "this almost always leads to difficulties in rent collection." The remark is loose. He was not dealing with difficulties in rent collection of the future, but during the years in respect of which the claim was made. His meaning must, however, be that, where you find a partition suit had been brought, it indicates disagreement between the co-sharers precedent to the date when suit is brought. It is difficult to say that this consideration could not be entertained by the District Judge. But this is not the only consideration on which he found that rent collection was difficult. He has mentioned that on the death of the *Lambardar* no one could be induced to take his place and the village had to be taken under the management of the Collector temporarily. Lastly he has mentioned that the Sajawal employed by the Collector has given evidence that he tried to collect rent for the year in suit and made little progress. It comes then to this that the District Judge has mentioned one reason for rejecting the allegation of negligence or rather rejecting the inference of negligence arising from the collection being much below the rent roll, and that reason is not of great strength. It is, however, a reason that was admissible as evidence. He has mentioned other reasons which have not been shown to be devoid of any force. He has, I may mention, rightly stated that negligence cannot be based merely on short collections. He has pointed out that the trial Court was wrong in inferring negligence from the fact that only Rs. 200 were available for distribution whereas if the full rent roll had been collected Rs. 2,500 would have been available. The result is, I

find, that the District Judge rightly or wrongly has come to the conclusion that the evidence did not justify a finding of negligence. It cannot be said that in coming to this conclusion he admitted any evidence which was entirely inadmissible. He may have given too much weight or too little weight to the evidence, but in second appeal we are not concerned with this. I hold that the finding of the lower Appellate Court that there was no negligence is a finding of fact with which this Court cannot deal. The appellant's Counsel has referred me to a decision of this Court in which it was settled that in a particular case a finding against negligence was a finding of mixed law and fact. It may have been so in that case. It is always a question of law what sort of evidence is admissible to prove negligence, and presumably what sort of evidence is admissible to disprove an initial inference or presumption of negligence. But nothing has been said in this case to show that any evidence used by the District Judge was not of a nature admissible for such a purpose. Difficulty in making collections is clearly relevant to explain the small amount collected. What was said is that certain facts relied on by the District Judge were not proved. This it is not permissible to urge except on the ground that there was no admissible evidence to prove these facts.

As regards the question of the exclusion from consideration by the District Judge of the *sir* and *khudkasht* lands, the District Judge's reason is that the evidence to fix the *Lambardar* with responsibility for collecting profits thereon was too vague. The appellants' Counsel points to a tabular statement produced by the *Patwari* and apparently verified by him in his evidence. This statement cannot be evidence that the *Lambardar* made himself responsible for the collection of rent in respect of these *sir* and *khudkasht* lands. It can only be evidence that, assuming such responsibility and assuming total collection the sum would have been so much. There appears to me to be a strong presumption against *Lambardar* being responsible for the collection of the rent due from the private tenants of co-sharers holding *sir* and *khudkasht*. In order to support the plaintiff's claim in respect of these collections that they should be accounted for by the *Lambardar*, it would be necessary not

merely to fix the *Lambardar* with responsibility for their collection but also to show that he was authorised by the individual co-sharers having made these collections to include them in the general account. The evidence clearly fell far short of this.

During the course of hearing the case some misapprehension was shown by the Counsel of the appellant as to the right of the plaintiff, his client to get a decree against the son of the *Lambardar* originally sued. It appears that Deosaran, the son, never objected to being brought on the record as legal representative of his father, Matabadal Singh, and as in possession of assets. This being so, the question of his liability could not arise. If he had taken up the position that there were no private assets of his father and that he was joint with his father, and as such was in possession of the joint family property by survivorship and not as legal representative in possession of assets, it would have been impossible to make him liable. A son cannot be made liable for the debts incurred by his father in a personal capacity such as a *Lambardar* nor can he be made liable for negligence shown by the father in that personal capacity, unless he has personal assets of the father in hand. The case of *Bharath Singh v. Tej Singh* (1) proceeded on the assumption that the son had not objected to being brought on the record as a legal representative in possession of assets.

For the reasons given above, I find that no interference in second appeal with the decision of the District Judge is justified, and dismiss both appeals with costs.

A. N. A.

Appeals dismissed.

(1) 43 Ind. Cas. 636; 16 A. L. J. 193; 40 A. 26.

BOMBAY HIGH COURT.FIFTH CRIMINAL SESSIONS CASE No. 33
OF 1927.

November 23, 1927.

Present:—Mr. Justice Mirza.
EMPEROR—PROSECUTOR

versus

NABIBUX KARIMBUX MULLA.

*Penal Code (Act XLV of 1860), ss. 34, 114, 398—
S. 398, whether creates substantive offence—Charge for
abetment of offence under s. 398, legality of.*Section 398 of the Penal Code does not create any
substantive offence, but only regulates the punish-
ment when certain facts are found to exist in the
commission of the substantive offence of robbery.Section 34 of the Penal Code has no application in
the construction of s. 398 of the Code.Where the accused were charged under two heads,
viz., (1) that they committed the offence of robbery
and aided and abetted each other in that offence, and
(2) that they committed the robbery and at the time
of committing such offence were armed with a deadly
weapon, and aided and abetted each other in the
commission of the said offence:*Held*, that that part of the second charge which fell
under s. 114 of the Penal Code read with s. 398, was
illegal and should be withdrawn from the Jury.*Emperor v. Ali Mirza* (1), followed.

Mr. S. B. Kapadia, for the Crown.

JUDGMENT.—In this case the accused
are charged under two heads, *viz.*, (1)
that they committed the offence of robbery
and aided and abetted each other in that
offence, and (2) that they committed the
offence of robbery and at the time of
committing such offence were armed with
a deadly weapon, to wit, a loaded revolver,
and aided and abetted each other in the
commission of the said offence.The learned Counsel for the prosecution
has argued that s. 398 of the Indian Penal
Code relates to a substantive offence and
any person aiding or abetting such offence
would be liable under s. 114 for the same
offence if he were present at the time the
offence took place.I am unable to agree with the argument
that s. 398 creates any offence. In my opinion
it only regulates the measure of punish-
ment when certain facts are found to exist
in the commission of the substantive offence
which is robbery. The word "offender"
appearing in the section can refer only to
the person who is proved to have been
armed with any deadly weapon and not to
any other who in combination with such
person may have committed robbery. Sec-
tion 34 of the Indian Penal Code has no
application, in my opinion, in the construc-
tion of s. 398. I agree with the judgment
of the Calcutta High Court in *Emperor v.**Ali Mirza* (1) which, in my opinion, should
be followed in this case.I would, therefore, withdraw from the
Jury that part of the second charge which
falls under s. 114 of the Indian Penal Code
read with s. 398.

A. N. A.

Order accordingly.

(1) 81 Ind. Cas. 800; 51 C. 265; A. I. R. 1924 Cal.
643; 25 Cr. L. J. 1024.**BOMBAY HIGH COURT.**

SECOND CIVIL APPEAL No. 296 OF 1926.

September 29, 1927.

Present:—Sir Amberson Marten, Kt.,
Chief Justice, and Mr. Justice Crump.

CHINTAMAN RAOJI NAIK

—PLAINTIFF—APPELLANT

versus

KHANDERAO PANDURANG

THAKUR AND OTHERS—DEFENDANTS—

RESPONDENTS.

*Limitation Act (IX of 1908), s. 10, Sch. I, Art. 98—
Trust for specific purpose—Limitation—Art. 98, ap-
plicability of.*A Hindu widow handed over a certain sum of
money to her brother in 1904 for the benefit and
education of her sons. The brother misappropriated
a portion of it. He died in 1918 and the widow
sued his representatives in 1924 for an account and
refund of the portion of the amount not spent for the
children. The latter contended that the suit was
barred by limitation:*Held*, that s. 10 of the Limitation Act was appli-
cable as there was an express trust for a specific
purpose and that the suit was not time-barred.
[p. 707, col. 1.]Article 98 of Sch. I of the Limitation Act applies
only to breaches of trust not covered by s. 10 of the
Act. [*ibid.*]Second appeal from a decision of the
Assistant Judge at Thana, in Appeal No. 284
of 1924, modifying that of the Subordi-
nate Judge at Thana, in Civil Suit No. 68
of 1924.

Mr. R. W. Desai, for the Appellant.

Mr. Y. N. Nadkarni, (with him Mr. K.
V. Joshi), for the Respondents.**JUDGMENT.**—This is a very simple
case though it raises points of general
importance. One Pandurang died in 1904
leaving a widow and two sons, plaintiff
No. 1 and plaintiff No. 2. His assets
consisted in part of certain moneys coming
under a provident fund and certain other
moneys. Pandurang's widow and natural
guardian of the children handed over the

moneys to her brother Raoji for the benefit and education of the two boys. On the facts of this case as found in the lower Court it must be taken that Raoji applied part of this trust moneys for that purpose, but put the balance amounting to Rs. 1,600 and upwards into his own pocket. He died in 1918. His representatives are called on to refund this balance and to account, and they set up limitation. In other words an apparently fraudulent trustee who has put trust money into his own pocket is thus to escape by reason of lapse of time.

It is clear, however, that s. 10 of the Indian Limitation Act, 1908, prevents a suit brought against such a trustee, (provided he is a trustee for a specific purpose), from being barred by lapse of time. The section provides:—

"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time".

It was said, to start with, that the property was not vested in Raoji. That, on the facts, is a hopeless argument. It was based on one answer which the widow gave in cross-examination, but as the learned Appellate Judge points out the answer has been an outcome of the ingenuity of the cross-examining Pleader in putting the words of the section into the mouth of the witness. The answer just previous to this one was that the money was entrusted to Raoji for the boys. The word actually used in the subsequent answer was *malik*, and as my brother Crump has pointed out, no doubt the lady thought that she was being asked whether she constituted Raoji the absolute owner of the moneys. Of course she did not. She had given it to him on trust for the boys. It is clear, therefore, that the money was "vested" in him.

Then was it vested for a specific purpose? Was he, in other words, an express trustee? Clearly he was. The moneys were given to him for the boys—for their benefit and education. In this respect the case resembles that in *Bhurabhai v. Bai Ruxmani* (1),

where a sum was handed over by a husband's father to the keeping of the wife's father as a fund constituting her *palla* or dowry in accordance with the usual practice prevailing in the caste. That fund was misappropriated by the lady's father, and an action was brought to recover the same. It was held that the property was vested in him for a specific purpose. I may also refer to *Soar v. Ashwell* (2) where a Solicitor to a trust got certain trust moneys into his own hands and misappropriated them. It was held there that he was in the position of an express trustee, and that under the English Law no lapse of time would bar a suit against him.

Then it was argued that this suit was not one for following trust money. It is unnecessary for us to consider the rulings in India as to the precise meaning of the expression, "following trust property", and as to whether a different meaning ought to be given to what is usually understood in England by that expression, for the decision I have just referred to in *Bhurabhai v. Bai Ruxmani* (1) was on s. 10 of the Indian Limitation Act of 1877, and as my brother Crump has pointed out, that section did not then contain the words which we have in the present section, *viz.*, "or for an account of such property or proceeds". So we may eliminate the words in s. 10 as to following the trust property, and confine ourselves to the question of an account of the trust property or the proceeds thereof.

Then if I understood the argument of the learned Pleader for the appellant correctly, he urged you can only get an order for an account, and not for payment of what is found due on taking that account. That again is an argument which cannot for one moment stand. It is quite erroneous to suggest that the Court has power to direct an account, but at the same time has not power to direct payment. Otherwise the whole object of the account would be frustrated.

Then it was said the proper Article to apply was Art. 98 of the Indian Limitation Act, and that thereunder the period of limitation for making good out of the general estate of a deceased trustee the loss occasioned by a breach of trust was three years. But that is the case

(1) 32 B. 394; 10 Bom. L. R. 540,

(2) (1893) 2 Q. B. 390; 4 R. 602; 69 L. T. 585; 42 W. R. 165.

of an ordinary breach of trust and not one covered as here by s. 10. Section 10 expressly says "Notwithstanding anything hereinbefore, contained". Consequently, before you can apply Art. 98 you must first get rid of s. 10. Here s. 10 clearly does apply. That being so, this suit was not barred by time.

In the result the appeal fails, and is dismissed with costs.

A. N. A.

Appeal dismissed.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 41 OF 1926.

September 29, 1927.

Present:—Sir Amberson Marten, Kt.,
Chief Justice, and Mr. Justice Crump.
BHOGILAL PURSHOTTAM—DEFENDANT
No. 1—APPELLANT

versus

CHIMANLAL AMRITLAL—PLAINTIFF
—RESPONDENT.

Arbitration—Long and unexplained delay in making award—Misconduct—Civil Procedure Code (Act V of 1908), Sch. II, para. 15.

Unreasonable and unexplained delay on the part of an arbitrator in making an award amounts to misconduct and is sufficient to vitiate the award. [p. 708, col. 2.]

Coley v. DaCosta (1) and *Pestonjee Nussurwanjee v. Manockjee & Co.* (2), referred to.

Per Marten, C.J.—The word 'misconduct' in reference to arbitrations does not necessarily or at all imply anything in the nature of fraud, but it includes failure to perform the essential duties which are cast on an arbitrator as such. [p. 708, col. 1.]

Appeal against an order of the Court of the Joint First Class Subordinate Judge at Ahmedabad, in Suit No. 1373 of 1925.

Mr. R. J. Thakor, for the Appellant.

Mr. H. V. Divatia, for the Respondents.

JUDGMENT.

Marten, C. J.—This is an extraordinary case, and one to which, in the view I take, the learned trial Judge has not given the care which it deserves. The suit is one to have an award in an arbitration out of Court filed and a decree passed thereon. A startling circumstance in the case is that whereas the agreement for reference (Ex. 28) was on September 11, 1920, the award was not made till after five years viz., on October 6, 1925. Nor is there any reasonable excuse for that delay put for-

ward. On the facts it would appear that the arbitrator had two meetings of the parties in 1920 within the first two months or so of the reference, but that thereafter, nothing whatever was done except that part of the property included in the reference was divided up by agreement between the parties. Notwithstanding this long lapse of time the arbitrator never called the parties again before making his award; and he kept no notes of the evidence in 1920 except some memoranda about certain ornaments and accounts. He does not appear even to have given any notice to the parties that he was proposing to make this award, but proceeded to execute this long document which in itself contains provisions which the appellant, defendant No. 1, objects to.

The mere statement of the above facts at once raises the query in the mind of any lawyer as to how an award could be validly enforced after such an unconscionable and unexplained delay. No case of this sort can be found in the books. Nothing approaching it is within my own recollection even in India. The attention of the learned Judge seems mainly to have been diverted to other points in the case, viz., as to two stupid lies which defendant No. 1 told, viz., first, that he never signed the reference paper at all, and, secondly, that if he did, he at once abandoned the arbitration. The second point, of course, would not really avail him, for, even if he purported to abandon the arbitration, he could not do so legally unless good cause was shown for taking that course.

Having disposed of those two points of fact, the learned Judge thus deals with Issue No. 3 as to whether the long interval between the reference and the making of the award vitiates the award. He says:—

"In the reference paper no date was fixed on or before which the arbitrator had to make his award. The evidence of the arbitrator shows that his award was delayed owing to the difference of opinion in the matter of partition of defendant No. 2's house. No authority has been cited to show that long interval between the reference and the making of the award vitiates the award. My finding, therefore, on issue No. 3 is in the negative".

As regards the reason given by the arbitrator, viz., that the parties themselves were disputing about the partition of a

particular house, it is really no excuse whatever. It is possible that this lay arbitrator entirely misconceived at one time the real duties of an arbitrator, and thought that he was merely a negotiator to bring the parties together and record an agreement, if any, at which they should arrive. That is not legal arbitration. His duty was not to negotiate, but to decide. And the fact that the parties could not agree was no reason whatever why he should not perform his duty, *viz.*, of deciding Yea or Nay how certain property should be partitioned so as to give it partly to A and partly to B and so on.

Then as regards the learned Judge's observation about the absence of authority, I would have rather thought that in a strange case of this sort authority would be required not to show that the award could not be made, but to show that it could be made, after this lapse of time.

But it is necessary to consider the matter rather more carefully than the learned Judge has done. This being a *mofussil* arbitration effected out of Court and not in any suit, the matter comes under the Second Schedule to the Civil Procedure Code, para. 20. Then para. 21 provides that where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in para. 14 or para. 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Paragraph 14 sets out certain grounds on which the Court may remit the award to the arbitrator. Paragraph 15 provides that an award is not to be set aside except on certain grounds, one of which, *viz.*, (a) is the "corruption or misconduct of the arbitrator or umpire".

Now, in reference to arbitrations we are familiar with the use of the word 'misconduct'. It does not necessarily or at all imply anything in the nature of fraud. But it certainly may include cases where the arbitrator has failed to perform the essential duties which are cast upon him as an arbitrator, as he is occupying a quasi-judicial position. Under English Arbitration Law for instance, it has been held to be misconduct for an arbitrator to see one of the parties about the case in the absence of the other, and without notice to him.

Was there then misconduct within the meaning of para. 15 in the present case? It is quite true, as the learned Judge points out, that no time was fixed here for the making of the award, but I take it that one of the commonest terms which are implied by the Court in dealing with contracts of various sorts is to imply that in the absence of an express term on this point the parties intended that the contract, whatever it may be should be performed within a reasonable time. Otherwise the very purpose of the parties in entering into the contract or arrangement may be entirely frustrated. So here I see no difficulty in holding that the intention of the parties was that the award should be made within a reasonable time.

On the facts I would hold that it is clear that the award was not made within a reasonable time or anything approaching a reasonable time. Then does that imply in any way misconduct on the part of the arbitrator? If that delay is not explained in my judgment it does imply misconduct on his part, because it was his duty to, make up his mind and decide this dispute. It was his duty to see *prima facie* that the proceedings were conducted with reasonable diligence, and if he so far failed in those duties that he did nothing whatever for some five years, then, in my judgment, he failed in material respects in his ordinary duties as an arbitrator. That being so, in my judgment, he was guilty of misconduct within the meaning of para. 15, and, accordingly the award may be set aside.

Now, the case is not entirely without authority as the learned Judge seems to think. My brother Crump drew attention to a useful and important case, *Coley v. DaCosta* (1). There there was an agreement to go to arbitration on March 31, 1886. Nothing appears to have been done by the arbitrators beyond the fact that two or three meetings were held, and matters so continued till December 8, 1886, on which date one of the parties wrote withdrawing from the arbitration. The point was whether he was entitled to do that, and the Court held that he was. At page 207* Mr. Justice Pigot says:—

"The powers conferred by the Code upon arbitrators are very great; and we think that a party has a right, if he chooses, to

(1) 17 C. 200; 8 Ind. Dec. (N.S.) 672.

*Page of 17 C.—[2d.]

insist upon it, that, once an arbitration is decided upon, it shall be proceeded with with reasonable speed. There is no doubt that in the present case the delay that took place was in itself unreasonable, and, being unexplained and not justified by any acts of the appellant, we hold that he had good cause under the circumstances for revoking this agreement. That being so, it was no longer competent to the Court to order the agreement to be filed under s. 523, and the proceedings were, therefore, invalid."

The Court relied there on a dictum of their Lordships of the Privy Council in *Pastonjee Nussurwanjee v. Manockjee* (2). That was an arbitration between two partners. There was some delay in the appointment of an umpire, and that one of the parties gave notice calling on the arbitrators to make their award within ten days or else to appoint an umpire. It was held that on the facts of that case the partner had no power to fix an unreasonably short time as ten days for the arbitrators to make their award. On the other hand, the question of serious delay was gone into, and at page 131* the judgment of the Board says:—

"If nothing whatever had occurred since the appointment of the arbitrators in June, 1864, and all matters between the appellant and the respondents had remained in exactly the same position that they were in at the date of the submission to arbitration, their Lordships are disposed to think, that this delay of the arbitrators would have justified the course which the appellant adopted. But in truth the facts disclose a very different course of proceeding. In July, 1864, the arbitrators made their award in a very important part of the matter in difference. They dissolved the partnership, and delivered up the business to the appellant, who has, since that time, carried it on alone, and had done so for a year prior to the letter of July 24, 1865. A second decision of the Arbitrators relative to the *Ponany* farms was made in May, 1865, and acquiesced in by both parties, the appellant and the respondents.

"A notice to the arbitrators to make their award and to appoint an umpire in ten days, does not appear to their Lord-

(2) 12 M. I. A. 112; 1 Ind. Jur. (N. S.) 69; 2 Suth. P. O. J. 164; 2 Sar. P. O. J. 390; 10 W. R. 51; 20 E. R. 283.

*Page of 12 M. I. A.—[Ed.]

ships to be sufficient time given to entitle the appellant to stop all further proceedings, and to cancel all further proceedings."

There it will be observed the Board considered that an unexplained delay of approximately a year would entitle one party to withdraw from the arbitration. In the Calcutta case the delay was less than a year. If again we turn to what is reasonable in point of time even in India, we find that in the Indian Arbitration Act, 1899, which applies to the Presidency town of Bombay, the time fixed for making an award is three months in the absence of an agreement to the contrary and subject to the time for making the award being enlarged (*see* First Schedule, para. 3). So we get this much, therefore, as clear on the authorities, that an unexplained delay of even a fraction of the time actually occupied here would entitle the parties to withdraw from the arbitration.

Next as regards the arbitrator himself, it is suggested in Russell on Arbitration, Tenth Edition, at page 197, that an arbitrator might be sued for breach of contract if he refuses to complete the reference and make an award within a reasonable time. The passage runs:—

"It having been established that an arbitrator can recover his fees upon an implied contract by the parties to remunerate him for his services as arbitrator it would seem that he might be sued as for a breach of contract on his part if he refused to complete the reference and make an award in a reasonable time."

In the present case it does not appear that the arbitrator was working for pecuniary reward. In fact we are told by the learned Pleaders that the contrary is the case. That being so, I take it that an action of the kind suggested would presumably not lie against him. In this connection I may refer to another case cited by my brother Crump, *viz.* *Savilappa v. Devchand* (3), a decision of Sir Lawrence Jenkins and Mr. Justice Chandavarkar. There the suit was brought against the arbitrator for damages for his fraud in collusion with one of the parties. The ground mainly alleged for establishing the fraud was the delay in making the award. But the Court negatived the charge of fraud, and said (page 135*):—

"But it is impossible to support a charge of fraud built on so flimsy a basis: there is

(3) 26 B. 132; 3 Bom. L. R. 691.

*Page of 26 B.—[Ed.]

no more reason to presume fraud than to presume negligence, and if there was only negligence, then admittedly the suit will not lie."

It does not, however, appear in that case whether the arbitrator was working for reward, nor is it exactly clear how long the delay in that particular case was.

But be that as it may, it does not really affect the precise point which we have to decide here. No doubt an important distinction between the case of *Coley v. Da-Costa* (1), and the present case is that in the former the award had not been made, whereas in the present case the award has been made. But we have to remember that here the parties were all laymen, and, in my judgment, it is not fatal to the appellant that he did not give a formal legal notice withdrawing from the arbitration. In my judgment, on the facts here, we still have it that the arbitrator failed in his duty, and that consequently the award ought not to be filed.

Under those circumstances I need only allude to other points on which the case might be put. I am by no means satisfied that the case here might not be put on this ground that by their conduct the parties, viz., the litigants and the arbitrator all really abandoned the reference. But that was not the precise way in which the case was put in the Court below, and I do not, therefore, pursue it. Nor need I go into the complaints as to the details of the award that have been urged before us. But one or two I may notice in passing. The arbitrator has purported to direct that the appellant should pay the debts and recover the outstandings, whereas, as has been pointed out by his Pleader, it may be that after this lapse of time all the outstandings have become barred by limitation. *Prima facie*, then, it is most unfair that the arbitrator should thus allow five years to pass as regards ordinary outstandings without doing anything.

Then there are several other objections which have been urged before us, based on paras. 6 and 8 of the award. They are certainly curious provisions. But we have not gone into them, nor required the Pleader for the respondents to deal with those points, because in our judgment it is unnecessary so to do, having regard to the main point as regards the lapse of time.

Under these circumstances I would allow

the appeal, and discharge the order of the learned Judge and dismiss this application.

As regards costs, the appellant has deliberately attempted to deceive the Court by asserting matters which were clearly false to his own knowledge, viz., that he had not signed the reference, and, secondly, that he had abandoned it at once. That being so, this is one of those exceptional cases where, having regard to his conduct, he should be deprived of all his costs. Our order as to costs will, therefore, be that each party do bear his own costs throughout.

Crump, J.—I agree.

A. N. A.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 141 OF 1926.

August 25, 1927.

Present:—Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump.

JAYAPPA LOKAPPA

NARSINGANAWAR—DEFENDANT—

APPELLANT

versus

SHIVANGOUDA DYAMANGOUDA

PATIL—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 17—Security bond executed to Court—Registration—Exemption of judicial proceedings, scope of—Principal and surety—Surety bond—Strict construction—Benefit of doubt—Security bond to Court, validity and mode of execution of—Civil Procedure Code (Act V of 1908), s. 145.

A security bond executed to the Court by a surety for stay of execution under O. XLI, r. 5 of the Civil Procedure Code is a step in judicial procedure and is, therefore, exempt from registration under s. 17 of the Registration Act. [p. 715, col. 1.]

Ma Shwe Mya v. Maung Ho Hnaung (2) and *Bindesri Naik v. Ganga Saran Sahu* (3), referred to.

Nagaruru Sambayya v. Tangatur Subbayya (1), dissented from.

A surety bond must be construed strictly and a surety cannot be held liable except to the extent to which he is clearly bound. The benefit of the doubt must be given to the surety. [p. 715, col. 2.]

Per Marten, C. J.—The fact that a security bond is given to the Court and not to a named individual does not render it void. [p. 716, col. 1; p. 717, col. 2.]

Appeal from the decision of the First Class Subordinate Judge at Dharwar, in Darkhast No. 39 of 1925.

Mr. A. G. Desai, for the Appellant.

Mr. R. A. Jahagirdar, for the Respondent.

JUDGMENT.

Crump, J.—The plaintiff instituted Suit No. 229 of 1917 in the Court of the

Additional First Class Subordinate Judge at Dharwar to recover possession of a share of one-third of certain lands. Defendant No. 5 was the brother of plaintiff and supported plaintiff's claim. The other defendants were members of the same family and it was alleged that defendant No. 6 had been adopted by defendant No. 4, the widow of a deceased member named Basvantgouda. The properties in suit were *watan* properties, and plaintiff and defendant No. 5 claimed to be the nearest heirs under the law applicable to such property. The Court found that plaintiff and defendant No. 5 were the nearest heirs, and that the adoption of defendant No. 6 was not proved. Consequent upon these findings a decree was made giving plaintiff and defendant No. 5 certain shares in the suit properties. A partition was directed, and an order was made directing an inquiry as to the mesne profits due.

Against this decree defendants Nos. 2, 4 and 6 appealed to the High Court making plaintiff and defendants Nos. 1 and 5 respondents. An application was made to stay execution of the decree under O. XLI, r. 5. On this the Court, on December 14, 1920, passed an order in the ordinary form, "rule and *ad interim* stay". This implied that security was required from the applicants "for the due performance of such decree or order as may be ultimately binding upon them." Order XLI, r. 5 (3) (c). This order was communicated to the District Judge of Dharwar by this Court's writ, dated December 14, 1920, and in reply the District Judge certified that security had been furnished. The writ refers to the petition of "Basangouda bin Mallangouda in Appeal No. 335 of 1920," and directs that execution be stayed on due security being furnished to the First Class Subordinate Judge. Basangouda bin Mallangouda is defendant No. 6. The return is endorsed on the writ under date January 25, 1921, and certifies that "the appellant petitioner having furnished the requisite security the further proceedings have been stayed." The surety was one Jayappa, now the appellant before us, and the bond executed by him was in the form laid down in Appendix G. No. 2, of the Code of Civil Procedure. Under it he makes himself liable to the extent of Rs. 4,000. On March 10, 1921, the Court made the following order "Rule absolute, costs costs in the appeal".

The bond is in the following terms:

In the Court of the First Class Subordinate Judge at Dharwar.

Suit No. 229 of 1917

Shivangouda bin Dyamangouda Patil... Plaintiff

versus

1. Marewa wife of Mahalinga Gaudas;
2. Somawa wife of Vibhadra Gauda Patil; 3. Basangouda Mallangouda Patil; 4. Basawa Gadoti wife of Mallangouda and others, ... Defendants.

To.

The First Class Subordinate Judge's Court at Dharwar.

In this Jayappa Lokappa Narasingnavar residing at Lokur Taluka Dharwar states, by this security bond passed for staying the execution of the decree, as follows:—

In Suit No. 229 of 1917 plaintiff Shivangouda Dyamangouda Patil residing at Lokur has filed a suit in this Court, against Marewa, Samawa, Basangouda and Basawa and others. The suit was decided in plaintiff's favour on March 27, 1920, and a decree was passed therein. And defendants No. 2 Somawa and No. 6 Basangouda and Basawa Gadoti filed an appeal in the High Court against the said decree.

The plaintiff who has got the decree in his favour filed an application for executing the said decree. Defendant has applied for getting the execution stayed and he (*awanige*) has been ordered to furnish security. I, therefore, voluntarily become a surety to the extent of Rs. 4,000, by mortgaging the property mentioned in the schedule annexed herewith. I hereby agree that in case the decree of the original Court is confirmed in appeal or reversed the said defendant (*prativadeyu*) will abide by the order and decree of the Appellate Court properly. And if he will have to pay anything in accordance with that he will pay the same and in case he fails to do so the amount that will have to be paid, accordingly should be recovered from the estate mortgaged by this writing. And if the said property does not cover the amount that will have to be paid I and my legal representatives will be personally liable. For this I have passed this security bond.

Dated this day January 5, 1921".

The High Court in appeal confirmed the decree of the lower Court with a variation which is immaterial for the purposes of the appeal now before us. An inquiry was then held as to the amount of mesne profits and these were assessed at Rs. 9,250, and

were held to be recoverable from defendant No. 2. Defendant No. 2 failed to pay the amount and the learned Judge directed that execution for Rs. 4,000 should proceed against the surety Jayappa. Jayappa appeals against this order.

The appeal raises the following questions.

(1) Is the surety bond invalid for want of registration?

(2) Is the appellant liable for the decree except in so far as it is against defendant No. 6?

(3) How and to what extent can it be enforced in these proceedings?

It is urged that the document requires registration and that, therefore, it cannot affect the property or even be looked at as evidence of transaction. This point, therefore, stands *in limine*.

Reliance is placed on *Nagaruru Sambayya v. Tangatur Subbayya* (1). A number of other authorities have been cited bearing more or less upon the point, but the first question is whether certain decisions of their Lordships of the Privy Council, to which I drew attention in the course of the argument, are not decisive upon the matter. I shall, therefore, proceed to discuss these first. I may, however, say here that there is no decision of this Court upon the point and that according to the prevailing practice, so far as I am aware of it, such bonds are not registered. This document "purports or operates to create or declare in the future a contingent right of the value of more than Rs. 100 in immoveable property". It is, therefore, within the scope of s. 17, sub-s. (1), of the Indian Registration Act, 1908. It may be noted that for the present purpose there is no difference between the terms of this Act and those of the previous Act of 1877. Therefore, ordinarily the document under either Act is compulsorily registrable. In both Acts there is a special exemption in favour of "any decree or order of a Court or any award". The result of holding that such a document executed as between a surety and the Court is not exempted from registration either on general principles or as falling within the special words cited would be somewhat embarrassing. What the precise result might be in view of s. 49 is a question difficult to resolve, but the words of s. 17 are very wide and if they apply to proceedings in Courts would cover

(1) 31 M. 330; 5 M. L. T. 317.

a variety of documents and necessity might arise for recourse to the registration office at several stages of a prolonged litigation. It is difficult to believe that the Legislature intended any such result. It seems reasonable to suppose that judicial proceedings in general are not within the scope of the Act. Order XXI, r. 34, of the Code of Civil Procedure, provides for the registration of documents executed by the Court, but no direction is to be found as to the registration of documents in the form prescribed by Appendix G, No. 2, as appropriate for the purpose of O. XXI, r. 5, or indeed in any other case. The argument *ab inconvenienti* is certainly very strong here. It would be most inconvenient in practice if the Judge were bound to register a variety of documents such as this. Some of the difficulties will be gathered from the decision in *Ma Shwe Mya v. Maung Ho Hnaung* (2) a decision to which I shall refer later.

Nor is this view without support in the decisions of their Lordships of the Privy Council. *Bindesri Naik v. Ganga Saran Sahu* (3) is a case decided with reference to the provisions of the Indian Registration Act of 1877 which, as has been said, differ in no way for the present purpose from those of the Act of 1908. The question there was whether compound interest should be allowed on certain mortgages and reliance was placed on a number of petitions for time made by the mortgagors which contained admission that compound interest was due. It was argued for the appellants (the mortgagors) that under s. 17 of the Act of 1877 no effect could be given to those petitions as they were not registered. The matter was fully argued and, though the decision was based on other grounds, Lord Watson in delivering the judgment of the Board remarked as follows (page 15*):—

"Although, in the view which their Lordships take, the question whether those proceedings can be founded on, without their having been registered in terms of the Act of 1877, does not necessarily arise in this appeal, they think it right to add that, having heard Counsel fully upon

(2) 70 Ind. Cas. 937; 49 I. A. 395; 31 M. L. T. 304; A. I. R. 1922 P. C. 359; 17 L. W. 213; 37 O. L. J. 343; 27 C. W. N. 533; 44 M. L. J. 732; 50 C. 166; 2 Bur. L. J. 264 (P. C.).

(3) 25 I. A. 9; 20 A. 171; 2 C. W. N. 129; 7 Sar. P. C. J. 273; 9 Ind. Dec. (N. S.) 471 (P. C.).

the point, they are satisfied that the provisions of s. 17 of the Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties, or of orders made by the Court".

This dictum is general in its terms and not expressed to be based on any specific provision of the Act. It might indeed be difficult to bring such petitions within the words "decree or order of the Court or any award".

In *Pranal Anni v. Lakshmi Anni* (4) there had been a previous suit between the parties in 1885. That suit was brought to an amicable conclusion, and on January 16, 1886, two documents were executed. One was termed a "*razinamah*", the other "agreement of union". Neither was registered under the Act of 1877. The "*razinamah*" alone was produced in the suit. Both were relied upon in the second suit which came before the Privy Council in appeal. Lord Watson again delivered the judgment of the Board. As to the *razinamah* the following passage may be cited from pages 103-4* of the report:—

"The second document executed by the same parties, the *razinamah*, was not registered in terms of Act III of 1877; but it was produced in the suit of 1885; its terms were considered in a judgment delivered by the Subordinate Judge of Kumbakonam on March 31, 1886, and they were made the foundation of an order passed by the learned Judge, the parties to the document having concurred in moving that a decree may be passed in accordance with the *razinamah* which they have presented under s. 375 of the Civil Procedure Act, after settling".

"The *razinamah* had incorporated with it four schedules of lands, marked respectively A, B, C and D; schedule D containing a description of the lands which had been expressly excluded from the suit of 1885, and of no others. In the body of the document, the parties, first, set forth in detail the lands as to which they were in controversy in the suit of 1885, and concluded by stating that they had agreed each to take a certain share of these lands and their produce, in full satisfaction of all claims within the 15th of Panguni (27th March, 1886) next; and that both the parties shall bear their respective

costs of this suit'. In the second place, the document set forth as follows: Remarks: Not only have we, on this date, entered into a union agreement in regard to the land, etc., referred to in the plaint in this suit, and described in schedule D hereof, and divided thereunder the said lands into two equal shares between us, but a deed of release has also been taken from the 7th defendant's (present appellant's) guardian in relinquishment of the right possessed by the 7th defendant (present appellant) to the said half-share of lands'.

"In the judgment delivered by him on March 31, 1886, the Subordinate Judge, having the *razinamah* before him, treated the first part of it as the only portion of the contents of the document with which he was desired by the parties to deal. In giving effect to its terms, the learned Judge observed: 'The 7th defendant (present appellant) is her only daughter (i. e., of Ramaswami's grand-daughter) and she and the plaintiff have put in a *razinamah* in respect to items Nos. 1, 3, 5 and 7, and a decree in its terms has been passed'. It is admitted that items Nos. 1, 3, 5 and 7 specified by the learned Judge, were the lands claimed from the present appellant in the suit of 1885. The learned Judge plainly did not understand that he was asked by the parties either to consider or to give effect to the terms of the compromise which the parties narrated, by way of remark, that they had made with respect to the lands contained in schedule D of the *razinamah*, which are the subject of this appeal. Accordingly, the order passed by him did not include and had no reference to the lands".

The distinction between the two documents is brought out in the following passage (page 105-6*):—

"It is sufficiently obvious that, in maintaining that defence, the appellant can derive no aid from the terms of the agreement of union. The document has not been registered under the provisions of Act III of 1877; and, therefore, its stipulations are ineffectual in law to create, in favour of the appellant, any right, title, or interest to or in the lands in dispute.

"The *razinamah* was not registered in accordance with the Act of 1877; but the objection founded upon its non-registration does not, in their Lordships' opinion, apply

(4) 26 I. A. 101; 1 Bom. L. R. 394; 22 M. 508; 3 C. W. N. 485; 9 M. L. J. 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. (N. S.) 363 (P. C.).

*Pages of 26 I. A.—[Ed.]

to its stipulations and provisions, in so far as these were incorporated with, and given effect to by, the order made upon it by the Subordinate Judge in the suit of 1885. The *razinamah*, in so far as it was submitted to and was acted upon judicially by the learned Judge, was in itself a step of judicial procedure not requiring registration; and any order pronounced in terms of it constituted *res judicata*, binding upon both the parties to this appeal, who gave their consent to it.

"If the parties, after agreeing to settle the suit of 1885 on the footing that they were each to take a half-share of the lands involved in that suit, and also a half-share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of land now in dispute. But their Lordships are unable to find that any such course was taken, either in the *razinamah* or in the judicial order which gave effect to it. The *razinamah* merely referred, by way of remark, to the lands now in dispute; and the Judge was only asked to give effect to a compromise which related to the lands then in dispute before him. This order, accordingly, merely concerns the latter, and has no reference whatever to the lands described in schedule D of the *razinamah*. So far as regarded these lands, the compromise was not submitted to the learned Judge, but was deliberately left by the parties to stand upon their unregistered agreement of union."

The distinction drawn is that the "act of union" was not submitted to the Court and was not made the foundation of any order: the "*razinamah*" was so submitted and an order was founded on it. It was thus "in itself a step of judicial procedure not requiring registration."

In this case too no reference is to be found to any special exemption created by the Act itself. As in *Binderri Naik's case* (3) the judgment rests on a broad general principle that the proceedings of Court do not require registration. It is permissible

to doubt whether the head-note in *Pranal Anni's case* (4) is not too narrowly expressed.

It is surely no straining of language to hold that the security bond in the present case is "in itself a step in a judicial procedure". Plainly the order making the Rule absolute was founded upon it, and in my judgment it matters not that it was submitted to the Court of the First Class Subordinate Judge and not to the High Court. The Subordinate Judge certified that the required security had been furnished and the Judges of this Court were seized of that fact when they made their order.

But even if it be supposed that in the two cases cited their Lordships of the Privy Council based their judgment on the expressed exemption in the Act, though they do not allude to it, the result is the same. If those proceedings fall within the exemption why not the proceedings in the case before us? I am unable to see any real difference. All are steps in the procedure of the Court.

The question is further dealt with by their Lordships of the Privy Council in *Hemanta Kumari Debi v. Midnapore Zemindari Co. Ltd.*, (5). In that case a petition of compromise had been made in a previous suit between the parties. The petition was not registered. The whole was embodied in a decree, but as to one clause of the petition the decree was not operative as that clause was outside the scope of the suit. The question raised was whether that clause could be put in evidence. It was held that the special exemption in s. 17, sub-s. 2 (vi), applied inasmuch as there was a decree or order of the Court embodying the disputed clause. Their Lordships refer to *Pranal Anni v. Lakshmi Anni* (4) and cite a passage from Lord Watson's judgment which has been set out above. They then say (page 248*) :—

"Section 375 and its effect were clearly under the consideration of the Board, and the judgment thus expressed showed that, merely regarding the question as a question of evidence and not as to the effect of the decree on lands outside the subject of the suit, such a document as that in the present case when incorporated in a decree was

(5) 53 Ind. Cas. 534; 46 I. A. 240; 22 Bom. L. R. 488; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 47 C. 485 (P. C.).

clearly admissible as judicial evidence. Though this judgment does not in terms refer to s. 17, sub-s. 2 (vi) of the Registration Act, it gives full effect to the opinion that their Lordships have formed as to its interpretation. The decree in the present case is a decree which makes no difference whatever in its language between one part and another part of the compromise; it incorporates the whole; and it is, in other words, a decree which, though affecting the lands in the suit as a decree, incorporates the whole of the agreement which led to the suit being compromised. For this reason their Lordships think that the registration of the agreement was unnecessary and that the decree is sufficient evidence of its terms."

Now it is true that here the surety bond is not embodied in the Court's order, but nonetheless the Court's order is based on the surety bond, and were the order writing out *in extenso* it would of necessity refer to the bond which had been made an exhibit in the case. Thus in my judgment the matter is within the scope of the judgments of Lord Watson, if not directly covered by the case last cited.

Reliance was placed for the appellant on *Ma Shwe Mya v. Maung Ho Hnaung* (2), but the point of registration was not decided there. The bond was registered. The question was whether it had been validly registered. It was assumed that registration was compulsory. The case was heard *ex parte* and the only point decided was as to the proper method of presentation. At page 397* their Lordships say. "The respondent was not represented on the appeal and their Lordships have accordingly not heard an argument in support of the validity of the bond". It would be wrong to rely on this decision as being in any sense an authority on the point before us.

In my opinion it is a fair conclusion upon these authorities that, on the facts of this case, the surety bond executed by the appellant does not require registration. I am, therefore, unable to agree with the judgments of the Madras High Court in *Nagaruru Sambayya v. Tangatur Subbayya* (1). It does not appear that the decisions of the Privy Council set out above were cited or considered in that case.

I now turn to the second point. Did the appellant undertake to be bound by the decree which might be passed against the appellants other than defendant No. 6?

First Appeal No. 335 of 1920 was filed by defendants Nos. 2, 4, and 6. The application for stay of execution describes the applicants as "Basangouda *bin* Mallangouda and others". Basangouda is defendant No. 6. It is carelessly drafted. In the preamble, in para. 1 and also in the concluding sentence the plural "petitioners" is used. In para. 3 the word "petitioner" appears in the singular. The affidavit in support is made by defendant No. 6 and it sets out that execution proceedings were being taken against defendant No. 2. The Court's order "Rule and *ad interim* stay" clearly meant, having regard to O. XLI, r. 5, that security must be given by the applicant and the application must be read as being, on behalf of all the appellants. But the Court's writ speaks of one petitioner only, *viz.*, defendant No. 6. It was upon that writ that the surety bond came to be executed. The precise terms of the bond are set out above. A surety bond must be construed strictly and upon a strict construction it appears that the appellant before us agreed to become surety for one defendant only. The word used is masculine and singular and as one only of the three appellants was a male, the description can apply to him alone. That one defendant is defendant No. 6. Thus there is a very real doubt as to whether the obligation of the surety extends beyond the decree as against defendant No. 6. The result is unfortunate but, in my opinion, a surety cannot be held liable except to the extent to which he is clearly bound. It is impossible to say that the appellant knowingly undertook to be liable for the decree which might be passed against the defendant No. 2. That being so the attempt to hold him so liable must fail.

Marten, C. J.—This first appeal raises numerous questions which are far easier to ask than to answer and which have not been adequately dealt with in the trial Court. The main questions are (1) whether the security bond, Ex. 11, of January 5, 1921, which was expressed to be given by the appellant surety Jayappa to the First Class Subordinate Judge's Court at Dharwar in Suit No. 229 of 1917, requires registration under the Indian Registration Act and (2) whether this security bond can be enforced in the present. Darkhast either against the property thereby expressed to be mortgaged, or against the

*Page of 49 I. A.—[Ed.]

obligor personally or otherwise, and (3) if so, in respect of whose default is the appellant surety liable.

The present Darkhast is No. 39 of 1925 taken out in Suit No. 229 of 1917. That was a suit filed by the plaintiff Shivangouda in the Court of the First Class Subordinate Judge at Dharwar against Mareva defendant No. 1, Somawa defendant No. 2, Bosangouda defendant No. 6, and Basava defendant No. 4, and others. The suit was decided in the plaintiff's favour on March 27, 1920, and a decree was passed therein. Somawa defendant No. 2 and Basangouda, defendant No. 6, and Basawa, defendant No. 4 filed an appeal in the High Court against the said decree. The plaintiff, who got the decree in his favour, filed an application for executing the said decree. Thereupon an application was made to the High Court in which the petitioners were described in the title as "Basangouda and others." A Rule nisi was granted by the High Court for a stay of execution on terms. Subsequently on the security being furnished that Rule nisi was made absolute. The security in question is this bond, Ex. 11 of January 5, 1921. It is expressed to be given to the First Class Subordinate Judge's Court at Dharwar.

The first point for consideration is whether this bond required registration under the Indian Registration Act. I have had the advantage of reading the judgment of my brother Ormump on this question, and I respectfully agree with his reasoning and conclusion that the Act does not apply here by reason of the fact that the bond was part of the judicial proceedings and incorporated therewith. It follows, therefore, I think that s. 59 of the Transfer of Property Act does not necessitate registration; for "registered" is defined to mean "registered under the law for the time being in force regulating the registration of documents". Further, ss. 5, 58, and 100 contemplate a transaction between two persons, but here the bond was to "the Court" and, as stated in *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (6) the Court is not a juridical person.

This brings me to the next point, viz., that the security was given to the Court and not to a named individual and is therefore void. Now the form is one taken from the First Schedule to the Civil Pro-
(6) 55 Ind. Cas. 550; 46 I. A. 228; 22 Bom. L. R. 521; 22 O. C. 212; 6 O. L. J. 682; 38 M. L. J. 302; 18 A. L. J. 263; 42 A. 158; 13 L. W. 82. (P. C.).

cedure Code, Appendix G, Form No. 2, but that form is headed "To (blank)" and is no doubt intended to be given to a named individual. In *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (6) their Lordships of the Privy Council had to consider a case where the old Code of Civil Procedure was in force when the suit began, but the new Code of 1908 was in force when the application against the widow and sureties for the recovery of mesne profits was started. There also a security bond had been given to the Court, but no person was mentioned in the instrument. After stating at page 236* that "there remains a matter which has given their Lordships considerable trouble" and after holding that s. 145 did not apply because the lower Court had construed the instrument as giving only a charge upon property, and after holding that ss. 47 and 144 did not apply, the judgment proceeded (page 237*):-

"But the questions of their liability upon the instrument, whether they were personally liable, and whether, in the events which happened, it had become applicable, were matters which they were entitled to have determined against them in a regular and authorized manner. The contention for the appellants is that for this purpose there should have been a separate suit to enforce the charge, and that this must have been one according to the procedure provided by s. 90 of the Transfer of Property Act.

"In order to see whether this is so their Lordships turn to the instrument itself. For a proceeding under the Transfer of Property Act there must be a mortgagor and a mortgagee. Their Lordships have to examine whether in this case there is any mortgagee, any person to whom the security was given. Now, no person is mentioned in the instrument. It recites the decree that the widow has been ordered to furnish security, and then the declarants furnish security by hypothecating their property. The form of an instrument such as this, in the absence of any special form being provided by the Code, and there is no suggestion that there was any such form provided under the Code then in force, must vary according to the practice of the Court. It appears that in the High Court at Calcutta, in instruments of this nature, the parties bind themselves to some named officer of the Court, and

*Pages of 46 I. A.—[Ed.]

that, if the instrument has to be put in suit, either the officer sues, or he, under order of the Court, assigns the security to the party who wishes to avail himself of it; but this instrument does not purport to bind the sureties to any individual officer or to anyone.

"It is suggested that they are bound to the Court. But the Court is not a juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it. It remains, therefore, that there is an unquestioned liability, and there must be some mode of enforcing it; and that the only mode of enforcing it must be by the Court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money. This form of procedure is that to which the High Court of Allahabad gave its sanction in the case of *Janki Kuar v. Sarup Rani* (7).

"The new Code of Civil Procedure, that of 1908, provides a special form of security bond to be given during the pendency of an appeal (Appendix G, No. 3). The form shows that it is intended to be given to someone and not to be a mere undertaking to the Court. Whether that someone should be the other party or an officer of the Court is not made clear; but with this form in use it is not likely that the difficulty which surrounds the present case will arise in future".

Stopping there for a moment, unfortunately that very difficulty has arisen in the present case because the bond was given to the Court, as I have already stated, and not to a named individual. Then their Lordships proceeded (page 238*):—

"It appears to their Lordships that the proper way of dealing with the present case is to consider that there are three steps: 1. The assessment of the mesne profits to which the sureties need to be parties. 2. The construction of the instrument determining that the property charged is liable as security in the events which have happened. 3. The order that the property be sold unless the sureties pay.

(7) 17 A. 99; A. W. N. (1895) 19; 8 Ind. Dec. (N. S.) 389.

"It might have been more regular to take the first by itself.....and to take the second with the third; but unless it be that there is possibly some increase of costs, no harm has been done. It is idle to talk of the proceedings as if they had been taken before a Court which had no jurisdiction; and no serious objection was raised to the form of procedure; nor can the appellants point to anything which would show that justice has not been done to them.

"In the result, therefore, their Lordships think that except as to the matter of the personal liability of the appellants, the decree appealed from is right".

They accordingly directed that the decree of the Subordinate Judge should be varied by substituting the words "the property hypothecated by the instrument of security of September 16, 1902, is liable" for the words "the two sureties are liable".

The effect of that decision was that the property hypothecated by the surety bond was held liable for the sums in question. The result, therefore, was that in effect their Lordships enforced the security bond given to the Court. Accordingly, stopping there, it would seem on the authority of that case that the present security bond could be enforced by the Court against the property in appropriate proceedings.

An alternative view is that the words in the bond refer not to the Court but to the Judge for the time being occupying the position of the First Class Subordinate Judge at Dharwar. That view presents obvious difficulties particularly having regard to what their Lordships say at page 238*. Having regard to the numerous changes which take place unfortunately amongst the personnel of the Subordinate Judges, I can understand the practical convenience of a bond to the Court instead to an individual Judge by name. But an undertaking to the Court is one thing, and could, I take it, be enforced by any Judge of the Court to whom the action was assigned for the time being. A mortgage to the Court as pointed out by their Lordships is quite another.

The next difficulty is that the present application is said to be based on s. 145 of the Civil Procedure Code. That section provides that the decree or order may be executed against him (the surety)

to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees. Now in the above case of *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (6) their Lordships of the Privy Council, as I have already pointed out took the view that s. 145 only applied if the sureties were personally liable, and as the instrument there only gave a charge on the property, the section had no application; nor was it in fact relied on. A similar decision has been arrived at by this Court in *Gurushantappa Sangappa v. Gurava Madivallappa* (8). That was a case where, pending insolvency proceedings, a composition deed was arrived at between the creditors and the insolvent. The appellant Gurushantappa became a surety for the insolvent, and hypothecated his property as surety, and he also became personally liable. It was there held in effect that the personal liability of the surety could be enforced as if it was for a money decree, and that then the property in question could be sold in execution of that quasi money decree. But in doing so the parties entitled to the benefit of the security bond, or the Court in their behalf, would only be in the position of unsecured creditors. Consequently, supposing the surety had assigned his equity of redemption to the third parties, then the mortgage security could only be enforced in a separate suit. Thus Sir Norman Macleod says (page 606*):—

"If, therefore, the surety has not disposed of the equity of redemption, the position is this, that the decree-holder, if he wishes to rely upon the mortgage contained in the surety bond, must get a decree upon the mortgage before he can realize his security. But he is not obliged to rely upon the security given him by the hypothecation of the property under the bond. He can rely upon the personal liability of the surety and seek to attach the property on account of that personal liability. Thereby he only releases his own interest in the mortgage, and runs the risk of other claims being made against the property either by persons entitled to later charges on it, or by other attaching creditors. However, that is a

(8) 95 Ind. Cas. 696; 28 Bom. L. R. 603; A. I. R. 1928 Bom. 279; 50 B. 339.

*Page of 28 Bom. L. R.—[Ed.]

matter which the present respondent must consider for himself. At present we say that the order made by the Judge for sale of the property in question was right, and the appeal must be dismissed..."

In the present case it does not appear that the surety has mortgaged or assigned his equity of redemption. But the decree-holder, the plaintiff, does not wish to be put to a separate suit to enforce the charge given by the security bond. His Darkast is framed in the alternative, and if necessary he contends that the security bond creates a personal liability on the part of the surety; and that consequently proceedings can be taken against him under s. 145 on that basis. The two cases above cited are in his favour on that point. If, however, contrary to our view, the Indian Registration Act had applied, then on the construction of his particular bond a difficult question might arise as to whether the personal covenant was severable. Alternatively it was argued for the surety that this was a contingent liability within the meaning of s. 32 of the Indian Contract Act, because it was dependent on the property charged proving insufficient, and so, it could not be enforced until the contingency happened. But, in the view we take, I need not pursue this point.

I arrive then at the conclusion that the bond could be enforced in appropriate proceedings against the property itself. The next main question then arises whether the surety, the so called defendant No. 8 was liable for the default of defendant No. 6 only as he contends, or for that also of defendants Nos. 3 and 4, as the plaintiff contends. I say "so-called defendant No. 8," because the surety was not an original party to the suit. He has only been a party to the present Darkast proceedings to enforce the bond he gave. Now the above question as to the liability of defendant No. 8 depends primarily on the construction of the bond itself taken in conjunction with the proceedings referred to in the body of the bond itself. My mind has fluctuated on the point, and the case appears to me to be on the line. But, undoubtedly, there was carelessness in the application to the Court for a stay, and in the subsequent orders that were made. I mean as to the person or persons for whom security was

to be given. Unfortunately for the plaintiff, this Court's writ of December 14, 1920, mentioned only one petitioner, viz., defendant No. 6 : and the return to the writ by the District Judge on January 25, 1921, is to the like effect. Further, the bond given is more consistent in its language with one petitioner and he of the male sex than with three petitioners of different sexes. In the result, I think, the benefit of the doubt must be given to the surety. Accordingly I agree with my brother Crump in holding that the surety is not liable for the default of the female defendant No. 2.

In the result, therefore, this appeal will be allowed, and the order of the trial Court, set aside, and the Darkhast dismissed with costs throughout including the costs of this appeal.

A. N. A.

Appeal allowed.

BOMBAY HIGH COURT.

CIVIL APPLICATION FOR REVISION No. 145
OF 1927.

November 14, 1927.

Present:—Mr. Justice Madgavkar and Mr.
Justice Patkar.

MOTI JAGTA—APPLICANT

versus

INDURAI BHAURAI DESAI AND OTHERS
—OPONENTS.

Mamlatdars' Courts Act (II of 1906), s. 26 (b)—
'Has been the subject of previous proceedings,' meaning
of—Jurisdiction of mamlatdar in respect of matter
pending in Civil Court.

The words 'has been the subject of previous proceedings' in s. 26 (b) of the Mamlatdars' Courts Act include pending proceedings in a Civil Court. [p. 720, col. 1.]

A mamlatdar has, therefore, no jurisdiction to entertain a suit in respect of any dispossession, recovery of possession or disturbance of possession which is the subject of a suit pending between the parties in a Civil Court. [p. 720, col. 2.]

Application for revision against an order of the Mamlatdar, Godhra, in Possessory Suit No. 13 of 1926, confirmed in revision by the Collector, Panch Mahals.

Mr. R. W. Desai, for the Applicant.

Mr. G. N. Thakor (with him Mr. M. H. Mehta), for the Opponents.

JUDGMENT.

Madgavkar, J.—The question in this application is whether the words "has been" in s. 26, cl. (b), of the Mamlatdars' Courts Act include the word "is" or only refer to past proceedings. The dispute between

the present parties was whether the petitioner was or was not a permanent tenant of the opponents. The petitioner brought a suit in the Civil Court for a declaration that he was a permanent tenant with consequential reliefs. The opponents sued, subsequently and during the pendency of the civil suit, in the Mamlatdar's Court for ejectment. The Mamlatdar held that the petitioner was not a permanent tenant and granted ejectment. The petitioner applies in revision, and it is argued on behalf of the opponents that the words "has been" cannot include a pending suit but only decided suit.

This contention is, in our opinion, untenable. In a decided suit, the question as to recovery or disturbance of possession or dispossession would be *res judicata*, and no express clause such as s. 26 (b) would be necessary. It follows that the words "has been" are used to include present proceedings, that is to say, proceedings that are pending; and, therefore, apply to the proceedings between the parties; and, in fact, s. 5, in any case, gives the Mamlatdar a clear discretion to refuse ejectment. It cannot for a moment be supposed that the Legislature contemplated that proceeding in the final Tribunal to decide the question between the parties should be allowed to be disturbed by proceedings before a Tribunal whose powers are much more limited, such as the Mamlatdar, which is created to prevent resort to force and not to interfere with the trial and decision by the Civil Courts.

The order of the Mamlatdar was, therefore, without jurisdiction; and the application must be allowed, the Rule made absolute and the order set aside, without prejudice to the remedy, if any, of the opponents in the civil suit which is now pending.

Patkar, J.—This is an application to revise the order of the Mamlatdar in a possessory suit brought by the *inamdars* against the defendant on the ground that he was a yearly tenant and that the lease terminated on March 31, 1926. The defendant contended that he was a permanent tenant and was not liable to be evicted by the plaintiffs *inamdars* who are only alienees of the Royal share of the revenue. The Mamlatdar awarded possession to the plaintiffs.

It is contended before us that the Mamlatdar had no jurisdiction to entertain the suit as the defendant-tenant had filed a Civil Suit No. 233 of 1926 on July 5, 1926, for

a declaration that he was a permanent tenant and for an injunction against the *inamdars* restraining them from disturbing him in his possession.

Under s. 26, cl. (b), of the *Mamlatdars' Courts Act*, no suit shall lie under the Act in respect of any dispossession, recovery of possession or disturbance of possession, that has been the subject of previous proceedings, to which the plaintiff or his predecessor-in-interest was a party in a Civil Court.

It is contended by Mr. Thakor on behalf of the opponents that cl. (b) of s. 26 does not apply to the present case where the proceeding in the Civil Court is pending, but applies only to previous proceedings which have terminated. I think that the words "has been the subject of previous proceedings" would include pending proceedings in a Civil Court. If the proceedings in a Civil Court have ended in a decree, the rights of the parties would be determined in the civil proceedings and the decision would be binding on the parties to the litigation. It would not be necessary, in my opinion, to make any provision in the *Mamlatdars' Courts Act* with regard to the civil proceedings which have ended in a decree.

In *Ramchandra v. Narsimhacharya* (1) it was held that the *Mamlatdar's* decision was not conclusive and the plaintiff was entitled to bring a second suit under s. 9 of the *Specific Relief Act*. In *Nagappa v. Sayad Badrudin* (2) it was held that the *Mamlatdar* had jurisdiction to try a possessory suit notwithstanding the fact that there were previous proceedings between the parties under s. 145 of the *Criminal Procedure Code*. In order to give effect to the view, overruling the above two cases, that the remedies under the *Mamlatdars' Courts Act* on the one hand and the *Specific Relief Act* and the *Code of Criminal Procedure* on the other hand should be alternative and not cumulative, s. 24 of Bill No. IV of 1905 seems to have been drafted. Section 26 as now enacted, enlarges the scope of s. 24 of the Bill and substitutes a proceeding in a Civil Court for a proceeding under s. 9 of the *Specific Relief Act* as proposed in s. 24 of Bill No. IV of 1905. It is clear,

therefore, that the pendency of a civil proceeding in any Court would be a bar to the exercise of jurisdiction by the *Mamlatdar* under the *Mamlatdars' Courts Act* (Bom. Act II of 1906). The usual course for the parties is to have recourse to the *Mamlatdar's* Court for a speedy relief before they seek assistance of a Civil Court, and the defeated party is generally driven to bring a suit in the Civil Court. The procedure adopted by the *inamdars* in this case was very unusual. They brought a suit in the *Mamlatdar's* Court after they were sued by the tenant in a Civil Court. Under the proviso to s. 5 of Act II of 1906 it is discretionary with the *Mamlatdar* to refuse to exercise the power under the Act if he is of opinion that the case before him would be more suitably dealt with by the Civil Court. The decision in the *Mamlatdar's* Court does not finally decide the rights of the parties. If a Civil Court decides the rights of the parties, then clearly apart from s. 26 of Act II of 1906 the *Mamlatdar's* Court would have no jurisdiction to entertain a suit under the *Mamlatdars' Courts Act*. Under the proviso to s. 5 (1) of the *Mamlatdars' Courts Act*, discretion is given to the *Mamlatdar* to refuse to exercise the power under the Act if he is of opinion that the matter would be suitably dealt with by a Civil Court.

I think that s. 26, cl. (b), bars the jurisdiction of the *Mamlatdar* when there is a civil suit pending between the parties in respect of any dispossession, recovery of possession or disturbance of possession. I think, therefore, that the contention on behalf of the applicant is well-founded and that the *Mamlatdar* had no jurisdiction to entertain the present suit.

I would, therefore, make the Rule absolute, reverse the decree of the *Mamlatdar* and dismiss the plaintiffs' suit with costs throughout.

A. N. A.

Rule made absolute.

(1) 24 B. 251; 1 Bom. L. R. 660; 12 Ind. Dec. (N. S.) 703 (F. B.).

(2) 26 B. 353; 3 Bom. L. R. 919.

CALCUTTA HIGH COURT.

CIVIL RULE No. 952 OF 1927.

November 29, 1927.

Present:—Mr. Justice Mukerji.

BANI KANTA MONDAL AND OTHERS—

DEFENDANTS—PETITIONERS

versus

HEMANTA KUMAR GHOSE

AND OTHERS—PLAINTIFFS—OPPOSITE PARTIES.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (ii)—Suit for damages for use and occupation—Jurisdiction of Small Cause Court.

The plaintiff had obtained symbolical possession of certain land against the defendants. Litigation went on between the parties, and taking advantage of the said litigation the defendants continued in possession and took away the paddy that was standing on the land. They further raised fresh crops and appropriated the same to their own use. The plaintiff sued for damages for use and occupation:

Held, that the damages claimed by the plaintiff were not in respect of any act amounting to a criminal offence within the meaning of Chap. XVII of the Penal Code and that the suit was not, therefore, barred from the cognizance of Small Cause Courts by Art. 35 (ii) of the Provincial Small Cause Courts Act. [p. 722, col. 1.]

Kunjo Behary Singh v. Madhub Chundra Ghose (1), relied on.

Abinash Chandra Sarkar v. Atul Krishna Bose (2), distinguished.

Rule against the decree of the Court of the Sub-Judge, Khulna, having powers of a Court of Small Causes, dated the 22nd April, 1927, in S. C. C. Suit (Register) No. 28 of 1927.

Mr. S. C. Bose and Babu Saroj Kumar Chatterjee, for the Petitioners.

Mr. Sarat Chandra Roy Choudhuri and Babu Santi Kumar Roy Choudhuri, for the Opposite Parties.

JUDGMENT.—I am of opinion that to accede to the contention urged on behalf of the petitioners in this Rule would be to hold that all suits for recovery of mesne profits against trespassers are outside the cognizance of Court of Small Cause. Schedule II, Art. 31 of the Provincial Small Cause Courts Act was construed by this Court prior to the introduction of cl. (ii) of Art. 35 in the case of *Kunjo Behary Singh v. Madhub Chandra Ghose* (1) and a Full Bench of this Court held that such suits were cognizable by Courts of Small Causes. To find out whether the introduction of cl. (ii) to Art. 35 in the said Schedule has effected any change in the law it may not be out of place to refer to what was said in that case by Trevelyan, J. He observed that suits for damages in the nature of mesne profits were cognizable by a Court of Small Causes even

under Act XI of 1865. It would require very strong reasons to suppose that the introduction of cl. (ii) was made in Art. 35 with the object of unsettling the practice that has obtained in this country ever since the foundation of Courts of Small Causes, and indeed to those who are familiar with the history of this clause it is well-known why and to meet what class of cases this clause was introduced.

Turning now to the allegations contained in the plaint upon which the plaintiff's cause of action is founded what is stated in paras. 6 and 7 thereof is this that the plaintiff had obtained as against the defendants delivery of possession through the Court on the 17th of November, 1924, that thereafter litigation went on between the plaintiff and the defendants, and that taking advantage of the said litigation the defendants did not give up possession and continuing in such possession took away the paddy that was standing on the land on the said 17th of November, 1924, and that thereafter they illegally grew paddy on the land in the year 1332 and appropriated the same to their own use and for that the plaintiff sued "for damages for use and occupation." These allegations standing by themselves would hardly make out a case either under s. 379 of the Indian Penal Code or under s. 447 thereof. Other elements have got to be proved in order to establish a case of criminal trespass or of theft as against the defendants. It might well be that the defendants acted under a *bona fide* claim of right, that although the Court had delivered possession of the land to the plaintiff they were not willing to part with their possession in view of such rights as they thought they had in the lands, and that after acting in that belief they did not give up possession but continued to be in occupation of the lands and to grow crops thereon and to take such crops as had actually been grown by them and belonged to them. I do not see how it can be said that the acts committed by the defendants necessarily amounted to theft or criminal trespass. My attention has been drawn to a decision of this Court in the case of *Abinash Chandra Sarkar v. Atul Krishna Bose* (2) in support of the position which the petitioners have taken up, namely, that the allegations in the plaint, if established, do

(2) 48 Ind. Cas. 678; 26 C. L. J. 120; 20 Cr. L. J. 10; 23 C. W. N. 385.

constitute a criminal offence. It will be seen, however, that there is a broad distinction between that case and the present one. The difference lies in this that in that case the complainant having obtained a decree for possession against a certain person had obtained actual possession of the land in respect of which the decree had been passed—actual possession in the sense in which the expression is understood in criminal law. I am of opinion that the damages that have been claimed in the present suit are not for any act which would amount to any criminal offence within the meaning of Chap. XVII of the Indian Penal Code. We need not in the present case look at the exceptions contained in Chap. IV of the Indian Penal Code for the determination of this question at all. I accordingly hold that the Small Cause Court had jurisdiction to deal with this suit.

The Rule is, in my opinion, fit to be discharged and I order accordingly. The opposite party will be entitled to costs, hearing fee two gold mohurs.

A. N. A.

Rule discharged.

CALCUTTA HIGH COURT.

CIVIL RULE No. 823 OF 1927.

December 2, 1927.

Present :—Mr. Justice Mukerji.

KHANTA KAMINI DUTT—

Pro forma DEFENDANT—

PETITIONER

versus

ASWINI KUMAR DUTT AND OTHERS—

OPPOSITE PARTIES.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—'Suit for account', meaning of—Suit for money involving accounting, whether suit for account.

A suit for money against a person who is alleged to have wrongfully realised monies due to the plaintiff does not fall within the purview of Art. 31 of Sch. II of the Provincial Small Cause Courts Act where no decree for accounts is asked for. [p. 723, col. 1.]

A suit in which accounting is involved is not necessarily a suit for an account. [p. 722, col. 2.]

Kunjo Behary Singh v. Madhub Chundra Ghose (1), followed.

Rule against the decree of the Munsif, First Court, Dacca, exercising the powers of a Court of Small Causes, dated the 21st March, 1927, in S. C. O. Suit (Register) No. 1694 of 1926.

Babu Mohendra Kumar Ghose, for the Petitioner.

Babus Trailakhya Nath Ghose and Amarendra Nath Mitra, for the Opposite Parties.

JUDGMENT.—The only ground on which this Rule has been issued is that the Small Cause Court had no jurisdiction to try the suit in view of Art. 31 of the Second Schedule to the Provincial Small Cause Courts Act.

There were two defendants in the suit, the defendant No. 1 being the principal defendant and the defendant No. 2, the *pro forma* defendant.

The plaintiffs claimed to recover Rs. 170 as house rent together with Rs. 10 for compensation against the defendant No. 1 who was the tenant in the house. The claim against the defendant No. 2 was worded thus in the plaint: If it appears and is legally proved that the defendant No. 1 has in good faith paid to the defendant No. 2 the rent claimed or the rent for any month then a decree may be passed against the defendant No. 2 for such amount as may be so found to have been paid.

In the course of the trial the plaintiffs appear to have reduced their claim to 2/3rd share of the rent, the defendant No. 2 being entitled to the remaining 1/3rd. The defendant No. 2 having admitted to have realised the rents and the learned Munsif having found that the defendant No. 1 had made the payments in good faith, he passed a decree against the defendant No. 2 for 2/3rds of the amount which he had realised.

It is urged in support of the Rule that the suit in so far as it is against the defendant No. 2 is to recover the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant. That, no doubt, is so. But as pointed out by the Full Bench decision of this Court in the case of *Kunjo Behary Singh v. Madhub Chundra Ghose* (1) the only class of suits excluded by Art. 31 are those in which the plaintiff claims an account of the monies which the defendant has received and to an account of which the plaintiff is entitled because the monies belonged to him (Per Petheram, C. J., at page 889*). A suit in which accounting is involved is not necessarily a suit for account. Trevelyan, J., also at page 890* says "But the jurisdiction of the Small Cause

(1) 23 C. 884; 12 Ind. Dec. (N. S.) 587.

* Pages of 23 C.—[Ed.]

Court is, in my opinion, only excluded by the Act where such suit is a suit for an account, that is, a suit which seeks for a decree, not for a definite sum of money but ordering the defendant to account to the plaintiff for monies received by him. The machinery necessary for the putting in force of that decree is of a kind with which Small Cause Courts have never been supplied, and it has always been the object of the Legislature to confine Small Cause Courts to simple suits which are concluded by the first decree. A suit for an account is a suit which seeks for discovery in pursuance of the decree." It is clear from these observations that unless a decree for accounts is asked for, a suit for money against a person who is alleged to have wrongfully realised monies due to the plaintiff does not come within the Article. The plaintiff in a suit of the present nature can have a decree for money so long as he is able to prove what monies were so realised by the defendant.

The ground of the Rule, in my opinion, fails. In view of the limited character of the Rule it is not necessary for me to consider whether on any other ground the Rule may be supported, nor indeed have I been asked to do so.

The Rule is discharged with costs—one gold mohur.

A. N. A.

Rule discharged.

CALCUTTA HIGH COURT.

CIVIL RULE No. 959 of 1927.

December 5, 1927.

Present:—Mr. Justice Mukerji.

MUJAFAR AHMED—PLAINTIFF

—PETITIONER

versus

KARIM BUKSHA AND OTHERS—DEFENDANTS

—OPPOSITE PARTIES.

Limitation Act (IX of 1908), Sch. I, Arts. 30, 31, 36. —Carrier conveying goods without passenger's permission—Loss of goods—Suit for price—Limitation.

For the presumption of an implied contract to carry goods, delivery of the goods to the carrier so as to enable the carrier to acquire lawful possession of the goods for the purpose of carriage, is an indispensable essential.

The plaintiff put certain goods on the defendant's ferry boat for conveyance and himself got on to it but finding that the boat was being overloaded got down and wanted to take down his goods. The defendant refused to allow him to do so. The boat

capsized on the way and the goods were lost. The plaintiff sued for the price of the goods:

Held, that the suit was governed not by Art. 30 or Art. 31 but by Art. 36 of Sch. I of the Limitation Act.

Rule against the judgment of the Munsif, First Court, Sudharam (Noakhali), dated the 29th April, 1927, in S. O. C. Suit No. 1436 of 1926.

Babu Jitendra Kumar Sen Gupta, for the Petitioners.

Babu Akhil Chandra Dutt, for the Opposite Parties.

JUDGMENT.—The only question which arises in this Rule is whether the plaintiff's claim is barred by limitation.

The learned Munsif has held that the suit is barred under Art. 30 or 31 of the First Schedule to the Limitation Act having been instituted more than one year after the date when the loss or injury took place or when the goods ought to have been delivered.

Shortly stated the facts which have not been controverted are that the plaintiff put the goods on the defendants' ferry boat for conveyance and himself got on to it. Other passengers with their goods also did so. The plaintiff found that the boat was being overloaded and feeling it unsafe to travel on it, he got down and wanted to take down his goods but the defendants refused to allow him to do so. Notwithstanding the plaintiff's protest the boat started on its journey with his goods and capsized on the way and the goods were lost. The claim is for recovery of price of the goods.

To give rise to those special privileges or liabilities which attach to transactions by or with carriers, the relationship has to be first established. There was admittedly no express contract for carriage; and for the presumption of an implied contract to arise, delivery of the goods so as to enable the carrier to acquire lawful possession of the goods for the purpose of carriage is the indispensable essential. It is difficult to see upon the facts set forth above that there was any delivery in this case. The Article applicable to the case is, therefore, not Art. 30 or 31 but Art. 36, and the claim was not barred.

The other facts having been found in plaintiff's favour, the plaintiff is entitled to a decree.

The Rule is made absolute. The decree of the learned Munsif is set aside and the plaintiff's suit is decreed with costs in the

trial Court as well as in this Court. Hearing fee in this Rule is fixed at one gold mohur.

A. N. A.

Rule made absolute.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER

No. 246 OF 1925.

June 15, 1927.

Present:—Mr. Justice Page and
Mr. Justice Graham.

Kumar BIRENDRA NATH ROY
BAHADUR—APPELLANT

versus

TARINI KANTA ROY AND ANOTHER

—RESPONDENTS.

Mortgage—Co-mortgagors—Decree against all—Redemption by one—Decree for contribution charging shares of co-mortgagors—Charge, whether can be enforced in execution.

One of several mortgagors who redeems the entire mortgaged property by depositing the full amount due to the mortgagee under a decree obtained by the mortgagee against all the mortgagors, and obtains a decree for contribution charging the properties of the other mortgagors for the respective amounts due from them, is entitled to enforce his charge in execution of his decree by sale of the properties charged by the decree, without bringing a second suit to enforce his charge. [p. 725, col. 2.]

Aubhoyessury Dabee v. Gouri Sunkur Panday (1) and Gobind Chandra Pal v. Kailash Chandra Pal (2), distinguished.

Appeal against an order of the Subordinate Judge, Rajshahi, dated the 24th March, 1925.

Babus Brojo Lal Chakrabarty and Jatindra Mohun Chowdhury, for the Appellants.

Babus Krishna Kamal Maitra and Rabindra Nath Chowdhury, for the Respondents.

JUDGMENT.

Page, J.—This is an appeal from an order of the learned Subordinate Judge of Rajshahi allowing the opposite party's objection to certain properties being attached in execution of a decree, and ordering the properties to be released from attachment. Defendants Nos. 1 and 2 mortgaged some properties including the property in suit to defendant No. 6 on the 19th of May, 1912. On the 26th of January, 1914, the appellant purchased the properties set out in schedule ka in execution of a money-decree against defendants Nos. 1 and 2. A mortgage suit was then brought

by the mortgagee to enforce his mortgage and some other property belonging to the mortgagors and subject to the mortgage was sold in execution of the mortgage-decree. The appellant as the auction-purchaser of part of the property mortgaged comprised in schedule ka was anxious to save the property still unsold from being put up to auction in execution of the mortgage-decree, and on the 19th September, 1916, deposited in Court the full amount remaining due under the mortgage-decree. Thereupon the properties still unsold which had been subject to the mortgage were freed from liability to attachment under the mortgage-decree. Now, pursuant to the rights given to him under s. 95 of the Transfer of Property Act the appellant brought a suit to obtain contribution from the other owners of the mortgaged property freed from liability to the mortgagee. That suit was numbered 510 of 1919. On the 21st January, 1921, the contesting respondent to this appeal one Tarini Kanta Roy purchased Sarat Sundari Debi defendant No. 1's 1/3rd share of property No. 2 in schedule ka. On the 27th July, 1923, a decree was passed in the contribution suit, and in order to obtain execution of that decree an application was presented by the appellant in respect of which the present appeal arises. The application was for leave to execute the decree by selling the properties of the other owners to the extent to which under the decree they were proportionately liable to contribution. One of those properties was the 1/3rd share of property No. 2 of schedule ga which belonged to Sarat Sundari, and which had been purchased by Tarini. Tarini objected to execution being levied in respect of the property which he had bought from Sarat Sundari, and his objection was upheld by the order against which the present appeal is preferred. Tarini based his objection to execution being levied upon the share in the property mortgaged that he had bought from Sarat Sundari upon three grounds. The learned Vakil who appeared for the respondents urged that in the circumstances disclosed in the evidence, the Court ought to hold, whatever the legal position might be, that the appellant must be taken to have released the property in dispute from any liability to contribute towards the liquidation of the mortgage-debt and the learned Vakil, while admitting that the release did not amount to an estoppel, claimed that it must be

held that the appellant had foregone any right which he might have had to obtain contribution from Tarini's property. In my opinion, there is no substance in this contention as will be seen as soon as the relevant facts are stated. It appears that the appellant was the holder of an interest in a *jote* under which the property was held a share of which was purchased by Tarini, and after Tarini's purchase on the 21st January, 1921, Tarini went to his landlord, that is the appellant and asked him if he would allow mutation of names in his *sherista*. It was agreed that there should be mutation of names in the *sherista* upon Tarini paying a *selami* of Rs. 200 and four years' arrears of rent. It is in those circumstances that the learned Vakil contended that the Court ought to hold that the appellant had agreed to forego any right that he might have in respect of any other charge upon the property. It is quite obvious that no such inference reasonably can be drawn. Tarini purchased the share belonging to Sarat Sundari with full knowledge of all the facts, for he was a party to the contribution suit, and whether there was a charge or whether there was not a charge as alleged upon this property it was necessary that Tarini should obtain a mutation of names in the *sherista*. There was no evidence whatever to support the contention that it was made a term of Tarini assenting to become a tenant and to pay the sums that I have mentioned that any other charge upon the property which the appellant might have should be released. That contention, therefore, fails.

The learned Vakil further urged that the appellant was in a dilemma. Either the decree in the contribution suit was a personal decree against the parties against whom the decree was made, or it was a decree granting a charge upon the property for the amount for which the property was held liable to contribute. If it was merely a personal decree against the defendants the property of the objector could not be attached in execution. If it was a decree imposing a charge upon the property and not merely for money, then, it could not be enforced by way of sale in the present suit, but must be made the subject of a second suit. The ground upon which this contention was based was that under O. XXXIV, rr. 14 and 15 it was clear that the Legislature intended that before the mortgaged property was brought to sale the mortgagor,

or mortgagors if there were more than one, should have an opportunity of redeeming the property before it passed by way of sale out of the hands of its former owner, and the learned Vakil in this connection referred to two cases: *Aubhoyessury Dabee v. Gouri Sunkur Panday* (1) and *Gobind Chandra Pal v. Kailash Chandra Pal* (2). The learned Vakil for the appellant has contended that there is a difference between a suit upon a mortgage which had developed in the present proceedings and a suit upon a charge not amounting to a mortgage, which was the case in each of the two authorities to which the learned Vakil referred. Where a suit is brought against several co obligors upon a bond for the purpose of obtaining a declaration that there was a charge upon the property secured by the bond no doubt an opportunity should be given to the co-obligors to redeem the debt secured by the bond, and so to release the property. But in the present case the *ratio* upon which it has been held in the decisions referred to above that it is incumbent to bring a separate suit is absent, for in the present case a mortgage suit was brought, and in that mortgage suit the co-mortgagors were each of them in a position in which if they elected to do so, they could redeem the mortgaged property by paying the mortgage-debt. The predecessor of Tarini, to the extent to which she was a mortgagor of the interest purchased by Tarini although she had the opportunity to do so, elected not to redeem the property. This opportunity having been given to the mortgagors and the appellant alone having availed himself of the chance of redemption open to all the co-mortgagors now brings a suit for contribution, and, assuming that the decree was not a mere personal decree for money against the defendants, but also declared a proportionate charge which attached to the several properties, in my opinion, the two cases upon which the learned Vakil for the respondents relied are inapplicable. The third contention raised on behalf of the respondents, therefore, becomes material, namely, was this decree a mere money-decree, or was it also a decree under which the several properties were proportionately charged with the amounts due for contribution? The plaint in the suit has not been printed in the paper book, but reference has been made to

(1) 22 O. 859; 11 Ind. Dec. (N. S.) 568.

(2) 40 Ind. Cas. 230; 25 O. L. J. 354.

it, and it does not appear from the plaint (so far as we are in a position to understand it), that any specific claim was made that a charge should be laid upon the properties liable to contribution. But in order to enable us to understand the decree we have been referred to the judgment in the suit which is in the printed paper-book, and, in my opinion, it is clear beyond doubt or controversy that the decree in the contribution suit did impose not merely a personal obligation upon the defendants against whom the decree was passed, but also a proportionate charge upon the properties liable to contribution. It is enough to say that in more passages than one the learned Subordinate Judge emphasises the importance of bearing in mind that "the liability attaches to the property and not to the person, and, as the mortgage charge is indivisible and attaches to the property, every person who holds the property must contribute." In dealing with issue No. 12, which relates to the relief to which the plaintiff is entitled, the learned Subordinate Judge specifically states that there is to be a charge upon the properties, and he takes the opportunity of specifically laying down the contribution chargeable to each of the several properties liable to contribute. The decree recites what the plaintiff's claim is, and after stating in detail the several sums which the plaintiff claims as payable by the owners of the several properties respectively proceeds to state that the plaintiff reserved a lien for the said sums on the respective properties set out in the schedule and held by the defendants. Coming to the operative part of the decree "it is ordered and decreed that this suit be decreed with costs," and although no special reference is made to the word 'charge,' it is, to my mind, abundantly clear that the learned Judge by this decree declared and imposed a proportionate charge upon the property liable to contribution to be paid by each of the properties respectively. It follows, therefore, in my judgment, that the application for execution was well-founded, and that the objection of Tarini was misconceived. The order will be that the order of the learned Subordinate Judge be discharged, that the objection of the respondent Tarini be dismissed, and that the application of the plaintiff-appellant for leave to issue execution be granted. The appeal, therefore, in this sense will be allowed with costs in both the Courts—the hearing-fee

in this Court being assessed at three gold mohurs.

The application is dismissed without costs.

Graham, J.—I agree.

A. N. A.

*Appeal allowed:
Application dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 561 OF 1925.

May 10, 1927.

Present :—Mr. Justice Cuming and
Mr. Justice Mallik.

NAIMUDDIN BISWAS AND OTHERS

—DEFENDANTS—APPELLANTS

versus

MANIRUDDIN LASHKAR AND OTHERS—

—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 3, O. XLI, r. 4—Suit by tenant for correction of Record of Rights—Appeal by landlords—Abatement of suit as against one appellant—Appeal, competency of—Reversal of decree by Appellate Court in favour of dead person, legality of.

Order XLI, r. 4 of the Civil Procedure Code cannot be applied to the case of an appellant whose appeal has abated by his death. [p. 727, col. 2.]

Protap Chandra Chatterjee v. Durga Charan Ghose (6), followed.

Chintaman v. Gangabai (4) and *Somasundaram Chettiar v. Vaithilinga Mudaliar* (5), dissented from.

An order of abatement operates as a judgment to the same extent as a judgment on the merits. [p. 728, col. 2.]

Bhikaji Ramchandra v. Purshotam (2), *Subbaya v. Samundayyar* (3) and *Rahim-un-nissa Begam v. Srinivasa Ayyangar* (9), referred to.

Per Mallik, J.—For the determination of the question whether an appeal is competent after partial abatement, the true test is whether the appeal can be heard in the absence of the appellant who is dead and the question whether the appeal can be heard in his absence will depend upon the nature of the suit and the decree made. [*ibid.*]

The tenants of a holding brought a suit for correction of an entry in the Record of Rights relating to the amount of rent and obtained a decree in their favour. The landlords appealed but one of them died during the pendency of the appeal and the appeal abated as against him as his legal representatives were not brought on record:

Held, that it was not open to the Court to apply the provisions of O. XLI, r. 4, Civil Procedure Code, and that the appeal could not be heard. [*ibid.*]

Appeal against the decree of the Special Judge, Jessore, dated the 1st December, 1924, reversing that of the Assistant Settle-

ment Officer, Kotechandpur, dated the 15th September, 1923.

Babu Nakuleswar Mukherjee, for the Appellants.

Babu Prafulla Kamal Das, for the Respondents.

JUDGMENT.

Cuming, J.—The facts of the case out of which this appeal arises are these:—

In Khatian No. 128 the rent of the holding was entered as Rs. 10. The plaintiffs, who are the tenants of the holding, brought a suit under s. 100, Bengal Tenancy Act, on the allegation that the rent was really Rs. 7 and praying that the record might be corrected accordingly.

The Assistant Settlement Officer held that the rent was Rs. 10 as entered in the Record of Rights and dismissed the plaintiffs' suit.

The plaintiffs appealed to the Special Judge. The Special Judge was of opinion that the rent was Rs. 7 and decreed the appeal.

The landlord-defendants who are 4 in number appealed to this Court.

Before the hearing of the appeal one of the appellants, defendant No. 4, died. His heirs have not been brought on the record and consequently the appeal, so far as he is concerned, has abated.

The respondent now contends that as the appeal has abated with regard to one of the appellants, the whole appeal must fail, because the right to appeal does not survive to the other three appellants alone. If they are allowed to appeal and are successful, the result will be that so far as some of the landlords are concerned, the rate of rent will be Rs. 7 and as regards others Rs. 10. The contention, no doubt, is correct. See *Kali Dayal Bhattacharjee v. Nagendra Nath Pakrashi* (1). The appellants, however, argue that the three appellants who are still on the record can appeal and as regards the appellant in whose case the appeal has abated the Court can apply the principle of O. XLI, r. 4.

His Counsel contends that the three appellants on the record have appealed from the whole decree on grounds which are common also to the 4th appellant and that, therefore, the Court can reverse, or vary the decree in his favour also. (Order XLI, r. 4).

(1) 54 Ind. Cas. 822; 24 C. W. N. 44; 30 C. L. J. 217.

The first difficulty I have in accepting this contention is that I cannot imagine that the Court can vary or reverse a decree in favour of a person who is dead and no longer has any existence. So far as the 4th defendant is concerned, he is no longer a defendant, for he is dead. Possibly he has some heirs but they are not on the record and so are obviously not parties. Order XLI, r. 4 can have no application therefore. A dead person is no longer a party to a suit in any capacity. No doubt, the death of an appellant does not cause the appeal to abate if the right to appeal survives, but this does not mean that any decree can be passed in favour of the dead person. It merely provides that his heir or representative may carry on the litigation if they so desire and have themselves duly been made party. There is a further consideration which I think also makes it clear that O. XLI, r. 4 can have no application. The appeal having abated so far as appellant No. 4 is concerned, the rights between him and the respondents have been determined.

As pointed out by Sargent, C. J., in the case of *Bhikaji Ramchandra v. Purshotam* (2) an order of abatement is virtually a decree as it disposes of the plaintiffs' (in this case the appellants') claim as completely as if the suit has been dismissed. This view was followed by the Madras High Court: *Subbayya v. Samindayyar*. (3). So long as the order of abatement remains it must be considered to have determined the rights between the parties. To allow an appellant whose appeal has abated to gain the advantage of O. XLI, r. 4 would result in the anomaly that so far as that appellant was concerned there would be two decrees in the same suit in existence at the same time: one in his favour and one against him. The conclusion to which I have no difficulty in coming is that O. XLI, r. 4, cannot be applied to the case of an appellant whose appeal has abated by his death.

No doubt there are decisions to the contrary: *Chintaman v. Gangabai* (4) and *Somasundaram Chettiar v. Vaithilinga Mudaliar* (5). The view, however, which I have

(2) 10 B. 220; 5 Ind. Dec. (N. S.) 533.

(3) 18 M. 496; 5 M. L. J. 63; 6 Ind. Dec. (N. S.) 696.

(4) 27 B. 284; 5 Bom. L. R. 90.

(5) 41 Ind. Cas. 546; 40 M. 846; 6 L. W. 253.

taken seems to have found favour with this Court : *Protap Chandra Chatterjee v. Durga Charan Ghose* (6). Clearly the appeal as it now stands is incompetent, for one of the necessary parties in whose absence the appeal could not proceed is not on the record. The appeal must, therefore, be dismissed as being incompetent. The respondent is entitled to his costs. Hearing fee one gold mohur.

Malik, J.—The suit out of which this appeal arises was one under s. 106 of the Bengal Tenancy Act. The tenants were the plaintiffs in that suit. Their prayer was for a correction of a certain entry in respect of *Khatian* No. 128 on the allegation that the rent of the holding was Rs. 7 and not Rs. 10 as entered in the Record of Rights. The Assistant Settlement Officer who tried the suit held that the rent of the holding was Rs. 10 and on that finding he dismissed the suit. On appeal the learned Special Judge found that the rent of the holding was not Rs. 10 but Rs. 7 and accordingly he directed a correction of the entry as prayed for. The defendants-landlords have appealed to this Court.

On behalf of the respondents a preliminary objection has been taken that the appeal is incompetent. It appears that one of the appellants, defendant No. 4, died after the institution of the appeal to this Court and it appears also that his legal representatives have not been brought on the record. It was said that under O. XXII, r. 3 of the Civil Procedure Code, the result of this is that the appeal has abated so far as defendant No. 4 is concerned and after that abatement the appeal does not stand properly constituted. To meet this contention a number of cases decided by Courts other than this Court were cited before us. Among them are the cases of *Chandraśang Versabhai v. Khimabhai Raghabhai* (7), *Chintaman v. Gangabai* (4), *Ram Sewak v. Lambar Pande* (8) and *Somasundaram Chettiar v. Vaithilinga Mudaliar* (5). These cases were decided on the principle laid down in O. XLI, r. 4, Code of Civil Procedure. Order XLI, r. 4 runs thus: "Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from, proceeds on any ground common to all the plaintiffs or to

all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be." It was said that although defendant No. 4 had died and his legal representatives had not been brought on the record, the Court might proceed to hear the appeal under O. XLI, r. 4. I do not think that this contention is sound. In cases falling under O. XLI, r. 4 the Court may reverse or vary the decree in favour of all the plaintiffs or defendants. But in the present case that is not possible. The appeal has abated so far as defendant No. 4 is concerned. This order of abatement operates as a judgment as between him and the respondents to the same extent as a judgment on merits: *Rahim un nissa Begam v. Srinivasa Ayyangar* (9). For the determination of the question whether the appeal is competent after partial abatement the true test seems to be whether the appeal can be heard in the absence of the appellant who is dead. Now whether the appeal can be heard in the absence of one of the appellants will depend on the nature of the suit and the decree made. In the present case the suit was for correction of a certain entry in the Record of Rights and the decree made was the correction of that entry from Rs. 10 to Rs. 7. The appeal, if heard, will have to be either allowed or dismissed. There would be no difficulty in the case of dismissal. But considerable difficulty will arise in case the appeal is allowed. The figure Rs 7 will have to be altered in the case of the present appellants, but it will have to be kept intact so far as the heirs of defendant No. 4 are concerned. This, I need hardly say, would be an impossible position. I am, therefore, of opinion that in the circumstances of the case the appeal cannot be heard in the absence of the legal representatives of defendant No. 4. The result of the partial abatement is that the appeal is imperfectly constituted and in the absence of necessary parties I do not think that we can proceed to decide the appeal on merits. In this view of the matter I am supported by the decision in the case of *Kali Dayal Bhattacharjee v. Nagendra Nath*

(6) 9 C. W. N. 1061.

(7) 22 B. 718; 11 Ind. Dec. (N. S.) 1081.

(8) 25 A. 27; A. W. N. (1902) 171.

(9) 54 Ind. Cas. 565; 38 M. L. J. 266; 11 L. W. 139.

Pakrashi (1). The preliminary objection must, therefore, be sustained and the appeal dismissed with costs.

A. N. A.

Appeal dismissed;

CALCUTTA HIGH COURT.

CIVIL REVISION No. 35 OF 1927.

January 26, 1927.

Present:—Mr. Justice Mukerji.

NABU SAHU AND OTHERS—PETITIONERS

versus

KAMDEV MAITY AND OTHERS—

OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 151, O. IX, O. XXI. rr. 100, 103—Application under O. XXI, r. 100—Ex parte order—Restoration under inherent powers, legality of—Inherent powers, exercise of—O. IX, Civil Procedure Code, whether applies to execution proceedings.

Where there is no provision in the Civil Procedure Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which it exists, the provisions of s. 151 may and should be resorted to. [p. 730, col. 1.]

A suit contemplated by O. XXI, r. 103, Civil Procedure Code, is one which may be instituted after a due and proper investigation of the matter in accordance with O. XXI, r. 100 of the Code and where the matter has not been so investigated but has been disposed of on default on the part of one or other of the parties, the remedy by way of suit is hardly a remedy for the dismissal for default, and does not, therefore, stand in the way of restoring the application under the provisions of s. 151 of the Code. [p. 729, col. 2; p. 730, col. 1.]

Order IX of the Civil Procedure Code is not applicable to applications arising out of execution proceedings. [p. 729, col. 2.]

Sarat Krishna Bose v. Bisweswar Mitra (1), applied.

Revision against an order of the Munsif, Second Court, Tamluk, dated the 13th November, 1926.

Babu Apurba Charan Mukherji, for the Petitioners.

JUDGMENT.—This Rule is directed against an order passed by the Munsif, Second Court, Tamluk, on the 13th November, 1926. The petitioners had applied under O. XXI, r. 100 of the Code of Civil Procedure in connection with an execution case that was pending in the Court of the learned Munsif. The application was registered as a claim case and was taken up for hearing on the 2nd July, 1926, when the decree-holder not having appeared,

the petitioners' claim was allowed. On the 22nd July, 1926, the decree-holder filed an application under O. IX, r. 13 of the Code of Civil Procedure for setting aside the aforesaid *ex parte* order and for the rehearing of the claim case. The learned Munsif dealt with this matter on the 13th November, 1926. He came to be of opinion that there was some mistake somewhere in consequence of which the decree holder was unable to appear on the day on which the claim case was heard. He held, however, that O. IX of the Code of Civil Procedure was not applicable to applications arising out of execution proceedings and in that view of the matter he was unable to give relief to the decree-holder under the provisions of that Order. He thought that in obtaining the *ex parte* order the claimants had not put the whole case before the Court and accordingly this was a matter which called for the exercise of the Court's powers under s. 151 of the Code of Civil Procedure. In this view of the matter he ordered the claim case to be restored to file. It is this order against which the present Rule is directed.

Now, in the judgment of this Court in *Sarat Krishna Bose v. Bisweswar Mitra* (1), to which I was a party, it was held on a discussion of the authorities, bearing upon the subject that O. IX of the Code of Civil Procedure is not applicable to applications arising out of execution proceedings and it was further observed that in cases where there is no remedy provided for by the Code when such an application is dismissed for default and there is nothing in the Code to suggest that no remedy should be given, the Court may very well in a proper case resort to the provisions of s. 151 of the Code of Civil Procedure. On behalf of the petitioners it is contended that a remedy in this particular case is provided for by the Code itself, inasmuch as an aggrieved party may institute a suit to establish the right which he claims in the claim case in accordance with the provisions of r. 103 of O. XXI of the Code of Civil Procedure. That, no doubt, is so; but a suit contemplated under that rule is one which may be instituted after a due and proper investigation of the matter in accordance with r. 100 of O. XXI of the Code. Where the matter has not been

(1) 103 Ind. Cas. 69; 31 C. W. N. 576; 54 C. 405; A. I. R. 1927 Cal. 534.

so investigated but has been disposed of on default on the part of one or other of the parties the remedy by way of suit is hardly a remedy for the dismissal by default, but is merely a further step which the law provides for all unsuccessful parties in such cases. I am accordingly of opinion that it cannot be said that the provision with regard to suit to which reference has been made on behalf of the petitioners in any way stands in the way of the applicability of the provisions of s. 151 of the Code. In the case to which I have referred it has been laid down that where there is no provision in the Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which it exists, the provision of s. 151 may and should be resorted to. In this particular case the learned Munsif was of opinion that all the facts had not been properly brought to his notice and being of that opinion he thought fit to exercise his powers under s. 151 of the Code. The only defect in the procedure which the learned Munsif adopted appears to have been this that it did not give the petitioners an opportunity of being heard in connection with these proceedings. Ordinarily, that would have been a good ground for our interference. But in view of the fact that he is the same officer who thought that the facts were not properly placed before him and also in view of the fact that after all the whole matter will now be heard on its merits in the presence of both the parties I do not think the case calls for the interference of this Court.

For these reasons, I would discharge the Rule. The opposite parties not having appeared there will be no order as to costs.

A. N. A.

Rule discharged.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 315 OF 1925.

July 27, 1927.

Present :—Mr. Justice Cuming and Mr. Justice Mukerji.

UPENDRA LAL GUPTA AND OTHERS—
DEFENDANTS—APPELLANTS

versus

JOGESH CHANDRA ROY—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 25—Order of remand—Reasons expressed, whether binding on Court hearing appeal finally—Landlord and tenant—Permanent, heritable and transferable tenure—Rent, whether enhancible—Presumption of fixity of rent.

An order of remand made under O. XLI, r. 25, Code of Civil Procedure, decides nothing, and the reasons that the Court gives for its support are given merely for its own convenience for the purpose of the determination of the appeal under O. XLI, r. 26, Code of Civil Procedure, and for helping the lower Court to proceed rightly in carrying out the order. The Court, either the same or differently constituted, when determining the appeal finally, has ample jurisdiction to go back on the views as expressed in the order of remand passed under O. XLI, r. 25 of the Code, and it would fail in its duty if, in deference to those views, which, no doubt, are entitled to the highest respect, it persists in them, although it is satisfied that they are erroneous. [p. 732, col. 1.]

Ganendra Nath Roy v. Surja Kanta Roy (2) and other cases, relied on.

There is no presumption that because a tenure is permanent, heritable and transferable, its rent is fixed. On the other hand, unless there is something to indicate that the landlord has abandoned his right to enhancement, such right must be taken to exist even in the case of a permanent, heritable and transferable tenure. [p. 732, col. 2.]

Krishnendra Nath Sarkar v. Kusum Kamini Debi (7) and *Nirod Chandra Singha v. Harihar Chakravarti* (8), relied on.

Port Canning and Land Improvement Co., Ltd. v. Katyani Debi (1), explained.

Bamasoondery Dassiah v. Radhika Chowdhraïn (9), distinguished.

Appeal against the remand order of the District Judge, Chittagong, dated the 6th April, 1925, reversing the decree of the Munsif, First Court, Satkania, dated the 8th October, 1923.

Babu Surendra Nath Guha, for the Appellants.

Mr. Atul Chandra Gupta and Babu Nripendra Chandra Das, for the Respondent.

JUDGMENT.

Mukerji, J.—The facts relating to the litigation which has given rise to this appeal and the circumstances under which

the appeal has come up for hearing before us are as follows:—

The plaintiff instituted the suit for ejecting the defendants from a tenure after service of a notice to quit, and in the alternative for enhancement of the rent of the tenure either at the customary rate or up to such limit as the Court thinks fair and equitable. The defence was that the tenure was an *etmam*, and that it was held as a permanent tenancy at a fixed rate of rent, and that, therefore, the plaintiff's claim should be dismissed.

The plaintiff's case was that the tenure was a temporary one bearing a rental of Rs. 12 and was created by a *kabuliyat* in 1212, M. E. (=1851). The trial Court held that the question whether the *kabuliyat* was genuine or not was barred by *res judicata* and though it was inclined to hold that it was genuine, it felt constrained to hold otherwise because it had been so found in a previous suit. It held that the tenancy was an *etmam*—which in the part of the District of Chittagong to which the suit relates means a permanent, heritable and transferable tenure. The plaintiff's claim for *khas possession* was accordingly dismissed by that Court and there it ended.

On the question of enhancement of rent, the defendants relied upon the presumption contained in s. 50 of the Bengal Tenancy Act, and also the further presumption based on the dictum of the Judicial Committee in the case of *Port Canning and Land Improvement Co., Ltd. v. Katyani Debi* (1) which is to the effect that where a tenure is proved to be permanent, heritable and transferable, the presumption of fixity of rent must arise in favour of the tenant.

The trial Court gave effect to the latter presumption and dismissed the plaintiff's claim for enhancement. The District Judge on appeal by the plaintiff appears to have ignored this presumption and was unable to give the defendants the benefit of the presumption under s. 50 as it was not known whether the rent of the tenure created in 1851 by the amalgamation of the two tenures that existed before was any different from the sum total of the rents of the latter. Being of that opinion the District Judge held

that the rent of the tenure was liable to enhancement. In that view he set aside the decree of the trial Court and remanded the suit for a fresh decision on framing the relevant issues that would arise in a suit for enhancement of rent under s. 7 of the Bengal Tenancy Act. He suggested the following issues:—Is there any customary rent payable by persons holding similar tenures in the vicinity? If so, what is the customary rent? If not, what is the fair and equitable rent? What are the gross rents of the tenure-holder?

The defendants then preferred the present appeal. It came on for hearing before a Division Bench of this Court. On the 14th June, 1926, that Bench made an order under O. XLI, r. 25, Code of Civil Procedure. The substance of the order then made was that the Munsif would, on giving the parties opportunity to adduce such further evidence as they might desire, record his findings on the following questions and then re-submit the records to this Court; 1st: Whether Rs. 12 the rent of the tenure represented the sum total of the rent of the holdings amalgamated in 1851, and whether the presumption under s. 50, Bengal Tenancy Act, arose in favour of the defendants; 2nd: Whether the presumption of fixity of rent which arises from the fact that the *etmam* is a permanent, heritable and transferable tenure has been rebutted; and 3rd: What is the customary rate or what is a fair and equitable rent for the tenure. It was indicated in the order that the onus of proving that the presumption mentioned in the 2nd question was on the plaintiff, and that the 3rd question need not be gone into if the Munsif found that the rent is not enhancible.

The Munsif in an elaborate judgment has held that the presumption under s. 50 does not arise but that the other presumption, namely, as to fixity of rent which arises from the fact of the tenure being permanent, heritable and transferable has not been rebutted. On these findings, there was no necessity for him, under the terms of the remand order, to go into the 3rd question and he has not done so. The appeal has then come up before us for final determination.

On these findings of the learned Munsif the appellants contend that there should be an end of the plaintiff's suit. The respondent, on the other hand, contends that there is no presumption,

(1) 53 Ind. Cas. 522; 47 C. 280; 37 M. L. J. 578; 17 A. L. J. 1061; 1 U. P. L. R. (P. C.) 91; (1920) M. W. N. 160; 24 C. W. N. 369; 11 L. W. 296; 46 I. A. 279; 22 Bom. L. R. 437; 32 C. L. J. 1; 27 M. L. T. 195 (P. C.).

either in fact or in law, that because a tenure is permanent, heritable and transferable, its rent is fixed; or, in other words that the remand order made by this Court was misconceived and the enquiry into question of fixity of rent as based on this presumption has been useless. To this contention the appellants rejoined that inasmuch as a Division Bench has already held, rightly or wrongly; that there is such a presumption, that finding or decision is conclusive as between the parties to the appeal and it cannot be re-opened. This position, however, cannot be seriously maintained in view of a long course of decisions of this Court: *Ganendru Nath Roy v. Surja Kanta Roy* (2), *Hiatunnessa v. Kailash Chandra Saha* (3), *Honuman Das v. Gursahay Singh* (4), *Official Assignee of the Calcutta High Court v. Bidyasundari Dasi* (5) and *Kamini Kumar Deb v. Durga Charan Nag* (6). An order of remand made under O. XLI, r. 25, Code of Civil Procedure, decides nothing, and the reasons that the Court gives for its support are given merely for its own convenience for the purpose of the determination of the appeal under O. XLI, r. 26, Code of Civil Procedure, and for helping the lower Court to proceed rightly in carrying out the order. The Court—either the same or differently constituted—when determining the appeal finally, has ample jurisdiction to go back on the views as expressed in the order of remand passed under O. XLI, r. 25, Code of Civil Procedure, and indeed it would fail in its duty if, in deference to those views, which, no doubt, are entitled to the highest respect, it persists in them, although it is satisfied that they are erroneous. It is necessary, therefore, to consider the respondent's contention on its merits.

The presumption, it must be noted, has no foundation in any Statute Law and indeed seems to be in conflict with general principles, such as are recognised in numerous authoritative decisions. It rests entirely upon a dictum of the Judicial Committee in *Port Canning and Land Improvement Co. Ltd. v. Katyani Debi* (1) which runs in these words: "Ordinarily

the two admitted characteristics (meaning, heritability and transferability which were the two admitted characteristics in that case) would create a presumption in favour of the tenant, and throw on the plaintiff the onus of showing that the tenure is wanting in the characteristic of fixity of rent." The decision of their Lordships in that case, however, did not rest on this presumption but, on the other hand, proceeded in spite of it and throwing the onus on the defendants, the tenants, as is clear from the passages which follow. Though, thus *obiter*, the dictum was treated as laying down a principle well worth acceptance and the order of remand made by this Court was based on it. A later pronouncement of the Judicial Committee in the case of *Krishnendra Nath Sarkar v. Kusum Kamini Debi* (7), however, seems clearly to militate against the correctness of the dictum. No such presumption was relied on in that case, though it should have been if the dictum was correct, and, on the other hand, the effect of that decision is to hold that unless there is something to indicate that the landlord abandoned his right to enhancement, such right must be taken to exist even in the case of a permanent, heritable and transferable tenure. In the case of *Nirod Chandra Singha v. Harihar Chakravarti* (8) it has been pointed out that the dictum was meant to apply to the special circumstances of the case, namely, that the land was let out for purposes of reclamation, that for some years from the commencement of the tenancy no rent was payable, that there was a progressive scale of rent for several periods prescribed thereafter and that there was no provision for any different rent for any period thereafter. It has been pointed out that in view of these special circumstances the last of the series of rents so prescribed was held as being intended to have been fixed in perpetuity. However that may be the dictum in its broad form in which it is laid down can no longer be treated as authoritative. The appellants seek to justify the correctness of the dictum by reference to the decision of the Privy Council in *Bamasoondery Dassiah v.*

(2) 15 Ind. Cas. 39; 17 C. W. N. 462.

(3) 17 Ind. Cas. 224; 16 C. L. J. 259.

(4) 21 Ind. Cas. 700; 18 C. L. J. 181.

(5) 51 Ind. Cas. 700; 24 C. W. N. 145; 30 C. L. J. 428.

(6) 74 Ind. Cas. 392; 37 C. L. J. 122; A. I. R. 1923 Cal, 521.

(7) 100 Ind. Cas. 93; 51 I. A. 48; 45 C. L. J. 305; (1927) M. W. N. 41; A. I. R. 1927 P. C. 20; 52 M. L. J. 412; 54 C. 166; 31 C. W. N. 514; 25 L. W. 631 (P. C.).

(8) 58 Ind. Cas. 867; 24 C. W. N. 874; 32 C. L. J. 19.

Radhika Chowdhra (9). That decision relates to the rights of a *zemindar* holding under a perpetual settlement to enhance the rent of his rent-paying lands, and deals with *taluks* within the meaning of the 51st section, and *ryoti* and other undertenures provided for in the 49th section of the Bengal Regulation VIII of 1793. The decision has very little bearing on the present case. The plaintiff in the present case is the holder of a Noabad *taluk* in respect of which the Government stands in the same position as an ordinary *zemindar*: *Nazir Ahmad Choudhury v. Secretary of State for India* (10). The *elmam* has not been proved to have existed from the time of the Permanent Settlement so as to attract the operation of s. 6 of the Bengal Tenancy Act. The dictum being out of the way, the rent must be held to be enhancible and the issues necessarily to be decided in order to deal with the question of enhancement will accordingly have to be gone into.

There was one contention advanced on behalf of the appellants at the time when the appeal was heard by the former Division Bench. It relates to the form of the remand which was made by the learned District Judge. This contention was reserved for consideration till now. The respondent concedes that it is not necessary to send the whole case down to the trial Court, but that it will be sufficient if the necessary issues are framed and sent to the trial Court for decision—the procedure that is contemplated by O. XLI, r. 23, Civil Procedure Code. This contention must be upheld.

We accordingly allow the appeal to this extent that we affirm the decision of the learned District Judge that the rent of the tenure is enhancible and while setting aside the order of remand passed by him in the form in which it has been made, direct that he do lay down the necessary issues, including the three issues already framed by him, and send them to the trial Court for its findings, and on receipt of the findings from that Court, finally dispose of the appeal.

We think that in the events that have

(9) 13 M. L. A. 248; 4 B. L. R. P. C. 8; 13 W. R. P. C. 11; 2 Suth. P. C. J. 293; 2 Sar. P. C. J. 524; 20 B. R. 541.

(10) 69 Ind. Cas. 74; 26 C. W. N. 913; 35 C. L. J. 580; A. I. R. 1922 Cal. 327.

happened, all the costs in this appeal will be borne by the parties for themselves.

Cuming, J.—I agree.

A. N. A.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 1048 of 1926.

January 26, 1927.

Present:—Mr. Justice Mukerji.

SATISH CHANDRA DE SARKAR

—PETITIONER

versus

RAKHAL CHANDRA SAHA AND OTHERS

—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 90—Error on question of limitation, whether ground for revision—Application for setting aside sale—Auction-purchaser impleaded after limitation—Maintainability of application—Auction-purchaser, whether necessary party.

An error on a question of limitation is not necessarily such an error as would bring the case within the purview of s. 115 of the Civil Procedure Code. [p. 735, col. 1.]

Obiter.—An application under O. XXI, r. 90, Civil Procedure Code, is not incompetent merely because the auction-purchaser is not made a party therein till long after the prescribed period of limitation for such an application has expired. All that is required by the law is that before the sale can be set aside or confirmed, notice of the application has to be served upon the auction-purchaser. [p. 734, col. 1.]

[Case-law discussed.]

Civil revision against an order of the Additional District Judge, Dacca, dated the 23rd January, 1926, affirming that of the Munsif, Narainganj, dated the 31st October, 1925.

Babu Suresh Chandra Talukdar, for the Petitioner.

Babu Kanaidhan Dutt, for the Opposite Parties.

JUDGMENT.—This Rule arises out of an application under O. XXI, r. 90 of the Code of Civil Procedure which was filed on behalf of the judgment debtors on the 4th April, 1925, in connection with a sale that had taken place on the 11th January, 1922. In the application as originally filed the auction-purchaser was not made a party. He applied on the 5th September, 1925, to be made a party to the proceedings and on that day an order was made to the effect that he should be made a party. The application was dealt with on its merits by the learned Munsif of Narainganj who on the

the 30th October, 1925, set aside the sale and directed the decree-holder to take steps for re-sale of the property. From this order appeals were preferred by the judgment-debtors as well as by the auction-purchaser and the result of these appeals was that the learned Additional District Judge of Dacca affirmed the order which the learned Munsif had passed. The auction-purchaser had now moved this Court and obtained the present Rule.

The question which arises in this Rule is whether the application under O. XXI, r. 90 of the Code of Civil Procedure was competent inasmuch as the auction-purchaser was not made a party therein till long after the prescribed period of limitation for such an application had expired. The question raised is one not free from difficulty. The learned Munsif was of opinion that there was no analogy between the addition of a party in a suit and that in an application under O. XXI, r. 90 of the Code of Civil Procedure and that it would not have mattered in the least if the name of the auction-purchaser was not mentioned in the application. In his opinion all that is required by the law is that before the sale can be set aside or confirmed, the notice of the application has to be served upon the auction-purchaser and that such notice should be given by the Court whether the applicant does or does not pray therefor. Upon a consideration of the relevant provisions of the Code, I am inclined to agree with the learned Munsif in the view that he has taken. There are, however, conflicting decisions on this point in the different Courts. In the Patna High Court Mr. Justice Ross, sitting singly held in the case of *Sumitra Kuer v. Damri Lall* (1) that the auction-purchaser is a necessary party to an application to set aside an execution sale, and where he is not made a party within the time allowed by the law for making the application, the application cannot be entertained. The Patna High Court, however, in a very recent case has taken a contrary view. A Division Bench of that Court in the case of *Iswardas Marwari v. Biseswar Lal Marwari* (2) overruled the contention that was put forward on behalf of the auction-purchaser to the

effect that it is necessary to have the parties affected by the application as parties to the application and held that the whole object of r. 92, O. XXI, is to provide that no adverse order be passed in the absence of the persons affected by the order and that in one sense all the decree-holders and the auction-purchaser are to be treated as being parties to the proceeding inasmuch as their names are already on the record. The learned Judges purported to follow another decision of the same Court in the case of *Bibi Zainab v. Paras Nath* (3). The Bombay High Court has held definitely in the case of *Ganesh Bab Naik v. Vithal Vaman Mahalya* (4) that in a case under O. XXI, r. 89 of the Code of Civil Procedure to which the same considerations would apply, although the auction-purchaser was a necessary party for the determination of the question which would arise under O. XXI, r. 92 of the Code of Civil Procedure an application in which he was not made a party but which was filed within thirty days was not bad on the ground that he was not made a party therein. The same view appears to have been taken in Oudh [*Abdur Rahman v. Har Narayan Das* (5)]. There is a decision of the Allahabad High Court under the Code of 1882 in which a contrary view was taken. That is the case of *Ali Gauhar Khan v. Bansidhar* (6). It may be pointed out that this decision was by Mr. Justice Burkitt sitting alone. So far as this Court is concerned there is no case on the point reported in any of the authorised reports. There are, however, two unreported decisions one in the case of *Ajiuddin Ahamed v. Khoda Bux Khondkar* (7) and also a decision in Civil Rule No. 950 of 1923 in which it has been held that an application under O. XXI, r. 90 of the Code of Civil Procedure though made within the period of limitation prescribed for such an application is bad if the auction-purchaser has not been made a party therein. These two decisions, therefore, take a view contrary to that

(3) 75 Ind. Cas. 430; 4 P. L. T. 491; 1 Pat. L. R. 361; 2 Pat. 800; A. I. R. 1924 Pat. 37.

(4) 19 Ind. Cas. 475; 37 B. 387; 15 Bom. L. R. 244.

(5) 68 Ind. Cas. 238; 9 O. L. J. 211; 4 U. P. L. R. (O.) 72; A. I. R. 1922 Oudh 129.

(6) 15 A. 407; A. W. N. (1893) 173; 7 Ind. Dec. (N. S.) 981.

(7) 50 Ind. Cas. 5.

(1) 62 Ind. Cas. 61; 2 P. L. T. 336.

(2) 94 Ind. Cas. 31; (1926) Pat. 83; A. I. R. 1926 Pat. 266; 7 P. L. T. 532.

which the learned Munsif has taken and were it not for the reasons which I am about to state and on account of which I do not consider this case to be one which calls for our interference it would have been necessary for me to follow these two decisions although I may say, as I have already said, I do not agree with them. I may state here that for myself I am inclined to take the same view of an application like this as was taken of an application under s. 105, Bengal Tenancy Act, in the case of *Birendra Kishore Manikya Bahadur v. Ambika Charan Dutta* (8). The considerations which weigh with me in not interfering with the order that has been passed are, firstly, that an error on a question of limitation is not necessarily such an error as would bring the case within the purview of s. 115 of the Code of Civil Procedure; secondly, the auction-purchaser in the present case is the *Sadar Naib* of the decree-holder and was looking after the execution proceedings all along on behalf of the decree-holder as appears clearly from a *vakalatnama* which was filed in the execution proceedings on behalf of the decree-holder and to which my attention has been drawn; and, thirdly, the findings of the Courts below on the question of the service of the processes and sale proclamation and generally on the question of the proceedings held in connection with the sale clearly go to show that a fraud was perpetrated on the judgment-debtors by the decree-holder and presumably also in collusion with the auction-purchaser who is but an officer of the decree-holder. In such a case as this merely because there has been an error on the part of the Munsif with regard to the view that may be taken on the question of limitation aforesaid, if really there has been any error at all, I do not think this is a fit case in which this Court should exercise its powers of revision.

I am accordingly of opinion that this Rule should be discharged but I would make no order as to costs.

A. N. A.

Rule discharged.

(8) 97 Ind. Cas. 142; 43 C. L. J. 591; A. I. R. 1926 Cal. 1037; 31 C. W. N. 860.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1141 OF 1924.

November 25, 1926.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cammiade.

ATAHARUDDIN TALUQDAR

AND ANOTHER—PLAINTIFFS—APPELLANTS
versus

MURARI MOHUN DUTT AND OTHERS—
DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 155—Breach of covenant against alienation—Suit for ejectment—Notice to tenant, whether necessary—Landlord and tenant—Abandonment of tenancy—Tenant remaining in possession as sub-lessee, effect of.

Section 155 of the Bengal Tenancy Act applies to all cases of breaches of conditions which create forfeiture of tenancies and render the tenant liable to ejectment, including breaches of conditions restraining alienation.

Afladdi v. Satish Chandra Banerji (3), followed.

Dwarika Nath Roy v. Mathura Nath Roy (2), distinguished and dissented from.

A tenant does not cease to be a tenant within the meaning of s. 155 of the Bengal Tenancy Act by merely committing an act in breach of the terms of the tenancy.

A landlord is not entitled to treat a holding as abandoned where the tenant alienates his tenancy but remains in possession as a sub-lessee, without repudiating the tenancy.

Monmatha Kumar Roy v. Josada Lal Podder (4), *Seprajan v. Ramdeb Rai* (5) and *Madar Mondal v. Mohina Chandra Mazumdar* (6), followed.

Appeal against the decree of the Subordinate Judge, Second Court, Backergunj, dated the 27th February, 1924, modifying that of the Munsif, Fifth Court, Barisal, dated the 18th November, 1922.

Babus Abinash Chandra Guha and Bhupendra Nath Das, for the Appellants.

Babu Asitaranjan Ghosh, for the Respondents.

JUDGMENT.

Suhrawardy, J.—In a lease executed by defendant No. 4 in favour of the landlords whose interest has now devolved upon the plaintiffs, creating a *miras karsha* there was a covenant that if the tenant transferred the holding without the landlord's consent the landlord would have the right of re-entry. In 1326 defendant No. 4 sold the holding to defendant No. 1 who purchased it in the *benami* of defendant No. 2. Thereafter the plaintiffs brought the present suit for recovery of *khas* possession of the holding on the ground of breach of the covenant and also of abandonment. The defence was that defendant No. 4 was not aware of the stipulation in the lease and that she had a

permanent transferable interest in the holding. The most important question raised at the trial was whether the plaintiffs' suit was maintainable in view of s. 155, Bengal Tenancy Act. There was also a denial of abandonment inasmuch as defendant No. 4 had taken a sub-lease from the purchaser (defendant No. 1) of the holding in suit. The Munsif found both the points in favour of the plaintiffs and gave them a decree. On appeal the learned Subordinate Judge has reversed the findings of the Munsif on these two points and dismissed the plaintiffs' claim for *khas* possession allowing them a decree declaring their title to the *oshat nimhowla* and *mira-sijara* claimed by them and further declaring that defendant No. 4 had no right to transfer the holding in suit.

The plaintiffs have appealed and it is argued on their behalf that the view of law taken by the learned Subordinate Judge on the two vital points raised in the case, *viz.*, the application of s. 155, Bengal Tenancy Act, and the abandonment by defendant No. 4 are erroneous.

With regard to the first point, the question that falls for determination is whether a case of breach of covenant giving the right of re-entry to the landlord is covered by s. 155, Bengal Tenancy Act, and makes it compulsory on the landlord in suing on the covenant for recovery of *khas* possession to serve a notice upon the tenant under that section. That a covenant which gives the landlord the right of re-entry on the tenant transferring the holding is subject to the provisions of the Bengal Tenancy Act cannot be doubted. It has been held that even if there be such a covenant under which the landlord can take possession of the holding without the intervention of the Court, he is unable to do so by virtue of s. 89, Bengal Tenancy Act. *Buddhimanta Pramanik v. Sarat Chandra Banerjee* (1). Section 155, so far as it is relevant to the present purpose, says that a suit for ejectment of a tenant on the ground that he has broken a condition on breach of which he is, under the terms of a contract between him and the landlord, liable to ejectment, shall not be entertained unless the landlord has served, in the prescribed manner, a notice on the tenant specifying the particular breach complained of *prima facie* and giving their

natural meaning to the words of the section it is clear that whenever a landlord sues for ejectment of a tenant he is bound to follow the procedure laid down in s. 155, Bengal Tenancy Act. But on the authority of the decision in the case of *Dwarika Nath Roy v. Mathura Nath Roy* (2) it is argued that where a tenant holding under a lease covenanting against alienation sells the tenancy he ceases to be a tenant and, therefore, s. 155, Bengal Tenancy Act, is not applicable in his case. The high authority of the decision has made it incumbent upon me to look very closely into the law and the reasoning which induced their Lordships to hold the view expressed therein. With very great respect, I do not find anything either in s. 155 or in the general law to hold that because a tenant commits an act in breach of the terms of the tenancy, he ceases to be a tenant within a meaning of s. 155. He continues to be a tenant until he is declared by a Court of Justice that he has forfeited his tenancy and is liable to be ejected. (Section 89, Bengal Tenancy Act). The view taken by one of the learned Judges in that case seems to be otherwise, but the wording of s. 155 is so general and clear that it cannot be questioned that the application of the section does not depend upon the nature of the covenant the breach of which is complained of but it applies to every case where the landlord sues the tenant for ejectment even though on the allegation that he has forfeited his tenancy on account of the breach of a covenant in the lease. It is not necessary to dwell further upon this point because the *ratio decidendi* of the case *Dwarika Nath Roy v. Mathura Nath Roy* (2) is not applicable in the present case. The learned Chief Justice held that the purchaser from a tenant under disability as regards transfer is a trespasser and, therefore, he cannot rely on s. 155, Bengal Tenancy Act, which is not applicable to one in his position. Mookerjee, J., based his judgment more on this fact than on any other. He observes: "In the case before us it is, in my opinion, plain that no title passed to the first defendant by the execution sale, the landlord has not waived forfeiture by receipt of rent or otherwise, and the forfeiture must be held to have taken effect from the date of sale. The first

(1) 6 Ind. Cas. 147; 13 C. L. J. 672.

(2) 34 Ind. Cas. 833; 21 C. W. N. 177; 24 C. L. J. 40.

defendant thus cannot take advantage of s. 155, Bengal Tenancy Act, as he is not a tenant but a trespasser. The original tenants are quite content with the decrees for ejectment and do not claim to be relieved against forfeiture." This view does not commend itself to me inasmuch as the plaintiffs sue for recovery for possession and they must prove even in the presence of a trespasser that they have obtained the right to recover possession by following the procedure as laid down in law. In view of the facts of the present case we need not consider this question further. The defendant No. 4, the original tenant, has appeared in his suit and objected to the plaintiff's recovering possession of the holding. In this connection we prefer to follow the ruling in the case of *Afiladdi v. Satish Chandra Banerji* (3) where the learned Judges held that s. 155, Bengal Tenancy Act, applies to every case of breach such as breach of covenant against alienation. In this view I am of opinion that the view taken by the learned Subordinate Judge that the plaintiffs' present suit is barred under s. 155, Bengal Tenancy Act, is correct.

With regard to the second question, that is, abandonment, the Subordinate Judge has found that defendant No. 4 is still in possession of the land; she was sued for rent by the plaintiffs for a period after the transfer and there is no evidence that there was any repudiation of the tenancy by defendant No. 4. On these grounds he held that there was no abandonment in law. With regard to the second ground as regards the suit for rent, he is not quite precise. The sale by defendant No. 4 was on the 22nd Kartick 1326 and the suit for rent was for the years 1323 to 1326 Pous. There was an overlapping of a few months only and there is nothing to show that the plaintiffs were aware of the sale by defendant No. 4 to defendant No. 1 before they brought the rent suit. The other ground seems to me on the authorities to support the view of the lower Appellate Court. In *Monmatha Kumar Ray v. Josada Lal Podder* (4) it is said that a landlord is not entitled to treat a holding abandoned where the original tenant is in possession as a sub lessee without some act of repudia-

tion of tenancy by him. I am not prepared to accept the view without further consideration as it would seem that the very fact of the tenant transferring the whole of the holding to a stranger and attorning to him is sufficient evidence of repudiation of tenancy under the original landlord. But I am not at present disposed to differ from the view taken in that case and the other cases which it has followed. I must, therefore, hold that the judgment of the lower Appellate Court is substantially correct and must be upheld. The appeal is dismissed with costs.

Cammiade, J.—The finding of the Subordinate Judge regarding the status of the defendant who has transferred his interest is that that defendant's interest was a non-transferable occupancy holding. The case has been argued before us on that footing both sides having accepted that finding. The suit was instituted by the plaintiffs for ejectment of both the transferor and the transferee from the land of the holding. The question is how such ejectment may be effected. The grounds on which the ejectment is prayed for are, firstly, that there was a breach of covenant against alienation in which there is a proviso for re-entry by the landlord; secondly, that the tenant has abandoned the holding. With regard to the relief sought on the first ground the question is whether or not the vendor is still to be considered a tenant for the purpose of the suit for ejectment. In the first place, the provisions of s. 155, Bengal Tenancy Act, undoubtedly relate to all cases of breaches of conditions which create forfeiture of tenancies and render the tenants liable to ejectment and, therefore, covenants restraining alienation must be held to be included within the scope of the section. A further consideration is that the tenancy being an occupancy holding unless the relationship of landlord and tenant is determined by some act on the part of the contracting parties or by operation of law that relationship continues and the vendor must, therefore, be a tenant till he is ejected under the provisions of s. 155, Bengal Tenancy Act. For these reasons I am entirely in agreement with the view expressed by a Bench of this Court in *Afiladdi v. Satish Chandra Banerji* (3). In that case also as in the present one the tenant who had sold the holding which was also an occupancy holding had remained in possession by taking a sub-lease from his

(3) 34 Ind. Cas. 497; 29 C. L. J. 40.

(4) 77 Ind. Cas. 551; 28 C. W. N. 300; A. I. R. 1924 Cal. 617.

vendee; and it seems to me, specially in cases of this nature, that there can be no doubt that the notice required by s. 155 (1) is necessary before a tenant can be ejected. In the case of *Dwarika Nath Roy v. Mathura Nath Roy* (2) it appears that the tenants had vacated the land and took no interest in the result of the suit for ejectment; and, therefore, as the purchaser who was the only contesting party was a trespasser, as far as he was concerned, no notice was necessary.

The other ground on which ejectment has been sought cannot be supported, on the rulings of this Court in various cases: *Monmatha Kumar Ray v. Josada Lal Podder* (4), *Separian v. Ramdeb Rai* (5) and *Madar Mondal v. Mohima Chandra Mazumdar* (6). In all these cases it has been held that there is a non-transferable occupancy holding is sold by the raiyat who after transfer takes sublease from the vendee and continues in possession, there is no abandonment of the land and there is nothing in the mere act of transfer to show any intention either to abandon the holding or to repudiate the relationship of landlord and tenant. This being the view held by this Court in various cases, we are bound to follow that view. I accordingly agree with my learned brother that this appeal must be dismissed with costs.

A. N. A.

Appeal dismissed.

(5) 55 Ind. Cas. 360; 24 C. W. N. 117.

(6) 33 O. 531; 3 C. L. J. 343.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1481 of 1927.

December 20, 1927.

Present:—Justice Sir Zahhadur Rahim
Zahid Suhrawardy, Kt., and Mr. Justice
Graham.

In re K. C. BONNERJEE, OFFICIAL
RECEIVER—PETITIONER.

Receivers—Status and powers of Receiver appointed by Court—Officer of Court—Acquisition of land belonging to idol—Suit by shebait for administration of estate—Appointment of Receiver—Power of Receiver to get compensation money deposited with President of Improvement Tribunal—Compensation money; whether vests in acquisition Court.

A Receiver, when he seeks to take possession of the subject-matter of the litigation under an order of Court does not claim as a representative or agent of the parties to the suit but as an officer of the Court. [p. 739, col. 2.]

Harihar Mukherjee v. Harendra Nath Mukherjee (1) and *Jagat Tarini Dassi v. Naba Gopal Chaka* (2), referred to.

Although an idol may be regarded as a juridical person capable of holding properties, it is only true in an ideal sense, and the right of management and possession is vested in the shebait. [p. 740, col. 1.]

A suit for declaration of shebaitship, for administration of the debutter estate and for setting aside alienations of the idol's properties is a suit in which the idol is interested even though it is not formally made a party to the suit. [*ibid.*]

Jagadindra Nath Roy v. Hemanta Kumari Devi (4), relied on.

The compensation money representing the estate of an incompetent person partakes of the nature of real property and does not lose its character as such because it has been transformed in shape. [*ibid.*]

Mrinalini Dasi v. Abinash Chander Dutt (5) and *Kamini Debi v. Promotho Nath Mukerjee* (6), referred to.

Section 32 of the Land Acquisition Act does not vest the acquisition Court with such power over the acquisition money as to empower it to retain the money in its possession in spite of the direction of a competent Civil Court. [p. 740, col. 2.]

Rule against an order of the Court of the President of the Calcutta Improvement Tribunal, dated the 23rd August, 1927:

Mr. Bipin Chandra Mallik and Babu Kusi Prasun Chatterjee, for the Petitioner.

JUDGMENT.

Suhrawardy, J.—This application in revision is by the Official Receiver of this Court against an order of the President of the Calcutta Improvement Tribunal by which the learned President refused to make over certain Government promissory notes held in his Court to the petitioner. In the circumstances of the case there is no opposite party and we had to hear this matter *ex parte*. We have given our earnest consideration to the facts of this case and to the observation made by the learned President in his judgment. The facts are that a portion of the premises No. 28, Giri Babu's Lane, in Calcutta belonging to the debutter estate of certain idols was acquired under the Land Acquisition Act and the compensation thereof was deposited with the Calcutta Improvement Tribunal under s. 31 of the Act. Thereafter some of the shebait of the said idols instituted a suit in the Original Side of this Court against certain persons for a certain declaration which will be more particularly mentioned later. In that suit an application was made by the plaintiffs for the appointment of a Receiver and the Court appointed the Official Receiver as Receiver in the suit with all the powers with which a Receiver can be vested under O. XL, r. 1, Civil

Procedure Code. The Receiver thereafter applied to the President of the Tribunal that the Government securities representing the compensation money awarded in respect of a portion of the *debutter* property acquired might be made over to him. The learned President on certain considerations has refused to make over these securities to the petitioner. Before proceeding further it is necessary to observe that the order appointing the petitioner as Receiver ran in the following words: "And it is further ordered that the said Receiver be also at liberty to withdraw the securities representing the compensation money in respect of premises No. 28, Gori Babu's Lane and deposited with the Tribunal of the Improvement Trust Calcutta, and the interest accrued due and to accrue due thereon." Since the learned President has declined to part with the securities in spite of the order of this Court, the matter has assumed an importance which demands very careful consideration by us. The main grounds on which the learned President has refused to make over the securities to the petitioner may be summed up thus: (1) The Receiver is only a trustee for the parties to the suit, and no party to the suit is a person competent to alienate the land within the meaning of s. 31 of the Land Acquisition Act I of 1894 or a person entitled to act under s. 3, proviso (iv) of the Act; (2) That the suit in the High Court is a suit between parties claiming to be *shebaitis* to which the idols are not parties either in name or in substance; and, therefore, the properties which belong to idols should not be made over to the Receiver appointed in such a suit; (3) The order of the High Court appointing the petitioner to be the Receiver cannot deprive the Improvement Tribunal of the statutory right which it has under the Act of retaining the money, under O. XL, r. 1 (2) and the order of appointment of the Receiver cannot operate so as to remove from its possession or custody the property as no party to the suit has a present right so to remove.

As regards the first ground it is clear on the authorities that the view expressed by the learned President is not tenable in the circumstances of the present case. As has been held in the case of *Harihar Mukherjee v. Harendra Nath Mukherjee* (1)

(1) 6 Ind. Cas. 416; 27 C. 754; 12 C. L. J. 252.

a Receiver appointed by the Court is not ordinarily the representative or agent of either party in the administration of the trust. But his appointment is for the benefit of all parties and he holds the properties for the benefit of those ultimately found to be the rightful owners; and reliance has been placed on the decision in *Jagat Tarini Dass v. Naba. Gopal Chaka* (2) where it is laid down that the Receiver is the representative of the Court and may be deemed to be right arm of the Court in exercising jurisdiction invoked in such cases for administering the property because the Court can only administer through a Receiver. The learned Judges further observed that, no doubt, in some cases the expression is used that the Receiver may be considered as a representative of the parties to the suit but this only in the sense that as against an adverse claimant his title does not stand higher than that of the parties to the litigation; and upon this notion of the character of the Receiver is founded the provision in O. XL, r. 1 (2), Civil Procedure Code. In *Harihar Mukherjee's case* (1) the question was whether the Receiver appointed by the Court could take possession of the property without a Succession Certificate. It was held that a Receiver when he seeks to take possession of the subject-matter of the litigation under an order the Court is not a person who claims to be entitled to the effects of a deceased person under the Succession Certificate Act, 1889, and he is in no sense a representative of the deceased person but is merely entrusted by the Court with certain power over the estate for temporary purposes. The decision in *Radha Binode Mandal v. Gopal Jiu Thakur* (3) rests on the fact that there the suit was for declaration of plaintiffs' title as *shebaitis* in which the idol was not interested.

This brings us to a consideration of the nature of the suit in the High Court which is connected with the second ground on which the learned President's judgment is founded. The suit in the High Court as appears from a perusal of the plaint is no doubt for a declaration that the plaintiffs and some of the defend-

(2) 34 C. 305; 5 C. L. J. 270.

(3) 101 Ind. Cas. 873; 54 I. A. 238; A. I. R. 1927 P. C. 128; 29 Bom. L. R. 931; (1927) M. W. N. 448; 45 C. L. J. 605; 26 L. W. 83; 53 M. L. J. 123; 25 A. L. J. 681; 31 C. W. 1063; 54 C. 770 (P. C.).

ants are *shebaitis* "of the idol. But there are also two prayers in the plaint which are relevant for our present purposes. The prayer (o) is to this effect: "If necessary the said *debutter* estate be administered by and under the direction of this Hon'ble Court", and, (p), "if necessary a scheme be framed for the proper performance of the worship of the Thakur." It is conceivable that in view of these prayers this Court appointed the Receiver and authorised him to take possession of all the *debutter* properties including the promissory notes in the hands of the Improvement Tribunal. In the suit the plaintiffs further prayed that certain unauthorised alienations of the idols' properties might be set aside. Considering the entire scope of the suit it is difficult to hold that the idols were not interested in the suit. As has been observed by their Lordships of the Judicial Committee in *Jagadindra Nath Roy v. Hemanta Kumari Devi* (4) that although an idol may be regarded as a juridical person capable of holding properties, it is only true in an ideal sense; but the fact remains that the possession and management of the dedicated properties belong to *shebaitis*; in other words though the idol is the owner of a property but being incompetent to manage it, the right of management and possession is vested in the *shebaitis*. The suit is for the benefit of the idols though a portion of it relates to matters personal to the plaintiffs. We are told that all the other properties belonging to the idols have been taken possession of by the Receiver. There appears to be no reason why the promissory notes which are in the possession of the Tribunal should not be taken possession of by the Receiver as a part of the *debutter* estate. As has been held in *Mrinalini Dasi v. Abinash Chander Dutt* (5) the compensation money representing the estate of an incompetent person partakes of the nature of real property and does not lose its character as such because it has been transformed in shape. The money in the hands of the Tribunal, therefore, is a portion of the *debutter* property which would have come into the possession of the Receiver under the direction of the Court if it were not acquired under the

Land Acquisition Act. See also *Kamini Devi v. Promotho Nath Mukerjee* (6).

As to the third ground under s. 32 of the Land Acquisition Act the acquisition Court is not absolutely vested with the compensation money. It is apparent that possession of the Receiver is the possession of the Court and the money if made over to the Receiver will remain in *custodia legis*. The law does not vest the acquisition Court with such power as to retain the money in its possession in spite of the direction of a competent Civil Court. Taking all these facts into consideration I am of opinion that the order of the learned President of the Improvement Trust should be set aside and that he be requested to comply with the order of this Court by making over the money to the petitioner. This Rule is made absolute.

Graham, J.—I agree and desire to add only a few words. The Rule was issued at the instance of the Official Receiver to show cause why an order of the President of the Calcutta Improvement Trust Tribunal rejecting the application of the Official Receiver to withdraw certain securities deposited with the Tribunal under s. 31 of the Act should not be set aside and an order made directing the delivery of the said securities to the petitioner. The learned President of the Improvement Trust Tribunal in refusing the application proceeded mainly upon the ground that he was precluded by the terms of the Statute (Land Acquisition Act I of 1894) from acceding to the application, and he has referred in support of the view taken by him to certain provisions of the Act. He has held that the Receiver stands in the shoes of the parties and represents them, and that that being so he cannot have any greater power than is possessed by the party whom he represents. The learned President has perhaps not considered sufficiently the fact that a Receiver by his appointment does not become the representative of the party, but is an officer and representative of the Court which appoints him. Indeed he is frequently spoken of as "the hand of Court" and is merely in possession of the property on behalf of the party who may be ultimately declared to be entitled thereto. One or other of the parties must eventually be declared to be entitled to the securities in question, or at all events to retain possession of them.

(4) 31 I. A. 203; 32 C. 129; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.).

(5) 6 Ind. Cas. 508; 11 C. L. J. 533; 14 C. W. N. 1024.

(6) 10 Ind. Cas. 491; 39 C. 33; 13 C. L. J. 597.

A Receiver appointed by the Court is merely a temporary custodian of the property on behalf of the Court, and holds them for the benefit of the party successful in the litigation. He cannot deal with the properties in any way without the consent and approval of the Court, so that no apprehension need arise that the interest of either of the contesting parties is likely to suffer in any way by reason of his temporarily retaining possession of the properties. For these reasons and also in view of the order made on the Original Side of this Court by Mr. Justice Pearson I agree with my learned brother that the order which has been made by the President of the Improvement Trust Tribunal cannot be sustained and that this Rule should be made absolute.

A. N. A.

Rule made absolute.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1856
OF 1925.

December 7, 1927.

Present:—Justice Sir Zahhadur Rahim
Zahid Suhrawardy, Kt.,
and Mr. Justice Graham.

MAHENDRA NATH BISWAS —

PLAINTIFF—APPELLANT

versus

CHARU CHANDRA BOSE AND ANOTHER

—DEFENDANTS—RESPONDENTS.

Co-owners—Adverse possession—Ouster, what constitutes.

Every case between co-owners with regard to the question of adverse possession must be decided on the particular facts of that case. [p. 741, col. 2; p. 742, col. 1.]

Exclusive possession in assertion of a title inconsistent with the existence of co-ownership is enough to entitle a Court to deduce ouster. [p. 742, col. 1.]

Ayennessa Bibi v. Sheikh Isuf (1), followed.

A person cannot be a tenant-in-common with a person whom he never recognised as a co-tenant and whose existence he was not aware of. [*ibid.*]

Appeal against the decree of the Additional District Judge, 24 Perganas, dated the 27th of April, 1925, affirming that of the Officiating Subordinate Judge, Second Court, 24 Perganas, dated the 9th of June, 1923.

Mr. Hemendra Nath Sen, (with him Babu Gopendra Nath Das), for the Appellant.

Babus Rupendra Kumar Mitra and Ajendra Nath Dutta, for the Respondents.

JUDGMENT.—This appeal may be disposed of on the short ground that the plaintiff's suit as framed is not maintainable under s. 42, Specific Relief Act. The plaintiff claims the land in the suit as a co-sharer with the defendants. The defendants deny that they were ever the plaintiff's co-sharers and say that the properties belonged to them by transfer from the rightful owner. The plaintiff brought the present suit for declaration of his title to the properties in suit and for confirmation of possession. The trial Court found all the issues relating to title and possession against the plaintiff and dismissed the suit. The learned Additional District Judge has not gone into the question of title but on his finding on the question of limitation he is of opinion that the suit is not maintainable. He has found that the plaintiff was never in possession, either actual or constructive, of the properties in suit and, therefore, the present suit which is brought under s. 42, Specific Relief Act, is not maintainable. The learned Advocate who appears for the appellant argues that the view taken by the learned Judge on the question of limitation is wrong and that as he is a co-sharer the possession of the defendants should be presumed to be his possession; in other words he was in possession of the properties in suit through the defendants. Various objections can be taken to this contention: (1) The plaintiff in his plaint admits that the defendants were claiming the entire moveable and immoveable properties on the strength of a Will and Probate. It is said that this conduct of the defendants has only clouded his title, but the facts cannot be concealed that the defendants were in possession in their own right to the exclusion of all others including the plaintiff. If the defendants were possessing the properties on the strength of a Will they were certainly possessing them as against the plaintiff, if he had any title to them. (2) The learned Additional District Judge's finding on the question of limitation does not appear to be erroneous in law. The Will under which the defendants are in possession is dated 1892. The present suit was brought in 1924. For so many years the defendants were in possession in their own right derived under the Will. Every case between co-owners with regard to the question

of adverse possession must be decided on the particular facts of that case. Admitting that the plaintiff was ever a co-owner his exclusion from this property for such a length of time under a title inconsistent with the title set up by the plaintiff is enough to entitle the Court to deduce from it that there was an ouster of the plaintiff from the properties. *Ayennessa Bibi v. Sheikh Isuf* (1). (3) The principle of possession between co-owners is that every co-owner is a tenant-in-common and that possession of a tenant-in-common is not adverse to his co-tenant. But a person cannot be a tenant-in-common with a person whom he never recognised as a co-tenant and probably had no knowledge of his existence. Since 1892 the defendants have been in possession of the property in their exclusive right. They never regarded the plaintiff as a co-sharer and it is possible on the case they have proved before the trial Court that they were not aware even that he was their co-sharer.

The plaintiff was out of possession at the time of the institution of the suit. That being so, the case comes within the purview of the proviso to s. 42, Specific Relief Act, and is not maintainable in its present form. It may be noted that the plaintiff describes the suit in the plaint as one for declaration of title and has affixed necessary Court-fees for such a suit. The appeal accordingly fails and is dismissed with costs.

A. N. A.

Appeal dismissed.

(1) 14 Ind. Cas. 722; 16 C. W. N. 849.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 74
of 1926.

January 4, 1928.

Present:—Mr. Justice B. B. Ghose and Mr.
Justice Cammiade.

MOHAR ALI—PLAINTIFF—APPELLANT
versus

ABDUL KARIM SARKAR AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Usurious Loans Act (X of 1918), ss. 3, 4—High
rate of interest—Power of Court to interfere.*

Where the rate of interest is high a Court can give relief under s. 3 of the Usurious Loans Act without considering whether the lender was in a position to dominate the will of the borrower or not.

The rate of interest may, by itself, be sufficient evidence that a transaction is substantially unfair. [p. 742, col. 2.]

Appeal against the decree of the Subordinate Judge, First Court, at Tipperah, dated the 30th January, 1926.

Babus *Upendra Kumar Roy, Monomohan Banerjee and Ramendra Chandra Roy*, for the Appellant.

Babu *Sasadhar Roy* (Sr.), for the Respondents.

JUDGMENT.—This is one of the most preposterous cases which shows that it was absolutely necessary to enact something in the nature of the Usurious Loans Act, 1918. In this case the principal defendants borrowed Rs. 400 on mortgage of properties which admittedly are very valuable. The interest charged was Rs. 7-8 per cent, per mensem which would come up to nearly 100 per cent, per annum with annual rests. The result is that within 4 years, as the Subordinate Judge observes, Rs. 400 principal swelled up to over Rs. 7,600. The Subordinate Judge says the rate is monstrous, we unhesitatingly endorse that opinion. Mr. Roy for the assignee of the mortgagee who is the appellant before us contends that that is the usual rate of interest in that part of the country. If that is so nothing can be more deplorable than the fact asserted, and in every such case the Courts would be justified in rigorously applying the Usurious Loans Act in that part of the country, whenever such a course is justified. The evidence, however, does not satisfy us that that is the usual rate of interest in that part of the country, for mortgage bonds. The *pro forma* defendants who were the original mortgagees are, no doubt, very hard money-lenders and they exacted usurious rates of interest in other cases as they have proved themselves. The Courts ought to be alert in allowing them interest in cases which are brought before the Court when usurious rates of interest are claimed by them. We have nothing to add to the judgment of the Subordinate Judge in this case except to point out that it is unnecessary in such cases to consider whether the lender was in a position to dominate the will of the borrower. Where the rate of interest is high the Court may proceed to give relief under s. 3 (1), cls. (a) and (b) read with the explanation to the proviso in cl. (d) where it is stated that interest may, by itself, be sufficient evidence that the transaction was substantially

unfair. In our opinion nothing can be more unfair than 100 per cent. interest with annual rests where there is sufficient security for the debt.

The next point argued on behalf of the appellant is that he comes within sub-s. (4) of s. 3 of the Usurious Loans Act, 1918, inasmuch as the plaintiff was a *bona fide* transferee from the original mortgagees. To assert such a proposition seems to be a mere effrontery. To say that they were not aware that the rate of interest was unconscionable seems to us to be absurd. Then again he purchased the mortgage-bond for Rs. 2,000 when the actual amount due on the bond was over Rs. 5,000. Was he not put upon an enquiry why the mortgagees were selling their interest at such a loss? The absurdity of the position taken up appears from the very statement of the fact.

This appeal is, therefore, dismissed with costs. We assess the hearing-fee at ten gold *mohurs*.

A. N. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1914 of 1925.

December 22, 1927.

Present:—Mr. Justice Mukerji.

MANMATHA NATH SARKAR—PLAINTIFF

—APPELLANT

versus

DEBENDRA NATH SAMANTA AND OTHERS

—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 105, 107—Enhancement of rent—Decree of Settlement Officer, binding nature of—Erroneous decision, whether binding on Civil Court.

A decree of a Settlement Officer in proceedings under s. 105 of the Bengal Tenancy Act operates as a Civil Court decree and cannot be treated as a nullity even if it happens to be erroneous.

Dharani Mohan Ray v. Asutosh Mukerji (1), followed.

Appeal against the decree of the Third Subordinate Judge, Midnapore, dated the 11th of May, 1925, modifying that of the Munsif, Fourth Court at Pamluk, dated the 6th of December, 1924.

Babu Pyari Mohan Chatterjee, for the Appellant.

Babu Apurba Charan Mukherjee, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for recovery of arrears of rent. The plaintiff claims rent at the rate of Rs. 13-3-15 *gandas* with cesses and damages. His claim was based upon a decision under s. 105 of the Bengal Tenancy Act. The defence was that the rate of rent was Rs. 12-6-4½ pies only. The learned Munsif decreed the suit at the rate at which the plaintiff laid his claim with costs and interest and from that decision the defendants having preferred an appeal, the decree of the trial Court was modified, the plaintiff being given a decree only at the rate which was admitted on behalf of the defendants. The substance of the decision of the learned Subordinate Judge is that the lands which formed the subject-matter of the suit consisted of undivided shares of parcels of homestead lands which did not constitute a holding and in respect of which no rent could be settled by the Settlement Officer under the provisions of s. 105 of the Bengal Tenancy Act. The learned Judge also was of opinion that certain matters which should have been taken into consideration in determining a fair and equitable rent for the lands had not been taken into account by the Settlement Officer and that there were grounds which stood in the way of any enhancement being made in respect of the rent of the lands. For these reasons the Subordinate Judge took the view that the Settlement Officer had no jurisdiction to make the order that he did under s. 105 of the Bengal Tenancy Act and that, therefore, the order was a nullity and was not binding on the parties. The plaintiff who has preferred this appeal challenges the correctness of the view which the learned Subordinate Judge has taken as aforesaid. I am clearly of opinion that the appellant's contention should succeed. I can put my reasons in no better words than what have been used by the learned Munsif in his judgment in this case. The learned Munsif has observed thus: "A decree in s. 105 proceedings operates as Civil Court decree (*vide* s. 107) and there cannot be any doubt that the Settlement Officer who enhanced the rent here had jurisdiction to try the case under s. 105, Bengal Tenancy

Act brought by the plaintiff against the defendant. Even if the Court made a mistake, the Court had jurisdiction to decide wrong as well as right and if the wronged party did not take the course prescribed by law to set the matters right the decision, however wrong, cannot be disturbed now. So in any case the decision under s. 105 proceedings must be taken to be binding on the parties". This view is amply supported by the decision of this Court in the case of *Dharani Mohan Ray v. Asutosh Mukerji* (1). The learned Subordinate Judge seems to have been under an entire misconception as regards the true meaning of the word 'jurisdiction.' What amounts to absence of jurisdiction in circumstances such as these and under what circumstances a decree passed by a competent Court may amount to a nullity as being passed without jurisdiction have been clearly explained in a very recent decision of this Court in the case of *Ishan Chandra Banikya v. Moomraj Khan* (2).;

For the reasons given above, I am of opinion, that this appeal should be allowed, the decree passed by the learned Subordinate Judge set aside and that of the trial Court restored and I order accordingly; but there will be no order for costs in this Court or in the Court of Appeal below.

A. N. A.

Appeal allowed.

(1) 82 Ind. Cas. 396; 40 C. L. J. 34; A. I. R. 1924 Cal. 907.

(2) 97 Ind. Cas. 770; 45 C. L. J. 24; 30 C. W. N. 940; A. I. R. 1926 Cal. 1101.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 483
OF 1925.

December 19, 1927.

Present :—Justice Sir Zahhadur Rahim
Zahid Suhrawardy, Kt., and
Mr. Justice Graham.

HARA CHANDRA MANDAL—PLAINTIFF—
APPELLANT

versus

MOHANANDA MANDAL AND OTHERS—
DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Suit by purchaser against trespasser—Trespasser, whether entitled to question bona fides of sale or adequacy of consideration—'Paper transaction', meaning of—Transaction found to be sham—Order for refund of price, whether proper.

A sued B and C for recovery of possession of certain properties alleging that he had purchased the properties from C and prayed that if C was found to have had no interest at the time of the purchase the price paid might be decreed to him. B pleaded that he had purchased the same properties from C's predecessors-in-title long before the alleged sale to A. C contended that he had validly transferred the properties to A. The lower Appellate Court found that the sale set up by B was untrue, and that the sale set up by A was a mere 'paper transaction' created by C to enable A to bring the suit, and, while dismissing A's suit for possession, directed that the amount admitted by C to have been received from A should be refunded to A. In second appeal:

Held, (1) that B, being a trespasser, was not entitled to challenge the validity of the sale to A on the ground that it was a mere 'paper transaction' or was for inadequate consideration; [p. 746, col. 1.]

(2) that C having admitted that he had sold the properties and received the price therefor and A having admitted that he had purchased the properties and paid the consideration therefor, there was no principle of law under which C could be compelled to return the purchase-money to A. [p. 746, col. 2.]

Lal Achal Ram v. Raja Kazim Husain Khan (1), applied.

Kamini Kumar Deb v. Durga Charan Nag. (2), explained.

Appeal against the decree of the Subordinate Judge, First Court, Dacca, dated the 18th of November, 1924, affirming that of the Munsif, Fourth Court, Dacca, dated the 28th of May, 1923.

Babu Bimal Chandra Das Gupta, for the Appellant.

Babu Kanai Lal Saha, for the Respondents.

Babu Biraj Mohan Mazumdar, for the Deputy Registrar.

JUDGMENT.

Suhrawardy, J.—This appeal arises out of a suit by the plaintiff for recovery of possession of a certain piece of land said to have been purchased by him from defendants Nos. 3, 4 and 5. The plaintiff's case was that the land belonged to three brothers Raj Mohan, Nanda Mohan and Deba Mandal. After the death of Raj Mohan and Deba Mandal their shares were inherited by the defendants Nos. 3 and 4, the 5th defendant being one of the brothers. The defence of the principal defendants was that the property belonged to Raj Mohan alone and that he had transferred it to the defendants before his death. During the progress of the suit in the trial Court the plaintiff added an alternative prayer to his plaint, namely, that if it was found that his vendors had no interest in the property the price paid by him to them might be decreed against them. The defence of the vendor defendants was that the land be-

longed to the three brothers and that Raj Mohan did not sell the land to defendants Nos. 1 and 2 as alleged by them but that they had sold the land to the plaintiff; and consequently a decree for refund of purchase-money should not be made against them. Judhistir, defendant No. 3, further said that the entire purchase-money as mentioned in the *kobala* was not paid to him and a portion of it was still unpaid. The Munsif in the trial Court held upon an examination of the evidence that the case for defendants Nos. 1 and 2 was true and that the property belonged to Raj Mohan alone who had sold it to the defendants as alleged by them. On appeal the learned Subordinate Judge found that the property did not belong to Raj Mohan alone that it belonged to all the three brothers jointly, and that the *kobala* propounded by the defendants was not executed by Raj Mohan and was not a genuine document. After entering this finding against the defendants the learned Subordinate Judge went on to discuss the merits of the plaintiff's case and remarked that the consideration of the three *kobalas* from the defendants Nos. 3, 4 and 5 though they had equal shares was not the same. He, however, does not question the genuineness of the plaintiff's *kobalas* but records an opinion about them in these words: "In my opinion, all these *kobalas* were mere paper transactions and they were created to enable the plaintiff to bring this suit. If the plaintiff really intended to purchase this land, he would have paid Rs. 200 to Judhistir. I, therefore, find no reason to decide the question of title in plaintiff's favour." In the result he confirmed the decree of the Munsif which was to the effect that the plaintiff's suit should be dismissed and that the amount admitted by defendants Nos. 3, 4 and 5 to have been received from the plaintiff should be returned to the plaintiff by the defendants. I regret that I am unable to follow the reasoning of the learned Subordinate Judge in this matter. He finds that the defendants' *kobalas* were not genuine. The defendants are, therefore, trespassers and he holds that the plaintiff's *kobalas* are genuine but says that they are paper transactions created in order to enable the plaintiff to bring this suit. It is difficult to understand what the learned Subordinate Judge exactly means by using the words 'paper transactions.' This is one of the instances where expressions are

loosely used without attaching proper legal significance to them. The reason that the Subordinate Judge gives for holding that the plaintiff's *kobalas* are paper transactions is that they were created to enable the plaintiff to recover possession of land from the defendants. If that is the idea with which the documents were created I do not see why they should be called paper transactions. The vendors admit that they sold the property and the purchaser claims that he has purchased this property. That being so, it is difficult to imagine any circumstance which would enable the Court to say that the documents were paper transactions. In the case of *Lal Achal Ram v. Raja Kazim Husain Khan* (1) their Lordships of the Judicial Committee held that where the plaintiff suing in ejectment claimed under a transfer from the true owner the deed of sale containing an untrue statement as to the payment of the purchase-money, but being otherwise reasonable in its terms, and affirmed and acted upon by both vendor and purchaser, and neither champertous nor contrary to public policy, it operated as a present transfer to the plaintiff giving him a good title on which it was competent for him to sue, unless the defendants succeeded in proving that the transfer was not merely voidable but absolutely void. The present case seems to me to fall exactly within the principle enunciated by their Lordships. It is a suit against a trespasser who has no right to retain possession of the property as against the true owners of it. The true owners are defendants Nos. 3, 4 and 5. They say that they had sold the property to the plaintiff and the plaintiff in virtue of that transfer—it does not matter whether the entire consideration money was paid for the transfer—brought the present suit against the defendants who had no right to retain possession of it in the presence of his vendors. In support of the view of the Court below reference has been made to the decision in the case of *Kamini Kumar Deb v. Durga Charan Nag* (2) where it has been held that if a document is fictitious the principle of the decision in *Lal Achal Ram's case* (1) does not apply. Though I consider that the

(1) 32 I. A. 113; 27 A. 271; 9 O. W. N. 477; 8 O. C. 155; 15 M. L. J. 197; 8 Sar. P. C. J. 772 (P. C.).

(2) 74 Ind. Cas. 392; 37 C. L. J. 122; A. I. R. 1923 Cal. 521.

law as broadly enunciated in that judgment is an inroad upon the principle underlying the decision of the Judicial Committee in *Lal Achal Ram's case* (1), I do not think that the considerations which influenced their Lordships in *Kamini Kumar's case* (2) to hold against the document are present in the present case. In *Kamini Kumar's case* (2) there is no finding that the defendants were trespassers. In fact on the statement of the facts of that case it is evident that they had some ostensible right to the possession of the lands in suit there. It has not been further found that the person who had title to the land supported the plaintiff's title either in the plaintiff in his own right or in the plaintiff as the representative of the true owner. The contention of the defendants in that case was that the conveyance upon which the plaintiff relied was without any consideration and passed no right. It may be said that a transaction without any consideration is void and, therefore, falls outside the decision in *Lal Achal Ram's case* (1). In the present case there was consideration, though inadequate according to the Subordinate Judge upon which plaintiff's title was well founded. If the consideration is inadequate the vendors may have the right to avoid the transaction or in other words, it renders the transaction voidable. If the whole of the purchase-money is not paid to one of the vendors he has the right of an unpaid vendor under the law. But any question that may arise between a vendor and a vendee with reference to the transaction is outside the competence of a trespasser to challenge the validity of the sale on any such ground.

Now, the reason which the Subordinate Judge has given to hold that the *kobalas* are paper transactions is that they are created to enable the plaintiff to bring the suit. Admitting the object to be as stated by the Subordinate Judge I do not find any reason why the plaintiff cannot maintain the suit. The vendors, defendants Nos. 3, 4 and 5, had the right to maintain the suit. The plaintiff under those transactions is either their agent or *benamdar*: in either capacity he is entitled to maintain the suit. Then again under the decree passed by the Subordinate Judge the amount of consideration received by defendants Nos. 3, 4 and 5 has been decreed

against them. The vendors admit that they have sold the property and received the price therefor and the purchaser says that he has purchased it and paid the consideration for it. I fail to see on what principle of law the vendors can be compelled in these circumstances to return the purchase-money. In my opinion on the findings arrived at by the Subordinate Judge the plaintiff is entitled to succeed.

The result is that this appeal is allowed, the decree of the lower Appellate Court set aside and the plaintiff's suit decreed with costs throughout.

Graham, J.—I agree.

A. N. A.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 1837 of 1925.

December 21, 1927.

Present:—Mr. Justice Mukerji.

RAMA NATH NASKAR AND OTHERS

—DEFENDANTS—APPELLANTS

versus

TARAK NATH BANERJEE AND OTHERS

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23, O. XLIII, r. (1) (u)—Order of remand under inherent powers, appealability of.

An order of remand in the exercise of the inherent powers of a Court for the ends of justice is not appealable. [p. 747, col. 1.]

Appeal against the decree of the Third Additional District Judge, 24 Perganas, dated the 7th of April, 1925, modifying that of the Munsif, Second Court at Baruipore, dated the 22nd of May, 1923.

M. Syed Nasim Ali, for the Appellants

Babus Apurba Charan Mukherjee and Panchanon Ghosal, for the Respondents.

JUDGMENT.—The decree of the lower Appellate Court which has given rise to this appeal is divisible into two parts. The first of these parts is the decree for arrears of rent that has been awarded to the plaintiffs. The second part of it relates to the question of enhancibility of the existing rent. The appeal to this Court is directed against the second part aforesaid and is confined to the relief which the plaintiffs claimed for enhancement of rent. The trial Court decreed the

suit at the existing rate of rent with damages at $12\frac{1}{2}$ per cent. The prayer for enhancement of rent was dismissed by that Court. The lower Appellate Court has confirmed the decree for arrears of rent with the modification that instead of $12\frac{1}{2}$ per cent. as damages, damages have been awarded at 25 per cent. As regards the prayer for enhancement of rent the order that has been made by the lower Appellate Court is that the decree of the trial Court is to be set aside and the case remanded for a fresh decision of the question in the light of such further evidence as the parties may think fit to adduce. The order in question appears to me to be one which is not one of those orders of remand from which an appeal would lie under the Code of Civil Procedure. It is an order which the learned Judge evidently thought fit to pass in the exercise of its inherent jurisdiction and for the ends of justice. I am, therefore, of opinion that no appeal would lie from this decision and that the present appeal must, therefore, on that ground be dismissed.

I have been asked by the learned Vakil for the appellants to treat the memorandum of appeal as an application under s. 115 of the Code of Civil Procedure. I have given the matter the consideration that it deserves but I am unable to say that the reasons which the learned Additional District Judge has given for making an order would not justify the same. Speaking for myself, I would perhaps not entirely agree with the view which the learned Additional District Judge has taken at least as regards the form in which he has made the order. That, however, is a different matter. On the whole I am unable to hold that the order, such as it is, calls for the interference of this Court under the provisions of s. 115 of the Code of Civil Procedure.

The learned Vakil for the appellants has brought to my notice the fact that settlement operations are in progress in the District to which the case relates and that in view of the provisions of s. 111 of the Bengal Tenancy Act the further trial of the suit that has been ordered by the learned Additional District Judge should be stayed. This, no doubt, is a matter that has got to be considered but I would leave it to the trial Court to determine whether the section to which I have just now referred is applicable under the circumstances and to

pass such orders as regards this matter as it may consider proper to pass.

The appeal is dismissed but in the circumstances there will be no order as to costs.

A. N. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE

No. 227 OF 1925.

December 8, 1927.

Present:—Mr. Justice B. B. Ghose and
Mr. Justice Cammiade.

ANNADA BANDHU DAS AND OTHERS

—DEFENDANTS—APPELLANTS

versus

AMBICA CHARAN BHATTACHARJEE

—PLAINTIFF AND ANOTHER

—CO-PLAINTIFF—RESPONDENTS.

Administrator—Alienation by administrator for purposes unconnected with administration, validity of—Probate and Administration Act (V of 1881)—Hindu Wills Act (XXI of 1870), s. 2—Succession Act (X of 1865), s. 269—Powers of administrators of Hindu Wills before 1881.

Before the passing of the Probate and Administration Act, 1881, an administrator acting under the Hindu Wills Act had the same authority as an executor under s. 269 of the Succession Act, which was made applicable to Hindus by s. 2 of the Hindu Wills Act. [p. 748, col. 2; p. 749, col. 1.]

An executor or administrator has no absolute power to dispose of property of the deceased for purposes not necessary for the administration of the estate. [p. 750, col. 2.]

Corser v. Cartwright (2), *Solomon v. Attenborough* (3) and *Attenborough v. Solomon* (4), applied.

Pronath Karar v. Surja Coomar Goswami (1), distinguished.

Where a Hindu widow who had taken out Letters of Administration of the estate of her deceased husband granted a permanent lease of property belonging to the estate describing herself as the widow of the deceased, without legal necessity, and for purposes unconnected with the administration of the estate, and the lessee was not even aware of the fact that Letters of Administration had been granted to the widow:

Held, that the lease was not binding on the estate and that the reversioners were entitled to recover possession of the property after the death of the widow. [p. 751, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, Second Court, Chittagong, dated the 15th of September, 1925.

Dr. Sarat Chandra Basak (with him Babus Chandra Sekhar Sen and Nikunja Behari Roy), for the Appellants.

Babus Jogesh Chandra Roy, Narendra Kumar Das, Nripendra Chandra Das and Jagneswar Majumdar, for the Respondents.

JUDGMENT.

Ghose, J.—This is an appeal by some of the defendants, that is, defendants Nos. 7, 10, 16 and the representatives of the original defendant No. 14, against the judgment and decree of the Subordinate Judge, Second Court, Chittagong, dated the 15th September, 1925. The suit was originally brought by the plaintiff No. 1 only by making the plaintiff No. 2 a *pro forma* defendant who was subsequently transferred on his own application to the category of plaintiffs. These two plaintiffs claimed the property in suit as the reversionary heirs of one Bhabani Das Bhattacharja who died in October or November 1874 leaving a widow Bama Sundari him surviving. Bhabani had previously executed a Will dated the 28th July, 1874, by which he had appointed several executors. The executors renounced their executorship and the widow applied for Letters of Administration with the copy of the Will annexed which was granted to her on the 8th of February, 1875. It appears that on the 6th May, 1879, the widow Bama Sundari executed two permanent leases in favour of one Gour Hari Das (Choudhury), the predecessor-in-interest of defendants Nos. 7 to 15 and the properties covered by these two leases are the only subject matter of dispute in this appeal. The Subordinate Judge has made a decree for possession in favour of the plaintiffs making the defendants liable for mesne profits. From that decree these defendants have appealed to this Court.

The history after the grant of the Letters of Administration is that the agnates of Bhabani Das oppressed his widow in various ways so that she was obliged to leave the family dwelling-house of her husband and had to go to live in her father's residence. In September, 1899, she applied to the District Judge for permission to sell certain properties. This permission was refused and in that order the District Judge made certain observations about the revocation of the Letters granted to her. In November 1899 two of the executors applied for Letters of Administration with the Will annexed of Bhabani Das and the plaintiff No. 1 also made a similar application. In the meantime on the 28th September, 1899, Bama Sundari sold her right to all the

properties to the predecessor-in-interest of defendants Nos. 1 to 6. The learned District Judge granted Letters of Administration to one of the executors named Kebab Krishna Bhattacharji. On appeal the High Court set aside that order, and the result was that the original grant to Bama Sundari was not interfered with. In September 1906 Bama Sundari brought the properties covered by the two *pattas* of 1879 to sale after having obtained a decree for rent. It will be noticed that this was after she had parted with all her interest in the properties left by her husband. The disputed properties were purchased by the predecessor-in-interest of the defendants Nos. 16 to 19, who has been found to be a *benamidar* of the original lessee Gour Hari. Bama Sundari died on the 10th January, 1921, and this suit was brought by the plaintiffs to recover possession of the properties left by their maternal uncle Bhabani Das, of which the properties subject to the aforesaid leases are now the subject-matter of this appeal. The ground urged by them is that there was no legal necessity for permanent leases. The Subordinate Judge in his judgment discusses various points and has come to the conclusion that the leases were not granted for legal necessity. He has further held that the widow had only limited powers of alienation as administratrix and has not the power before the passing of the Probate and Administration Act, 1881, to grant permanent leases without the sanction of the District Judge. He has also held that the transaction entered into by the widow in granting permanent leases was not a *bona fide* one. He appears to have been of opinion that the *selami* which was said to have been paid to the lady before the Sub Registrar was not actually received by her, but that there was only a show of payment. In that view he has decreed the suit.

The first contention on behalf of the appellants is that the Subordinate Judge has misread the law as regards the powers of an administrator governed by the Hindu Wills Act before the passing of the Probate and Administration Act as stated in Phillips and Trevelyan's book on Hindu Wills (2nd Edition, page 225) by omitting a 'not' in the quotation made by him. This is true. Their argument is that before the passing of the Probate and Administration Act, an administrator acting under the Hindu Wills Act had the same authority as

an executor under s. 269 of the Indian Succession Act which was made applicable to Hindus by s. 2 of the Hindu Wills Act. Section 269 of the Succession Act of 1865 runs thus: "An executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he may think fit." I am of opinion that the Subordinate Judge was wrong in his view of the law as regards the powers of an administrator under the Hindu Wills Act before the passing of the Probate and Administration Act of 1881. Whether the leases are binding on the plaintiffs or not will depend on other considerations and the matter will be dealt with later on.

The next point urged is that in any view of the case under the terms of the Will, it should be held that the widow forfeited her right to succeed to the property by the sale of all her properties inherited from her husband on the 28th September, 1899, and that the plaintiffs were entitled to come in as heirs under the Hindu Law on that date; and the suit having been brought in January 1924 was barred by limitation. With regard to this point we are of opinion that the appellants' argument cannot be sustained. Even assuming that the sale would work a forfeiture of the right of the widow, which we are not prepared to hold, there is no subsequent disposition of the property under the Will and the result would be an intestacy. The widow was the heir under the Hindu Law and she would be entitled to hold the property as the heir of the testator Bhabani Das under any circumstance when there was no gift over under the Will; and so long as Bama Sundari was alive, the plaintiffs would have no title to the property left by Bhabani.

The first point is a more substantial one and requires careful consideration. It is contested on behalf of the respondents that Bama Sundari did not give the permanent leases of the property in question in the course of the administration of her husband's estate, and, therefore, the power conferred upon an administrator under s. 269 of the Succession Act of 1865 does not come into play. Letters of Administration were granted to her in 1875. The finding of the Subordinate Judge is that there were no debts to be paid by the administrator. It was not necessary for the administrator to alienate the property for the purpose of administration; nor does it appear that the

administration had not already come to an end at the time when the permanent leases were given. The leases, therefore, granted by the lady were not granted by her as administratrix but should be taken as granted by her as a Hindu widow and not being supported by legal necessity are not binding on the plaintiffs. It is further argued that on the finding of the Subordinate Judge that the leases were not *bona fide* they are not binding on the plaintiffs under any circumstance.

The lease Ex. B (15) shows the reason why it was given. The other lease, we are told, was in the same terms. There the lady describes herself as the widow of Bhabani. It is stated that the *istemrari mokarrari kaemi daemi patta* was given for the purpose of her husband's *Gaya sradh*, for the expenses of her residence at Benares and other necessary expenses. These are matters which cannot be held to be for the purpose of the proper administration of the estate of her deceased husband, and she does not describe herself in granting the leases as administratrix nor does it anywhere appear that the lessee was aware that she was given Letters of Administration of her husband's estate.

I apprehend that the powers given to an executor under s. 269 of the Succession Act of 1865 were for the purpose of conversion of the testator's estate into money for the payment of debts to the creditors and for the facility of division of the legacies. The powers granted under that Act were the same for all cases of administration, whether the testator died after leaving a Will or died intestate. Where it is clear that no debt has to be paid and no legacies have to be divided, it would be difficult to say that an administrator has an unlimited power of sale for his own purposes. No authority in point has been cited at the Bar with regard to any restriction on the exercise of the power of an executor or administrator under s. 269 of the Succession Act, but as that section was taken from the English Law, I think it is permissible to refer to English authorities in order to explain the nature of the power, which I shall presently do.

It was contended by Mr. Chandra Sekhar Sen in reply that the fact that the lady did not describe herself as administrator did not affect the right of the lessee and he relied on the case of *Preonath Karan*

v. Surja Coomarr Goswami (1) where the Court held that the fact that the vendors did not describe themselves as administrators but described themselves as heirs did not affect the case, because either as administrators or as heirs they were entitled to sell, though as heirs they could not sell anything more than their own shares. This would be applicable only to the case of *bona fide* purchasers who had no knowledge that the money was to be applied otherwise than for the payment of the testator's debts. [See *Corser v. Cartwright* (2) referred to in the above case.] In *Soloman v. Attenborough* (3) one of two executors without the knowledge of his co-executors pawned articles of plate belonging to the testator's estate with certain pawn-brokers, who had no notice that he was not the absolute owner thereof, and he misapplied the money advanced upon them for his own purposes. At the date of the pledge all the testator's legacies and debts so far as they were known had been paid, but the residuary estate had not been completely realised and distributed. On the death of the pledgor the transaction was discovered, and an action was brought by his co-executor and a new trustee against the pawn-brokers to recover the plate. The Court of Appeal held, reversing the trial Court, that inasmuch as the pledgor had not purported to act as executor, and the defendants had no notice that he was executor, the latter had no title to the plate and must deliver it up to the plaintiffs. The House of Lords affirmed the decision on appeal on the ground that the proper inference from the facts was that the executors at the time held the plate not as executors but as trustees and, therefore, the deceased executor had no power to pledge the plate: *Attenborough v. Soloman* (4). In *Ricketts v. Lewis* (5) it was held that an administrator has no power to mortgage lease-holds of an intestate under leases not containing repairing covenants in order to raise money for repairing the property. And such a mortgage will be set aside as against a mortgagee who has notice of the

purpose for which the money is raised. Fry, J., (as he then was) observed: "What authority had the administratrix to raise money for the purpose of repairing the property? It may be that she was liable to repair by virtue of covenants in the lease, but having regard to the length of the terms and the time when they were granted that does not appear probable, and the onus of proving that there was such a liability is on the mortgagee, and he has not discharged it. It comes then, shortly, to this, that at the date of the mortgage Mrs. Lewis did not require the money for any purpose which it was her duty to perform as administratrix, and that she did require it for the purposes of her own beneficial enjoyment."

Applying the principles laid down in these cases there cannot be any doubt, in my judgment, that the leases in dispute cannot be sustained. There was no debt to pay off the testator; the lessor did not purport to grant the leases as administratrix, she did so rather as the widow of Bhabani Das: the lessee does not appear to have any knowledge that Letters of Administration had been granted to the lessor, there was clear notice in the lease to the lessee that the money was required for purposes quite different from what it was the duty of the lessor to perform as an administratrix, all these circumstances establish that the leases are not binding on the estate left by Bhabani Das, even assuming that the lessee did actually pay the premium to the lady as stated in the leases. An executor or administrator does not appear to have according to the law an absolute power to dispose of the property of the deceased if it is not necessary for the purpose of administration of the estate, but a *bona fide* purchaser may be protected in certain cases where a transfer is not for that purpose.

There can be no doubt that she could make alienations for necessity as a Hindu widow. But the Subordinate Judge has found that there was no necessity for such alienation and no attempt has been made to show that that finding is incorrect. It is further argued on behalf of the respondents that the Will itself does not give a free power of alienation by way of leases even to the executors. Paragraph (8) of the Will says: "In case it becomes necessary to grant any permanent leases to tenants, the executors shall be com-

(1) 19 C. 26; 9 Ind. Dec. (n. s.) 464.

(2) (1876) 7 H. L. 731; 45 L. J. Ch. 005.

(3) (1912) 1 Ch. 451; 81 L. J. Ch. 212; 106 L. T. 87; 56 S. J. 270; 28 T. L. R. 225.

(4) (1913) A. C. 76; 82 L. J. Ch. 178; 107 L. T. 833; 57 S. J. 76; 29 T. L. R. 79.

(5) (1882) 20 Ch. 745; 51 L. J. Ch. 837; 46 L. T. 368; 30 W. R. 609.

petent to grant them under the signature of my wife, and at the end of each year, they shall submit and explain an account of the income and expenditure to her." It is urged that it cannot be reasonably said that when the executors had renounced, the widow would according to the Will itself, get an unfettered power of making alienation by way of permanent leases by taking Letters of Administration with the Will annexed. I am not quite sure that if it was necessary for the purpose of administration the widow could not grant a permanent lease by reason of these provisions. But on the grounds already stated we are of opinion that the leases which were granted by the lady were granted by her in the exercise of her right as the owner of a widow's estate as heir of Bhabani, and, as such, not being supported by legal necessity, the reversioners are entitled to recover possession after the death of the widow.

On these grounds the appeal must be dismissed with costs.

Cammiade, J.—I agree.

A. N. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1537 OF 1925.

December 21, 1927.

Present:—Mr. Justice Mukerji.

NIBARAN CHANDRA SIKDAR.

—PLAINTIFF—APPELLANT

versus

ABDUL HAKIM AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review—Revised decree confirming original decree without modification—Appeal from revised decree, competency of—Landlord and tenant—Assignment by landlord—Possession, whether transferred ipso facto as against tenant.

The effect of allowing an application for review is to vacate the decree originally passed, and the decree that is subsequently made on the review, even if it does not modify the decree originally passed, is a new decree superseding the original one; and it is, therefore, open to a party to prefer an appeal from the decree passed on review even if it does not in any way modify the decree originally passed. [p. 752, col. 1.]

Basheshar Nath v. Ram Kishen Das (4), followed.

A mere assignment or transfer is not sufficient to put the assignee or transferee in possession as against persons claiming to hold under the assignor or transferor. [p. 752, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Chittagong,

dated the 7th of March, 1925, reversing that of the Munsif, South Raozan, dated the 9th of August, 1923.

Babus *Krishna Kamal Moitra* and *Rabindra Nath Choudhury*, for the Appellant.

Babu *Narendra Kumar Das*, for the Respondents.

JUDGMENT.—The suit which has given rise to this appeal was instituted by the plaintiff for declaration of title and recovery of *khas* possession of certain lands.

The lands comprised of two plots,—the southern portion of Cadastral Survey Plot No. 3315 and the whole of Cadastral Survey Plot No. 3316. The plaintiff's case was that the lands originally belonged to his father in *ryoti* right and comprised a holding held under one Nobo Chandra Saha, that the said Nobo Chandra Saha sold up the holding at a rent sale, and that one Ramesh Chandra Rakshit purchased it at the said sale and let it out to the plaintiff in *dar-ryoti* interest on the 23rd April, 1920, that the defendants dispossessed him in August, 1920, upon which he instituted a suit under s. 9 of the Specific Relief Act but was unsuccessful therein and hence the suit. The case of the defendant No. 1 was that Cadastral Survey Plot No. 3315 was held by his father in *dar-ryoti* right under one Sarada Charan Sikdar who in 1917 also mortgaged his *ryoti* interest to the said defendants' father. The case of the defendant No. 3 was that Cadastral Survey Plot No. 3316 belonged to certain persons, that under a partition and a transfer subsequently made it came to be owned in *ryoti* right by the defendant No. 3, and that he settled it in *dar-ryoti* to the defendant No. 1.

The Munsif decreed the suit, but the Subordinate Judge on appeal has dismissed it.

The Subordinate Judge has found that the documents showed that one Nobo Chandra Saha having obtained a decree for arrears of rent against the plaintiff's father Ratanmani put the holding up to sale and Ramesh Chandra Rakshit purchased it at such sale in 1900, that in 1906 Sarada Charan Sikdar sold his interest in the lands to Ramesh Chandra Rakshit, and in April, 1920, plaintiff obtained a settlement thereof from the said Ramesh Chandra Rakshit. He was of opinion that there was nothing to show who this Nobo Chandra Saha was or whether he was the sole land-

lord and whether Ratanmani was the sole tenant, and that there was no explanation why Sarada was not made a party in the rent suit which Nobo Chandra Saha instituted though Sarada along with Ratanmani were recorded in Cadastral Survey Records as the tenants in respect of the two plots Nos 3315 and 3316 which were also described therein as one holding with the defendant No. 1's father as a *korfa* tenant under them. On the whole he was of opinion that the rent-decree and the sale was a shady and suspicious transaction. He, however, decided the appeal on the ground of limitation holding that the suit failed as neither the plaintiff nor his lessor Ramesh was in possession within 12 years before the suit. It is this finding on the question of limitation that is challenged on behalf of the plaintiff who has preferred this second appeal.

To the maintainability of the appeal a preliminary objection has been taken on behalf of the respondents. It is pointed out on their behalf that this appeal was filed on the 24th June, 1925, that prior to filing the appeal the plaintiff had filed an application for review on the 30th April, 1925, before the Subordinate Judge and the application for review was allowed on the 14th September, 1925, the result being that the appeal was again heard and on the 20th January, 1926, a fresh judgment was delivered by which the original judgment was held to stand good and a fresh decree was prepared and signed on the 27th January, 1926. It is urged that the present appeal is in the circumstances not maintainable. The appellant, on the other hand, urges that by the order granting the application for review the Subordinate Judge merely kept his original judgment "in abeyance", as he expressly said in his order passed on the 14th September, 1925, and that when by the judgment ultimately passed on the 28th January, 1926, and the decree prepared and signed on the 27th January, 1926, the original judgment was held to stand good, the appellant is competent to attack the original judgment and the original decree in this appeal. In my opinion the effect of allowing an application for review is to vacate the decree originally passed, and the decree that is subsequently made on the review, even if it does not modify the decree originally passed, is a new decree superseding the original one. For this view that I take, I do not find any authority

directly or clearly in point. The case of *Kanhaiya Lal v. Baldeo Prasad* (1) was one in which the former decree was modified in important particulars on the review; so also in the case of *Brijbasi Lal v. Salig Ram* (2) there was a modification. In the case of *Pyari Mohan Kundu v. Kalu Khan* (3) it is said at page 1016*, that if the application for review is successful the appeal cannot proceed, and *Kanhaiya Lal v. Baldeo Prasad* (1) is quoted in support. The decision of the Lahore High Court in *Basheshar Nath v. Ram Kishen Das* (4) is perhaps the only authority which may be cited as fully supporting my view.

In the circumstances I think it proper to record my views on the merits of the appeal on which also I think the appeal must fail. The argument on the merits is that as the defendants cannot claim any higher rights than those of under-ryots, and inasmuch as Ratanmani's and Sarada's names were recorded as *ryots* in the Cadastral Survey Records, and because the defendants cannot dispute the purchase by Ramesh of Ratanmani's interest at the rent sale and of Sarada's interest by private purchase, or challenge the lease granted by Ramesh to the plaintiff, it should be held that the under-ryoti tenancy which was at one time held under Ratanmani and Sarada still continues and, therefore, the possession of Ramesh and also of the plaintiff is established. In other words, it is contended, that the relationship as between *ryot* and his under-ryots not having been determined even though no rent may have been paid or received, Ramesh must be held to have been in possession and so the plaintiff. This argument assumes that a mere assignment or transfer is sufficient to put the assignee or transferee in possession as against persons claiming to hold under the assignor or transferor, a proposition which cannot be seriously put forward. In my opinion, the finding of the Subordinate Judge on the question of possession is a question of fact and should be viewed as such.

The appeal fails and is dismissed with costs.

A. N. A.

Appeal dismissed.

(1) 28 A. 240; A. W. N. (1905) 265.

(2) 14 Ind. Cas. 472; 34 A. 282; 9 A. L. J. 183.

(3) 41 Ind. Cas. 497; 44 O. 1011.

(4) 54 Ind. Cas. 966; 140 P. R. 1919.

*Page of 44 C.—[Ed.]

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1160 OF 1927.

November 29, 1927.

Present:—Mr. Justice Tek Chand.

KHURSHID HAQ—DEFENDANT—

APPELLANT

versus

RAM DITTA MALL—PLAINTIFF—

RESPONDENT.

*Negotiable Instruments Act (XXVI of 1881), s. 80—
Pro-note silent as to interest—Interest from date of
note, whether can be awarded.*

The liability on a promissory note payable on demand arises from the date of the note from which date limitation begins to run and not from the date on which a demand is made for payment, and, therefore, where such a note is silent as to interest, interest is claimable under s. 80 of the Negotiable Instruments Act at 6 per cent. from the date of the note.

Framroz Eduljee Dinshaw v. Mahomed Essa (2), followed.

Best v. Haji Muhammad Sait (1), dissented from.

Second appeal from a decree of the District Judge, Gurdaspur, dated the 12th of March, 1927, reversing that of the Subordinate Judge, Second Class, Gurdaspur, dated the 5th of July, 1926.

Mr. Mehr Chand Mahajan, for the Appellant.

Mr. Fakir Chand, for the Respondent.

JUDGMENT.—The main point urged in this second appeal is concluded by the findings of fact arrived at by the learned District Judge. The plaintiff-respondent sued the defendant-appellant for recovery of Rs. 807-2 due on foot of a pro-note which was admittedly executed by the defendant in favour of the plaintiff for Rs. 650. The defence set up was want of consideration. The trial Court accepted this plea and dismissed the suit but on appeal the learned District Judge, after carefully going through the evidence and examining the story set up by the defendant-appellant in all its aspects, came to the conclusion that he had failed to prove that the pro-note had been executed without consideration. Mr. Mehr Chand for the appellant has tried to attack this finding but he has been unable to point out any substantial error in procedure which would justify interference by this Court on second appeal. It must, therefore, be held that the defendant has failed to prove that the pro-note was without consideration.

The second point urged by Mr. Mehr Chand is that in the pro-note no rate of interest is mentioned and as the plaintiff

has failed to prove that he made any demand from the defendant before the institution of the suit—no interest was legally payable. In support of his contentions he relies on a decision of the Madras High Court reported as *Best v. Haji Muhammad Sait* (1). There are, no doubt, certain observations in that ruling which support Mr. Mehr Chand's contention, but so far as I am aware the view taken there has never been accepted as correct by this or any other Court. The question was recently considered by a Division Bench of the Bombay High Court in *Framroz Eduljee Dinshaw v. Mahomed Essa* (2), where Macleod, Chief Justice, (Coyajee, J., concurring) held that the liability on a promissory note payable on demand arises from the date of the note from which date the time of limitation begins to run and not from the date on which a demand is made for payment. Where, therefore, such a note is silent as to interest, interest is claimable under s. 80 of the Negotiable Instruments Act at 6 per cent. from the date of the note. Following this ruling I hold that the learned District Judge was right in allowing plaintiff interest at 6 per cent. from the date of pro-note till realization.

No further point was urged. The appeal fails and is dismissed with costs.

R. L.

Appeal dismissed.

A. N. A.

(1) 23 M. 18; 8 Ind. Dec. (N. S.) 407.

(2) 94 Ind. Cas. 21; 50 B. 266; 28 Bom. L. R. 141; A. I. R. 1926 Bom. 241.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 740 OF 1927.

(FORMERLY CIVIL APPEAL No. 1428 OF 1927).

November 23, 1927.

Present:—Mr. Justice Tek Chand.

KUNJ BEHARI LAL—DEFENDANT No. 1

—PETITIONER

versus

Musammam MUBARIK BEGUM AND
ANOTHER THROUGH Musammam MUBARIK
BEGUM—PLAINTIFFS—MUHAMMAD
MUNIR KHAN AND OTHERS—DEFENDANTS
—RESPONDENTS.

Civil Procedure Code (Act V. of 1908), s. 151—Injunction, principles governing grant of—Order under inherent powers, appealability of.

When the jurisdiction of a Court under s. 151, Civil Procedure Code, is invoked for granting an

njunction and it is called upon to act *ex debito justitiæ*, it is necessary for the plaintiff to establish a strong *prima facie* case and to show that if the injunction asked for is not granted, irreparable injury or inconvenience would result. [p. 755, col. 1.]

Firm of Manohar Lal-Mahabir Pershad v. Firm of Jai Narain-Babu Lal (1), referred to.

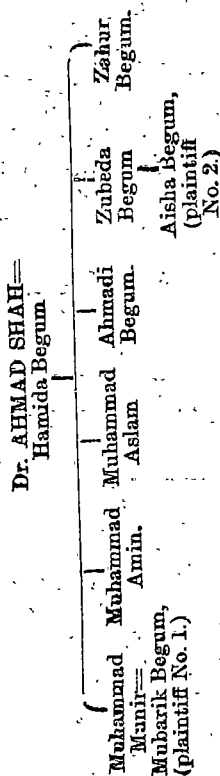
An order passed under s. 151, Civil Procedure Code, is not appealable. [ibid.]

Petition for revision of the order of the Subordinate Judge, First Class, Ludhiana, dated the 18th February, 1927.

Mr. Fakir Chand, for the Petitioner.

Mr. Muhammad Tufail, for the Respondents.

JUDGMENT.—In order to clearly understand the points involved in this appeal it is necessary to state a few preliminary facts. The relationship of the parties will appear from the following pedigree table :—



On the 10th of October, 1922, Muhammad Munir mortgaged a house with defendant No. 1. He having failed to make payment in accordance with the terms of the mortgage the mortgagee instituted a suit against him for recovery of the amount

due to him and a preliminary decree was passed in his favour on the 12th of November, 1924, for Rs. 12,427-15 which was made final on the 6th of June, 1925. In execution of this decree the mortgaged property was sold by public auction on the 18th of March, 1926, to the decree-holder for Rs. 5,000 only. To this sale the judgment-debtor raised a number of objections which were after lengthy enquiry dismissed by the executing Court and the sale confirmed on the 28th of May, 1926. Muhammad Munir judgment-debtor appealed to this Court against the order of confirmation but the appeal was rejected by Colostream, J., on the 5th of October 1926. After the dismissal of this appeal the decree-holder applied for being put in possession of the property which he had purchased at the auction-sale, but before any proceedings could be taken on this application, the judgment-debtor's wife Musammat Mubarik Begum and his sister's daughter Musammat Aisha Begum, a minor 14 years old, instituted the present suit for a declaration that the property sold to the decree-holder was owned by them under a Will purporting to have been executed by Musammat Hamida Begum, mother of Muhammad Munir, judgment-debtor, on the 10th of June, 1906. On the same day an application was presented in the Court praying that proceedings in execution of the decree passed in favour of the decree-holder against Muhammad Munir may be stayed. It was not stated under what provision of law the application was made. On this application the Senior Subordinate Judge has issued a temporary injunction staying delivery of possession to defendant No. 1 pending the disposal of the suit instituted by Musammat Mubarik Begum and Aisha Begum.

Against this order granting the temporary injunction the decree-holder has preferred a miscellaneous appeal under O. XLIII, r. 1. Mr. Muhammad Tufail for the respondents urges that no appeal lies as the lower Court, in granting the injunction, has acted under s. 151 of the Civil Procedure Code. Mr. Fakir Chand for the appellant replies that the lower Court has really issued the injunction under O. XXXIX, r. 1, and an appeal is competent. He further prays that, in case it be held that the order in question is not appealable, the memorandum of appeal may be treated as one for revision.

In order to decide whether the appeal is competent, it is necessary to determine under what section the lower Court purported to act. It is unfortunate that the judgment of the learned Senior Subordinate Judge granting the temporary injunction is a rambling document and it is not easy to find out under what section the learned Judge purported to act. The judgment is written in such a way that it cannot be said where the recital of the arguments of Counsel ends and where his own decision begins. The difficulty is enhanced by the fact that in the application filed by the plaintiffs on the 29th of November, 1926, it was not stated under what section the applicants were moving the Court, nor did the Court insist upon a compliance by the parties with the instructions repeatedly issued by this Court that every application presented by a party must clearly give the provision of the law under which the party seeks to apply. The observations of the learned Judge in the penultimate paragraph of the judgment are not mutually consistent but I gather from the very last sentence of that paragraph where the Court has expressed the opinion that the injunction in this case was legally issuable "under s. 151, Civil Procedure Code" that he intended to act under that section. Orders passed under s. 151, Civil Procedure Code, are admittedly not appealable, and I must accordingly sustain the preliminary objection urged by Mr. Muhammad Tufail and hold that no appeal lies.

But while I hold that no appeal lies I am of opinion that the circumstances of this case are such as to justify interference by this Court on the revision side. The lower Court has, as already held, issued the injunction under s. 151, Civil Procedure Code, but in doing so it has entirely overlooked the principle which should be kept in view by a Court in taking action under that section. It is well-settled that when the jurisdiction of the Court is invoked under that section and it is called upon to act *ex debito justitiæ*, it is necessary for the plaintiff to establish a strong *prima facie* case and show that if the injunction asked for is not granted, irreparable injury or inconvenience would result. The ruling of the Letters Patent Bench, [*Firm of Manohar Lal-Mahabir Pershad v. Firm of Jai Narain-Babu Lal* (1)], which

has been referred to by the lower Court itself, lays down clearly these propositions. The lower Court has not applied its mind to this aspect of the case. The respondents' Counsel has candidly expressed his inability to make out such a case from the materials on the record. On the other hand, he concedes that when the mortgage suit against the husband of plaintiff No. 1 was pending and protracted proceedings in execution of the decree passed thereon were going on the plaintiffs did not intervene and assert that they possessed any rights in the house, but that as soon as the judgment-debtor had exhausted all his tactics in delaying the execution of the decree, and the sale had been confirmed, plaintiff No. 1 who is the judgment-debtor's wife and plaintiff No. 2, who is a minor relation of his, at once instituted the suit and applied for grant of a temporary injunction to stay delivery of possession to the decree-holder. The plaintiffs' suit was based mainly on a Will purported to have been executed on the 20th of June, 1906, by Musammat Hamida Begum, mother of the judgment-debtor and in para. 5 of the plaint it was stated that in a decree obtained against Ahmad Shah (father of the judgment-debtor) this Will had been set up but had not been accepted by the Court. On these recitals in the plaint it was absolutely necessary for the plaintiffs to make out a strong case before the jurisdiction of the Courts under s. 151, Civil Procedure Code, could be invoked, but as already stated, it is admitted that such a case cannot be made out on the record as it stands at present.

I, therefore, accept the petition for revision, set aside the order of the lower Court and discharge the injunction issued staying delivery of possession of the property in question to the decree-holder. Having regard to all the circumstances of the case the parties shall bear their own costs in both Courts.

I wish to make it clear that nothing contained in this judgment is to be taken as in any way affecting the rights of the parties on the merits of the suit, which are yet to be enquired into and adjudicated upon by the lower Court.

R. L.

Order set aside.

A. N. A.

(1) 55 Ind. Cas. 403; 2 Lah. L. J. 283.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2811 OF 1926.

December 1, 1927.

Present—Mr. Justice Broadway
and Mr. Justice Jai Lal.**AGYA SINGH—DEFENDANT—APPELLANT**
*versus***SUNDER SINGH—PLAINTIFF—****RESPONDENT.**

Civil Procedure Code (Act V of 1908), ss. 2, 104—Court Fees Act (VII of 1870), Sch. I, Art. 1, Sch. II, Art. 11—Order filing or refusing to file award, whether decree—Appeal—Court-fee—Arbitration—Reference of disputes relating to partnership accounts—Power of arbitrator to decide dispute as to assets—Award—Direction to transfer all title-deeds, whether vague.

An order filing an award or refusing to file an award in an arbitration without the intervention of the Court is neither a decree nor an order having the force of a decree, and an appeal from such an order need not, therefore, bear *ad valorem* Court-fee under Sch. I, Art. 1 of the Court Fees Act but is to be stamped as an appeal from an order not having the force of a decree under Sch. II, Art. 11 of that Act. [p. 757, col. 2.]

Gauri Shankar v. Anant Ram (1), *Dharam Das v. Ajudhia Pershad* (2), *Hari Mohan Singh v. Kali Prosad Chaliba* (3) and *Ghulam Khan v. Muhammad Hassan* (4), distinguished.

Sarwan Pande v. Jagat Pande (5), applied.

In a reference to arbitration of disputes relating to partnership accounts with a view to the dissolution of a partnership, it is open to the arbitrators to decide any disputes that might arise during the course of the investigation into the partnership affairs as to whether or not any particular contract or property belonged to and formed part of the partnership assets. [p. 758, col. 1.]

Shamlal v. Parshotam Das (6), relied on.

An award cannot be held to be invalid for want of finality merely because it directs one party to transfer or endorse to another all the title-deeds and securities relating to certain properties without specifying particularly what those deeds are. If in the course of the execution of the decree passed in terms of the award any question arises as to whether or not a particular title-deed relates to the properties referred to, the question can be settled by the execution Court. [p. 758, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, Delhi, dated the 31st August, 1926.

Lala Sardha Ram, R. S., Lala Badri Das, R. B., and Mr. Hem Raj, for the Appellant.

Messrs. Man Singh and Kishen Dial, for the Respondent.

JUDGMENT.

Broadway, J.—Two persons Sunder Singh and Agya Singh, were carrying on business as contractors in partnership. About the 20th May, 1925, they decided to end this partnership and referred the questions arising between them to the

arbitration of Sardar Bahadur Singh, who had to go into the question of dissolution of the partnership and into the accounts. The arbitrator gave his award on the 5th July, 1925, subsequent to which Sardar Sunder Singh filed an application in the Court of the Senior Subordinate Judge, Delhi, for an order that the award should be filed and made a rule of Court. On the 30th August, 1926, an order was passed directing that the award be filed and a decree was drawn up in the terms of the said award. Agya Singh then preferred an appeal to this Court attacking the order directing that the award be filed and paid a Court-fee of Rs. 10 on the memorandum of appeal. At the hearing of this case a preliminary objection was taken by Mr. Man Singh, on behalf of the respondent Sunder Singh, to the effect that the appeal was insufficiently stamped inasmuch as Art. 1 of Sch. I of the Court Fees Act was applicable. Under that Article the Court-fee prescribed is an *ad valorem* one. Mr. Man Singh in support of his contention referred to *Gauri Shankar v. Anant Ram* (1). That was a decision of my own sitting alone. A reference to my judgment in that case shows that the point now before the Court was not decided by me. The proceedings in that case were under para. 16 (1) of the Second Schedule, Civil Procedure Code, and I held there that the appeal did not fall within the purview of s. 104 (f), Civil Procedure Code. Reference had been made in the course of the arguments in that case to *Dharam Das v. Ajudhia Pershad* (2) and *Hari Mohan Singh v. Kali Prosad Chaliba* (3) and Mr. Man Singh referred to these two authorities. Now both these cases dealt with the old Code. In *Dharam Das v. Ajudhia Pershad* (2) it was held that inasmuch as Art. 18 of the Second Schedule of the Court Fees Act did not apply, the only Article applicable was Art. 1 of Sch. I of the Court Fees Act, fixing an *ad valorem* fee in the case. The question was not discussed at any length by the Judges deciding the case and *Hari Mohan Singh v. Kali Prosad Chaliba* (3) is really more in point. There it was held by a Division Bench of the Calcutta High Court, following *Ghulam Khan v. Muham-*

(1) 94 Ind. Cas. 646; A. I. R. 1926 Lah. 403.

(2) 70 P. R. 1881.

(3) 33 O. 11.

mad Hassan (4) that an order having the force of a decree is in fact a decree and it was, therefore, held that the fee payable was an *ad valorem* one. *Ghulam Khan v. Muhammad Hassan* (4) was a case decided ultimately by their Lordships of the Judicial Committee who state at page 182* as follows: "The decisions of the Indian Courts on those provisions are so conflicting that it may be useful to state generally the conclusions at which their Lordships have arrived on some of the disputed points brought to their attention in the course of the argument." They then proceeded to lay down certain definite conclusions and the third one is as follows:—

"Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award..... Proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award as the case may be—under the cognizance of the Court. That is or may be a litigious proceeding cause may be shown against the application and it would seem that the order made thereon is a decree within the meaning of that expression, as defined in the Civil Procedure Code."

Now, it seems to me that their Lordships held that an order directing the filing of an award in circumstances such as exist in the present case fell within the definition of the expression "decree" as defined in the Civil Procedure Code, that was then in force. A reference to that definition and the definition of the term or expression 'decree' as found in the existing Code are different in material particulars. There it was specifically laid down that an order specified in s. 588 of the old Code is not within this definition. A reference to s. 588 shows that an order filing an award or refusing to file an award in an arbitration without the intervention of the Court was not made appealable. It follows, therefore, that such an order fell within the definition of the expression "decree" and the necessary consequences followed. In the present Code s. 2(2) defines a decree and specifically states that

the expression shall not include (1) any adjudication from which an appeal lies as an appeal from an order; while s. 104 of the Code (new) in sub-s. (f) specifically provided for an appeal against an order filing or refusing to file an award in an arbitration without the intervention of the Court. In these circumstances it appears to me that the order in the present case is not and cannot be regarded as a decree and, therefore, the remarks of their Lordships of the Judicial Committee in *Ghulam Khan v. Muhammad Hassan* (4) do not appear to me to be applicable.

Mr. Man Singh on this being pointed out to him admitted that the order in this case was not a decree but contended that it was an order having the force of a decree. He was, therefore, unable to cite any authority in support of his contention and I am unable myself to see how an order of this nature can have the force of a decree and I would, therefore, hold that for the purposes of Court-fees an appeal from an order under s. 104 (f), Civil Procedure Code, would be governed by Art. 11 of the Second Schedule of the Court Fees Act. In this view I am supported by *Sarwan Pande v. Jagat Pande* (5) a Division Bench of the Allahabad High Court to be found printed in 103 Ind. Cas. 315. At page 316 their Lordships say:—

"In our judgment the Court below was wrong in holding that the memorandum of appeal was not sufficiently stamped. It is to be noted that an appeal is allowed by s. 104 (f), Civil Procedure Code, against an order filing or refusing to file an award without the intervention of the Court. That being so, the present applicant was entitled to file an appeal against the order of the learned Munsif, by which he ordered the award to be made a rule of the Court. The appeal being against an order the requisite Court-fee stamp was of eight annas, and the memorandum of appeal being stamped with a Court-fee stamp of that value, was sufficiently stamped and the appeal ought to have been heard on the merits."

I would, therefore, disallow the preliminary objection and holding that the memorandum of appeal is sufficiently stamped proceed to hear the case on the merits.

Turning to the merits of the case, Mr. Sardha Ram for the plaintiff, Agya Singh,

(4) 29 C. 167; 29 I. A. 51; 6 C. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

*Page of 29 C.—[Ed.]

(5) 103 Ind. Cas. 315; 25 A. L. J. 741.

contended that the agreement to refer to arbitration dated the 20th May, 1925, did not contain any reference to matters which the arbitrator decided, namely, the question as to what contracts were joint and what were not joint was not referred to the arbitrator, nor was the question as to the immoveable property of the partnership. The agreement to refer is to be found translated at page 5 of the printed paper book from lines 14 to 22. This translation Mr. Sardha Ram has admitted to be correct. A reference to this shows that the terms of reference were very wide. It recites that the parties to this appeal had been carrying on work as contractors in partnership for a considerable period and had decided to end the partnership business but that for certain reasons, not given, they were unable to dissolve the partnership amicably. They, therefore, referred their mutual disputes which related to the settlement of partnership accounts to Sardar Bahadur Singh, Sub-Divisional, Officer who was to be the sole arbitrator and whose decision on the matter was to be binding on both.

It appears that the arbitrator went into the question as to whether certain contracts were partnership contracts or not, and also dealt with certain immoveable properties which he found belonged to the partnership. It appears to me that there was nothing either irregular or improper in what the arbitrator did. In order to arrive at a proper settlement of the partnership accounts it seems to me that it was necessary for the arbitrator to ascertain first what the assets and liabilities of the partnership actually were, and in order to discover this it was obviously necessary for him to decide any dispute that might arise during the course of his investigation into the partnership affairs as to whether or not any particular contract or property belonged to and formed part of the partnership assets. In this view I am supported by *Shamlal v. Parshotam Das* (6). I would, therefore, hold that there is no force in this objection and that the agreement to refer to the arbitrator the settlement of the partnership accounts necessarily included a reference of all the disputes that might arise during the arbitration proceedings as to what property was to be taken into account. Had

(6) 58 Ind. Cas. 585; 42 A. 277; 18 A. L. J. 241; 2 U. P. L. R. (A) 104.

there been any moneys belonging to the partnership in Banks or deposited with other persons it is obvious they would have been and ought to have been included in the distribution and, therefore, I consider that the arbitrator rightly included in his distribution the immoveable property which admittedly belonged to the partnership.

Next it was urged that the arbitrator had been guilty of corruption. This matter was put in issue and decided against the appellant by the Court below. The charge of corruption is based on the fact that while the award was given on the 15th July, 1925, the arbitrator had on the 29th June, 1925, deposited a sum of Rs. 20,000 in the Punjab Sind Bank at Amritsar. Admittedly there is no direct connection between this deposit and any malpractice on the part of the arbitrator. We are, however, asked to presume that this payment was the result of a bribe or illegal remuneration given to him by the respondent. It has not been pointed out to us that the arbitrator had no private means of his own, and I think it would be unfair to raise the presumption contended for.

Next it was urged that the award was bad for want of finality, inasmuch as by cl. 5 of the award the appellant was directed to transfer or endorse the separate title-deeds and documents and other valuable securities in favour of the respondent. It was contended that the arbitrator should have drawn up a list of all the documents referred to. Inasmuch as the arbitrator decided, rightly or wrongly, that the respondent was entitled to all the properties represented by these title-deeds and valuable securities, and as far as can be made from the agreements advanced at the Bar, there is no doubt, as to what these title-deeds and valuable securities actually were. I am unable to see that the award is bad on this account. If in the course of the execution of the decree passed in terms of the award any question arises as to whether or not a particular title-deed refers to property which belongs to the partnership the question can be settled by the Executing Court. The decree itself would to my mind be specific enough.

Finally, it was urged that the arbitrator was wrong in administering a special oath to the respondent. It appears that the oath was administered at the instance of the appellant and this objection, therefore, scarcely appears to be within his powers.

In any event the arbitrator has solemnly stated as a witness of the appellant, that the statement was made by the respondent, on the oath as required by the appellant and he filed the record of the statement made which he said had been signed by both appellant and respondent. The appellant went into the witness-box after the arbitrator had given his evidence and did not deny his signature nor contradicted the arbitrator's statement. I must, therefore, hold that there is no substance in this objection.

I would, therefore, dismiss this appeal with costs.

Jai Lal, J.—I agree.

E. L.

Appeal dismissed.

A. N. A.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 787 OF 1927.

November 25, 1927.

Present:—Mr. Justice Tek Chand.

KHANA AND ANOTHER—ACCUSED—

APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal trial—Sentence—Enhancement of sentence in revision, grounds for.

The mere fact that the High Court as a Court of first instance would have passed a heavier sentence is not by itself a sufficient ground for enhancing a sentence in revision especially when the sentence passed by the trial Magistrate is a substantial one.

Empress v. Chuni Lal (1) and Emperor v. Budha (2), relied on.

Appeal from the order of the Magistrate, First Class, exercising enhanced powers under s. 30, Criminal Procedure Code, Shahpur at Sargoda, dated the 29th June, 1927.

Mr. M. L. Puri, for the Appellants.

Mr. Mulk Raj, for the Government Advocate, for the Respondent.

JUDGMENT.—The appellants, Khana and Dosa, have been convicted of an offence under s. 304, Part II, Indian Penal Code, for having caused the death of one Saphiya, a blind old man, 60 years of age, and have been sentenced each to undergo rigorous imprisonment for five years. They have now appealed and the Crown has filed an application for enhancement of sentence.

[His Lordship after dealing with the appeal by the accused proceeded as follows:—]

As to the sentence **Mr. Mulk Raj** for the Crown has strenuously urged that in view of the unprovoked nature of the assault on a helpless, blind old man, the maximum sentence of seven years, which could be passed by the learned trial Magistrate, is the appropriate sentence in a case like this. After fully considering the matter I am, however, of opinion that no adequate grounds have been shown for my interfering on revision with the sentence passed by the Magistrate. The principles upon which this Court acts as a Court of Revision in such applications were enunciated in the well-known case of *Empress v. Chuni Lal (1)* and have been recently re-affirmed by **Mr. Justice Broadway** in *Emperor v. Budha (2)*. The mere fact that I myself sitting as a Court of the first instance would have passed a heavier sentence is not by itself a sufficient ground for interference especially when the sentence passed by the trial Magistrate is a substantial one.

I, therefore, dismiss both the appeal filed by convicts and the petition for enhancement of sentence on behalf of the Crown.

E. L. *Appeal and application dismissed.*

A. N. A.

(1) 7 P. R. 1889 Cr.

(2) 49 Ind. Cas. 772; 7 P. R. 1919 Cr.; 20 Cr. L. J. 212; 48 P. L. R. 1919; 8 P. W. R. 1919 Cr.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 954 OF 1927.

December 2, 1927.

Present:—**Mr. Justice Zafar Ali.**

Musammât LACHHMI BAI AND ANOTHER—

APPELLANTS

versus

DIWAN OHAND—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 25 (1) —Application for custody of minor—Matters to be considered—Welfare of minor.

An order under s. 25 (1), Guardians and Wards Act, cannot be made but for the welfare of the minor and in considering what will be for the welfare of the minor regard must be had to the age, sex and religion of the minor and where the minor is old enough to form an intelligent preference that must also be taken into consideration. [p. 760, cols 1 & 2.]

Sarat Chandra Chakrabati v. Forman (1), followed.

Miscellaneous first appeal from an order of the District Judge, Shahpur at Sargodha, dated the 21st March, 1927 / 9th April, 1927.

Ch. Zafar Ulla Khan, for the Appellants.

Dr. Gokal Chand Narang, for the Respondent.

JUDGMENT.—This is an appeal against an order made by the District Judge of Sargodha under s. 25 of the Guardians and Wards Act. The minor in question named Kushalya is a grown up girl who in company with her mother and a younger sister left the roof of her father Diwan Chand and eloped with a Muhammadan neighbour of the name of Ghulam Yasin. He took them off to Lyallpur where he was prosecuted for kidnapping, etc., and it is stated that he has been convicted and sentenced to imprisonment for one year. In that case *Musammat Kushalya* was examined by Dr. R. T. Wells, Civil Surgeon of Lyallpur, as to her age, and his opinion which he recorded on the 30th March, 1927, was that she was between 15 and 18 years of age—probably nearer 18 than 15. He further found that she was about five months pregnant. While the kidnapping case was pending at Lyallpur, Diwan Chand made an application to the District Judge of Sargodha to be appointed guardian of the persons of her daughters. The District Judge fixed the 29th April, 1927, for hearing the application and ordered that notice thereof should go to the wife of Diwan Chand who was one of the respondents. Before that date, i. e., on the 8th April, Diwan Chand filed another application withdrawing the previous one and praying for immediate action under s. 25 of the Act for the restoration of *Musammat Kushalya* to his custody. The girl who was previously in the judicial lock-up at Lyallpur had been released therefrom and made over by the District Magistrate of Lyallpur to two Muhammadan gentlemen to produce her when required to do so. On the 9th April the District Judge of Sargodha made an order under s. 25 to the effect that the girl should be handed over to her father Diwan Chand. It is against this order that *Musammat Kushalya* and her mother appeal and it is contended on their behalf that an order under cl. (1) of s. 25 cannot be made but "for the welfare of the minor" that in considering "what will be for the welfare of the minor" regard must be had to the age, sex and religion of the minor as laid down in cl. (2) of s. 17 of the Act,

that *Musammat Kushalya* is old enough to form an intelligent preference which should be considered and that having regard to the age of *Musammat Kushalya* and the fact that she has become a Muhammadan and has married a Muhammadan and has borne him a child she should not be compelled to return to her father's custody. This argument is unassailable. In *Sarat Chandra Chakrabati v. Forman* (1) where a minor Hindu over the age of sixteen, who had embraced Christianity and left the house of his elder brother by whom he had been maintained and brought up, appeared to be well able to take care of and provide for himself, and preferred to be left as he was and had sufficient mental capacity to judge what was best for himself, the Court refused to make any order upon an application by the brother for his custody and guardianship.

In the present case it has not yet been definitely proved what *Musammat Kushalya's* age is. According to medical opinion referred to above she is about 18. Her father's allegation is that she is about 14 but it has not yet been proved that the entry in the register of births on which he relies, relates to *Musammat Kushalya*. She might have already attained majority or may attain it after only a few months. She and her mother have been living with strangers for many months and there is nothing to show that she is not happy where she is. The learned District Judge must take into consideration all these facts and if he should consider it necessary he may make an enquiry as to the age of the girl and may also ascertain her wishes before making an order under s. 25. I, therefore, set aside the order under appeal directing that further proceedings, if necessary, may be taken in the light of the observations made above.

R. L.

A. N. A.

Order set aside.

(1) 12 A. 213; A. W. N. (1890) 80; 6 Ind. Dec. (N. S.) 885.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 375 OF 1927.

November 29, 1927.

Present:—Mr. Justice Tek Chand and

Mr. Justice Coldstream.

THAKAR SINGH AND OTHERS—ACCOUSED—

APPELLANTS

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 145, 157—First Information Report, evidentiary value of.

The statement of a person recorded by the Police as a First Information Report can be proved only to corroborate that person's evidence in Court under the provisions of s. 157, Evidence Act, or to impeach his credit by cross-examination under s. 145 of the Act. It cannot be used as substantive evidence against the maker who is subsequently charged with the offence. [p. 763, col. 1.]

Harji v. Emperor (1), referred to.

Criminal appeal from the order of the Sessions Judge, Amritsar, dated the 14th March, 1927.

Diwan Pindi Das, R. B., for the Appellants.

Mr. Sundar Das, for the Government Advocate, for the Respondent.

JUDGMENT.—On the afternoon of the 23rd September, 1926, Puran Singh Jat of Jati Umra in Tarn Taran Tahsil reported at the Police Station of Vairawal, some five kos from his village, that his uncle Harnam Singh had been killed in his village by Kirpa Singh, Atma Singh and Thakar Singh. His story was that Thakar Singh's wife had come across the lane from her house in the morning to search for a cup of her own which she believed to be in possession of *Musammatt Kisso*, Puran Singh's mother. The two women had quarrelled and abused each other and Harnam Singh had remonstrated with both of them. *Musammatt Harnam Kaur* went off home in rage, threatening reprisal by her men-folk. At mid-day when Harnam Singh, attended by his sister-in-law *Kisso*, was bathing in the lane in front of his house, Kirpa Singh and his cousin Atma Singh, armed with spears, and Thakar Singh, Kirpa Singh's brother, carrying a *lathi*, came to the house and abused him and *Musammatt Kisso* for having insulted Harnam Kaur. Kirpa Singh drove his spear into Harnam Singh who died of his wound. The assailants then ran away.

After reciting this story Puran Singh added that before leaving his village to come to the Police Station he had heard a rumour that Kirpa Singh, Atma Singh and Thakar Singh had, after killing Harnam

Singh, also murdered their cousin Narain Singh, the adoptive father of Kirpa Singh, in order "to save their skins."

While this story was being recorded by the Police, Thakar Singh, one of the men accused and a *Lambardar* of Jati Umra, arrived at the Police Station with Bhan Singh another *Lambardar* and told his story. This was that *Musammatt Man Kaur*, Puran Singh's aunt, had come to Narain Singh's house and stolen a cup and was making off with it when Harnam Kaur snatched it from her. *Musammatt Man Kaur* ran off towards her house (that is to say, Harnam Singh's house). Shortly afterwards Harnam Singh, his brother Lachhman Singh, his nephews Puran Singh and Ichhar Singh and two other men Dasaundha Singh and Santa Singh had come to Narain Singh's house enraged at *Musammatt Harnam Kaur's* accusation of *Musammatt Man Kaur*. A dispute arose and Puran Singh had killed Narain Singh with his spear. Thakar Singh explained that he had been informed of all this when he was working in his fields.

The Police accepted Puran Singh's version and challaned Kirpa Singh, Atma Singh and Thakar Singh who were proceeded against in two separate trials on charges of murdering first Harnam Singh and then Narain Singh.

In the case relating to the death of Harnam Singh the prosecution produced three eye-witnesses, Puran Singh (P. W. No. 3), Santa Singh (P. W. No. 4), whose sister-in-law is engaged to Puran Singh's brother, and *Musammatt Kisso* to support the story told by Puran Singh in his First Information Report. Bhan Singh (P. W. No. 9) the *Lambardar* who had accompanied Thakar Singh to the Police Station was also called as a witness. He was not examined for the prosecution, the Public Prosecutor stating that he had nothing to do with the present case. In cross-examination Bhan Singh contradicted the prosecution story and gave an account similar to that which was subsequently put forward in defence by the witnesses produced by the accused.

Puran Singh's and Santa Singh's evidence was that Santa Singh whose house was at a little distance from Harnam Singh had come to the latter's house to borrow a saddle from Puran Singh. *Musammatt Kisso* was pouring water over Harnam Singh outside the gate of the house. Puran

Singh and Santa Singh heard the three accused abusing Harnam Singh and saying that they would have revenge for the abuse given to *Musammat* Harnam Kaur. Puran Singh and Santa Singh went to the doop and saw the accused armed as already stated. Thakar Singh cried out "strike, I will be responsible" and Kirpa Singh drove his spear into Harnam Singh's body. Puran Singh searched in vain for the *chaukidar*. The *Lambardars* Mit Singh and Bhan Singh refused to help him. So he and Santa Singh started for the *Thana* taking with them only Lachhman Singh, the dead man's brother. On the way they picked up Sundar Singh *Lambardar* of Sahsra who went with them to Vairawal. On their way Dasaundha Singh caught them up and told them that the three accused had killed Narain Singh. The evidence of *Musammat* Kisso (P. W. No. 5) was that the three accused came to Harnam Singh's house while she was helping Harnam Singh to wash his head in the lane outside the *haveli* door. They began to abuse Harnam Singh who turned towards them. Thakar Singh said "strike him and we will see what will happen" whereupon Kirpa Singh drove his spear into Harnam Singh's heart. She believed that the accused had come to be revenged because she had refused to allow Harnam Kaur to search her house for a cup which she had lost. *Musammat* Man Kaur corroborated *Musammat* Kisso's story about the quarrel between *Musammat* Kisso and *Musammat* Harnam Kaur over the cup. The medical evidence proves that Harnam Singh had died of a penetrating wound which had pierced his heart.

The accused denied their presence at the spot and called witnesses who supported their plea of *alibi* and also corroborated Bhan Singh's version of the affair. This version which, unlike the report made by Thakar Singh at the Police Station, accounted for the death of both Harnam Singh and Narain Singh, was as follows:—

Musammat Man Kaur, Puran Singh's aunt, had come to the house of the accused in the morning when *Musammat* Harnam Kaur, Thakar Singh's wife, was absent. On returning to her house *Musammat* Harnam Kaur missed a cup. She went to Harnam Singh's house and searched for it there. *Musammat* Kisso and *Musammat* Man Kaur who were in Harnam Singh's house quarrelled with and abused

her. When she was returning to Narain Singh's house Harnam Singh, Puran Singh, Dasaundha Singh, Lachhman Singh, Ichhar Singh and Santa Singh came running after her armed with spears and sticks and a *takwa*, and began to abuse her. Narain Singh came out of his house to interfere and Harnam Singh aimed his spear at *Musammat* Harnam Kaur who ran into the house. Narain Singh snatched the spear from Harnam Singh and stabbed him with it. Then Santa Singh, encouraged by Dasaundha Singh and Ichhar Singh struck Narain Singh with the back of his *takwa*, and Puran Singh and Lachhman Singh wounded him with their spears. *Musammat* Harnam Kaur raised an alarm. People gathered and Harnam Singh's party ran away leaving both bodies outside Narain Singh's door. Before the Police came Harnam Singh's body had been removed to near his house.

This was the evidence of *Musammat* Harnam Kaur (D. W. No. 10) and six witnesses, namely, Mit Singh one of the *Lambardars* (D. W. No. 2), Gurmukh Singh (D. W. No. 1), Harnam Singh (D. W. No. 3), brother of Bhan Singh, Sarmukh Singh (D. W. No. 6), Vir Singh (D. W. No. 9) and Hakam Singh (D. W. No. 17) son of Mit Singh, who professed that they had seen the death of Harnam Singh and Narain Singh, were produced to corroborate it. Mit Singh, Gurmukh Singh and Harnam Singh declared that they were returning together to the village from their fields when they heard an uproar coming from Thakar Singh's house and got there in time to see *Musammat* Harnam Kaur run into her house. Harnam Singh was thrusting at her with his spear when Narain Singh seized it and used it against Harnam Singh who fell down dead. Harnam Singh's party then killed Narain Singh. Sarmukh Singh saw all this from the roof of his house and then went and told Thakar Singh in the fields what had happened. Ishar Singh (D. W. No. 5) on hearing a noise went to the roof of an adjoining house from where he saw Harnam Singh's and Narain Singh's bodies lying in front of Thakar Singh's house. Bhan Singh and Mit Singh *Lambardars*, Gurmukh Singh, Hakam Singh, Harnam Singh, Sarmukh Singh and Tahl Singh were present. On descending into the lane he saw Lachhman Singh and Puran Singh running away with their spears in their hands. Jhanda (D. W. No. 7) a *chaukidar*

of the village, saw both bodies lying in front of Thakar Singh's house before the Police came. He put two sweepers to watch it and went away to prepare fodder for the Police. In his absence Harnam Singh's body was removed to the front of Harnam Singh's house.

The learned Sessions Judge agreeing with the assessors believed Puran Singh's story and convicting Kirpa Singh, Atma Singh and Thakar Singh sentenced them all to death. They have appealed and the sentences of death are before us for confirmation under s. 374 of the Code of Criminal Procedure. We have heard Rai Bahadur Pindi Das who appears for the appellants and Mr. Sundar Das who opposes the appeal on behalf of the Crown and we have carefully considered and weighed the evidence on both sides.

* * * * *

The learned Sessions Judge appears to have attached considerable importance to two matters in deciding that the prosecution story was true:—First the fact that Narain Singh was an older and weaker man than Harnam Singh, and, secondly, the difference between the defence story as told by the witnesses in the Court and the story told to the Police by Thakar Singh which as already noted offered no explanation of Harnam Singh's death. We do not, however, know that Narain Singh was weaker than Harnam Singh and the First Information Report by Thakar Singh cannot be used as substantive evidence against him in this case. The statement of a person recorded by the Police as a First Information Report can be proved to corroborate that person's evidence in Court under the provisions of s. 157 of the Evidence Act or to impeach his credit by cross-examination under s. 145 of the Act provided that the procedure there prescribed is observed. But Thakar Singh was not a witness. The law on this point is clearly laid down in the judgment of *Harji v. Emperor* (1) to which the learned Judge's attention was drawn at the trial. In the present case it is also to be observed that the report by Thakar Singh was hearsay and even if he had been in the witness-box and not in the dock could only have been used to discredit him had he stated at the trial that his informant told him something different from what he reported at the Police Station.

(1) 45 Ind. Cas. 273; 4 P. R. 1918 Cr.; 19 Cr. L. J. 513; 134 P. L. R. 1918.

The report could not, of course, be proved to discredit Sarmukh Singh. No attempt was made to prove that Sarmukh Singh had made a statement to Thakar Singh in the fields different from the statement Sarmukh Singh himself made on solemn affirmation in Court.

Disbelieving the prosecution story and finding it not proved that Kirpa Singh struck the blow which killed Harnam Singh or that he was abetted or instigated by either of the other two appellants we accept their appeal and setting aside the sentences of death acquit Kirpa Singh, Atma Singh and Thakar Singh.

R. L.

A. N. A.

Appeal allowed.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1592
OF 1927.

December 20, 1927.

Present:—Mr. Justice Jai Lal.

MUHAMMAD BAKHSH AND ANOTHER—
ACCUSED—PETITIONERS
versus

EMPEROR—RESPONDENT.

Practice—Counsel's right to argue, limits of.

So long as a Counsel is not guilty of unnecessary repetition or of irrelevant arguments he is entitled to present his client's case as he thinks best and it is no ground for a Judge to decline to hear him or to cut short his argument merely because he is expected by the superior courts to turn out a certain amount of work within a fixed time. [p. 764, col. 1.]

Petition for revision of the order of the Additional District Magistrate, Amritsar, dated the 22nd August, 1927, affirming that of the Magistrate, Second Class, Amritsar, dated the 29th June, 1927.

Mr. Mohsin Shah, for the Petitioners.

JUDGMENT.—Notice was issued in this case on the ground that it was alleged by the petitioners, which allegation was supported by an affidavit of the Counsel, who appeared for them before the lower Appellate Court, that Counsel was not allowed to argue the appellants' case by the Additional District Magistrate.

An explanation has been submitted by the Additional District Magistrate from which it appears that proper opportunity was given by the lower Appellate Court to the Counsel. There may be a difference of opinion as to the sufficiency of the oppor-

tunity given between the Counsel and the Court, but having regard to the explanation of the Additional District Magistrate, I must hold that there is no substance in the complaint. The lower Appellate Court has discussed the evidence produced in support of the prosecution case and agreeing with the trial Court has held the guilt of the petitioners proved. I am unable to arrive at a different conclusion in these proceedings.

The petition for revision is, therefore, dismissed.

The petitioners were released on bail pending the disposal of the petition. They must surrender to their bail and serve out the remaining sentence awarded to them.

Though I have accepted as correct the version of the Additional District Magistrate as to what happened in this case, I desire to point out to him that, as appears from his explanation, he holds an opinion about the respective positions of the Bench and the Bar which, to say the least of it is peculiar; he relies in support of his view upon an extract from some extra-judicial remarks made by a learned Judge of another High Court without regard to the context or the occasion on which it was made. He apparently entertains exaggerated notions as to the alleged tendency of a class of legal practitioners to waste the time of the Courts. The learned Additional District Magistrate must bear in mind that so long as he is not guilty of unnecessary repetition or of irrelevant arguments a Counsel is entitled to present his client's case as he thinks best and it is no ground for a Judge to decline to hear him or to cut short his argument merely because he is expected by the Superior Courts to turn out a certain amount of work within a fixed time.

R. L.

Petition dismissed.

A. N. A.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 1112 OF 1927.

December 16, 1927.

Present:—Mr. Justice Broadway and
Mr. Justice Tek Chand.

SUBA—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Blow aimed at one killing another—Offence—'Transferred malice', doctrine of.

Where a blow aimed at one person lights upon another and kills him, the offence committed by the assailant is the same as it would have been if the blow had struck the intended victim. [p. 765, col. 2.]

Queen v. Phomonee Ahyn (1), referred to.

Criminal appeal from the order of the Sessions Judge, Multan, dated the 8th September 1927.

Mr. Nihal Singh, for the Appellant.

The Government Advocate, for the Respondent.

JUDGMENT.

Tek Chand, J.—The appellant, Suba, an Indian Christian of Chak No. 68/10 R, has been convicted by the Sessions Judge, Multan, under s. 302, Indian Penal Code, for having committed the murder of Musammat Fini, of the same village and has been sentenced to death. He has appealed and the record is also before us under s. 374, Criminal Procedure Code.

The facts are very simple. The wedding of a daughter of Labhu Ram Jhiwar (P. W. No. 2) was being celebrated in the village and on the evening of 8th May, 1927, a number of women had assembled in the courtyard of Labhu's house and were singing. Among those present were Musammat Barkati, the wife of the appellant, and Musammat Fini deceased, a woman 18 years of age, who had been married to Tabu (P. W. No. 5). The appellant came to Labhu's house and asked his wife to go back to her own house as the children were crying. She said that she would go after a short time. He repeated his request three times but she gave the same reply. He accordingly went back. About an hour after, he returned to Labhu's house with a *toka* in his hand and again asked Musammat Barkati to go along with him. She replied that she would go after the sweetmeats had been distributed. He repeated his request and she said "go and I will come." On this he got excited and struck the *toka* at Musammat Barkati, but she evaded it by ducking her head and the blow struck Musammat Fini, who was sitting close to her. Musammat Fini lost consciousness at once and about 10 P. M. she was taken to her own house. On the third day she was removed to the hospital at Khanewal and on the 12th her statement (Ex. P-D) was recorded by Altaf Hussain, Sub-Divisional Officer. She remained in the hospital till her death on the 15th of May.

The post mortem examination was con-

ducted by Dr. S. C. Lal (P. W. No. 1) who found the following injuries on her body.

(1) An incised wound on the left side of the head above the temple cutting through the skull.

(2) A granulating incised wound on the left forearm.

(3) An incised wound on the left thigh skin deep.

(4) A fresh incised wound on the bend of the right elbow.

The witness expressed the opinion that death was due to an abscess in the brain following upon a compound fracture of the skull caused by injury No. 1. It was found that the skull had a cut under the wound $3\frac{1}{4}$ inches long and there was also a small loose piece of bone lying embedded in a small thin blood clot on the outer surface of the dura. The witness was of opinion that this injury (No. 1) had been caused by a direct blow struck with a fair amount of force, but that the other injuries were of a simple nature and were probably caused by the falling of the chopper from the assailant's hand on the body of the victim.

The main facts of the story are fully established by the evidence of Labhu Ram (P. W. No. 2) and *Musammât Jhandi* (P. W. No. 3) and the dying declaration of *Musammât Fini* (Ex. P-D) recorded on the 12th May. Both these witnesses are absolutely disinterested persons and Counsel could not urge anything against their veracity. It is not necessary to discuss their evidence at length as the appellant in the grounds of appeal which he submitted to this Court from Jail practically admitted all the facts. After describing his first visit to Labhu's house, he states that as *Musammât Barkati* had not returned to the house after having promised to do so, he felt much excited and made a search for a *lathi* but as he could not find one he picked up a *toka* and left for Labhu's house so that he might fetch her after holding out threats to her. On her refusing to return he got still more excited and was about to strike her with a back side of the *toka* when Labhu came behind him and seized him. In the course of the struggle "he tried to strike his wife with the back side of the *toka* but she escaped and it hit *Musammât Fini* deceased with the sharp side."

It will be seen that the appellant's version of the occurrence differs from that of the prosecution in one particular only, viz., that he suggests that he aimed a blow at his wife with the back side of *toka* but that Labhu seized him and in the struggle *Musammât Fini* was hit. There is, however, no reason to suppose that the prosecution witnesses have not told the truth on this point. The nature of the injury caused to the head puts the matter absolutely beyond doubt that the appellant struck the blow with blade of the *toka* with considerable force. The sole question to be decided is whether on these facts the appellant has been rightly convicted under s. 302, Indian Penal Code. There is no doubt that the appellant had no intention to cause the death of *Musammât Barkati* but at the same time, it is clear that he attacked her with a heavy lethal weapon in such a manner that he must be presumed to have known that he was likely to cause such bodily injury as would result in death. If, therefore, *Musammât Barkati* had not ducked her head and the blow had struck her, the appellant would have been guilty of an offence under s. 302, Indian Penal Code. The fact that *Musammât Barkati* evaded the blow and it fell upon the unfortunate woman, *Musammât Fini*, who was sitting next to her, does not in any way affect the guilt. Such a case is provided for in s. 301, Indian Penal Code, which embodies a well-established principle of criminal jurisprudence based on the doctrine of "transferred malice." It is settled law that where a blow aimed at one person lights upon another and kills him, the offence committed by the assailant is the same as it would have been if the blow had struck the intended victim. The case is very similar to *Queen v. Phomonee Ahun* (1) where the accused aimed a blow with a sharp *dao* to B but instead of killing B it struck the child in his arms and killed it and it was held that the offence was of murder punishable under s. 301, Indian Penal Code.

For the foregoing reasons I am of opinion that the conviction under s. 302, Indian Penal Code, must be maintained. But I think that the circumstances of the case are such that the lesser penalty should be imposed on the appellant. He did not strike the blow with the intention of

killing his wife and had been provoked by her repeated refusal to go home and take care of the children. I would, therefore, commute the sentence to one of transportation for life.

Broadway, J.—I concur.

R. L.

A. N. A.

Sentence commuted.

LAHORE HIGH COURT.
CRIMINAL REVISION PETITION No. 1545
OF 1927.

December 9, 1927.

Present:—Mr. Justice Addison.

SOBHA MAL AND ANOTHER—ACCUSED

—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 403—Acquittal—Conviction (on same facts for another offence, legality of).

Where an accused has once been acquitted he cannot be convicted on the same set of facts for an offence different from the one with which he was charged and acquitted.

Petition for revision of the order of the Additional District Magistrate, Multan, dated the 10th May, 1926, modifying that of the Magistrate, Second Class, Lodhran, dated the 28th January, 1926.

Mr. H. D. Bhalla, for the Petitioners.

JUDGMENT.—A complaint against the petitioner for erecting a small portion of their new building on public land was preferred by the Small Towns Committee of Kahror. It was under s. 447, Indian Penal Code. It was dismissed and the petitioners were acquitted under the provisions of s. 247, Criminal Procedure Code. On the same facts the Committee decided to institute a fresh complaint but to change the section to 291, Indian Penal Code. The petitioners have been sentenced after trial on the new complaint to Rs. 10 fine each, under s. 38 of the Small Towns Act, the maximum penalty under that section being Rs. 20. It is clear that a conviction could have been had under s. 38 of the Small Towns Act on the first complaint. That being so, the petitioners could not be tried again, as laid down in s. 403, Criminal Procedure Code. I accept the petition, set aside the convictions of the petitioners, and direct that the fines, if paid, be refunded.

R. L.

A. N. A.

Petition accepted.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 981 OF 1927.

January 3, 1928.

Present:—Mr. Justice Fforde and
Mr. Justice Jai Lal.

HAYAT AND OTHERS—ACCUSED

—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal trial—Cross-cases—Use of evidence in one case as evidence in the other, illegality of—Criminal Procedure Code (Act V of 1898), s. 162—Statements before Police, proper use of.

It is illegal to use as evidence in a case evidence led in another case which was not recorded in the presence of the accused. [p. 767, col. 1.]

Allu v. Emperor (1) and *Madat Khan v. Emperor* (2), followed.

Statements made by prosecution witnesses before the Investigating Police Officers cannot be used except for the limited purpose specified in s. 162 of the Criminal Procedure Code. [p. 768, col. 2.]

Criminal appeal from an order of the Sessions Judge, Mianwali, dated the 30th August, 1927.

Mr. Ram Chand Manchanda, for the Appellants.

Mr. Des Raj Sawhney, Public Prosecutor, for the Respondent.

JUDGMENT.

Jai Lal, J.—On the 15th of February, 1927, at the village Silwan in the District of Mianwali there was a serious fight between two parties in which injuries were received by Hussain, Musammatt Bhagan, Akbar, Azam, Sher and Dalil on one side, and Muhammad son of Tana and Sikan-dar on the other. Hussain died as a result of the injuries received by him and consequently members of both the parties were sent up for trial to the Court of the Sessions Judge, Mianwali. They were tried with the result that 8 men of one party, which may for the sake of brevity be called the party of Darhal, were convicted for having taken part in the fight. Out of these Zaman was convicted under s. 302 of the Indian Penal Code and sentenced to death, while the other convicts were sentenced to various terms of imprisonment. Of the other party, i. e., the party of the Silus, two men named Akbar, son of Azam and Sher son of Muhammad were convicted under s. 324 of the Indian Penal Code and sentenced to two years rigorous imprisonment each. The convicts on both sides have appealed to this Court and the case of Zaman is also before us on the question of confirmation of the sentence of death.

At the outset the learned Counsel, who appeared for the convicts belonging to the Darhal party, raised an objection that the trial in this case was conducted by the learned Sessions Judge in a manner which is not warranted by law and that in consequence his clients have been seriously prejudiced. What appears to have happened is this. Ostensibly two separate trials were held in respect of the accused of each party. The trial of the accused of the Darhal party was held first. After the entire evidence against them had been recorded by the learned Sessions Judge the assessors apparently desired that they would like to hear the evidence in the cross-case before giving their opinion in the case in which the evidence had been recorded. The Sessions Judge considered this request to be reasonable and directed that the case be put up with the cross-case and that the opinion of the assessors be recorded after the evidence in that case had been heard. He thereupon proceeded to record the evidence in the cross-case and then heard the arguments in both the cases, and thereafter recorded the opinion of the assessors and then proceeded to judgment. He wrote one judgment in both the cases and an examination thereof shows that he did not keep the evidence recorded in each case separate but made use of the evidence recorded in the cross case in arriving at his conclusions about the matters in controversy between the parties in the first case.

I will give illustrations what the learned Sessions Judge has done by quoting from his judgment. One matter in controversy was whether there was previous enmity between the two contending parties or whether it was a sudden fight between them. The learned Sessions Judge makes the following remarks:—

"The previous enmity * * * is admitted by both the parties (*vide* Hayat accused as P. W. No. 2, in the cross-case and Sher, P. W. No. 5, a Silu, in the main case) * * * Hayat accused as P. W. No. 2 in the cross-case has stated that about a year or two ago Ramzan son of Musa and he himself with some other men found Hussain deceased cutting their crop and gave him a thrashing * * *. Again, "Langar, P. W. No. 17, has now professed his ignorance of this previous incident but he was confronted under s. 162 of the Crimi-

nal Procedure Code with the statement which he made to the Police and in which he himself related this incident as an eyewitness. I have, therefore, no doubt that previous to the main incident an altercation did take place between Hayat and Dalil in Raja's field * * *"

Then with regard to the actual incident there were two versions and in arriving at his conclusion about them the learned Sessions Judge remarked:—"The fact that the whole of this story about Dalil's party coming up to *Chah* Muhammadwala and then following Hayat and Muhammad son of Tana through the fields in pursuit is entirely baseless became clear when Hayat accused as P. W. No. 2 and Muhammad son of Tana as P. W. No. 5 were confronted under s. 162, Criminal Procedure Code, with what they stated to the Police. What Hayat stated to the Police (*vide* Ex. D O) was * * *". Then follows what Hayat had stated before the Police. Again, "Umar, D. W. No. 2, in the main case also confronted with his statement before the Police (Ex. D-E) which also showed that his present version was different from what he had stated originally * * *". The judgment of the learned Sessions Judge is full of similar instances of quotations from the evidence in the cross-case when discussing the guilt of the accused in the first case and *vice versa* and from the statements made before the Investigating Police Officers, which were brought on the record under s. 162 of the Criminal Procedure Code.

It will thus be observed that the learned Sessions Judge has committed several irregularities. In deciding one case he has not only used the evidence in the other case and which was not recorded in the presence of the accused, but has contravened the express provisions of s. 162 of the Criminal Procedure Code, which prohibit the use of the statements made before the Investigating Police Officers except in the limited purpose of contradicting the testimony of the prosecution witnesses produced at the trial. He has used the statements made during the investigation and proved in the cross-case as substantive evidence in the first case. There is absolutely no sanction in law for such a procedure. The opinion of the assessors was influenced by material which could not be legally considered at all and the conclusions of the learned Sessions

Judge are based on irrelevant and inadmissible evidence. The contention of the learned Counsel, therefore, has force that his clients have been seriously prejudiced by the manner in which the learned Sessions Judge has dealt with the case.

In the present case there are graver irregularities than existed in *Allu v. Emperor* (1) where the trials of the accused in two cross-cases were held to be illegal and the cases remanded for fresh trial. What happened in these cases was that, after the prosecution evidence in one case had been finished, the accused and their Counsel stated that they wanted the prosecution witnesses in the cross-case treated as defence-witnesses in their case. Then the cross-case was taken up and after the prosecution evidence had been recorded the accused in that case were asked whether they wanted to call witnesses for defence, they said, no, but added that they wanted the evidence of three prosecution witnesses in the other case to be treated as defence evidence in their case. The arguments were then heard and after the opinions of the assessors had been recorded judgment was pronounced. Eforde, J., expressed himself as follows as to the manner in which those trials were conducted:—

"In my opinion the procedure adopted in the cases before us is wholly unauthorised by law in several particulars. In the first place, though the two sets of accused were intended to have been tried separately—as in law they were bound to be—the mode in which they were actually tried was in substance a joint trial. Only prosecution evidence appears on each record; speeches of Counsel were reserved till the close of both cases, the assessors were not asked to give their findings until both cases had been closed, and only one set of findings was recorded in respect of both and, finally, one composite judgment was delivered. * * *

"In all penal matters the utmost strictness in procedure must be observed. Where the mode in which a criminal trial is to be conducted is, as it is in India, regulated by Statute, a departure from the authorized procedure can itself only be sanctioned by a statutory provision. There is no such sanction for any of the illegalities which have taken place in the course of

(1) 75 Ind. Cas. 980; 4 Lah. 376; A. I. R. 1924 Lah. 104; 6 Lah. L. J. 103; 25 Cr. L. J. 68.

the trial of these two cases. * * * Finally the learned Judge held that the trials being prohibited in the mode in which they were conducted were, therefore, illegal. These observations apply with greater force to the circumstances of the present case because a procedure somewhat similar to that in the reported case was adopted therein with this difference that in the present case there is not even the consent of the accused and the Counsel to the unauthorized procedure, and use has been made as substantive evidence of statements made before the Investigating Police Officers.

Reference may also be made to *Madat Khan v. Emperor* (1) in which their Lordships of the Privy Council, advised His Majesty that special leave to appeal should be granted because of the apprehension that it might turn out that evidence which was given in one trial had been improperly imported into a quite separate trial. In that case there were two separate trials in two cross-cases but they were dealt with in one judgment by the Appellate Court. When the case was finally discussed before the Judicial Committee on its merits it turned out that the apprehension mentioned above was not well-founded because in spite of there being one judgment in two cases the Appellate Court had kept the evidence in both separate and it did not appear that the evidence recorded in one case was used as evidence in the other. The appeal was finally dismissed by their Lordships but the reasons given for granting special leave to appeal show that if the apprehension alluded to above had turned out to be well-founded the convictions would probably have been set aside.

In my opinion, therefore, the manner in which the learned Sessions Judge has dealt with the two cases is not warranted by any sanction of law and the trials in these cases were illegal. I would, therefore, accept these appeals, set aside the convictions of the appellants in both cases and order a re-trial of the appellants in the manner provided by law.

I wish to make it clear that this order does not authorize the re-trial of those of

(2) 100 Ind. Cas. 126; 8 Lah. 193; (1927) M. W. N. 68; A. I. R. 1927 P. C. 26; 31 O. W. N. 393; 28 P. L. R. 167; 52 M. L. J. 441; 28 Cr. L. J. 254; 25 L. W. 724; 29 Bom. L. R. 784; 45 O. L. J. 408; 7 A. I. Cr. R. 350 (P. C.).

the accused, who have been acquitted by the Sessions Judge.

Fforde, J.—I agree.

R. L. *Convictions set aside.*

A. N. A.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 713 OF 1927.

December 21, 1927.

Present:—Mr. Justice Dalip Singh.

NATHU LAL AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

NUR MUHAMMAD AND OTHERS—

DEFENDANTS—RESPONDENTS.

Easement—Easement to bury the dead, acquisition of.

An easement to bury the dead is not known to law and cannot, therefore, be acquired by prescription.

Mangat Ram v. Siraj-ul-Hasan (2) and *Gopal Krishna Sil v. Abdul Samad Chaudhuri* (3), relied on.

Second appeal from a decree of the Court of the Senior Subordinate Judge, with enhanced appellate powers, Rohtak, dated the 30th November, 1926, reversing that of the Subordinate Judge, Fourth Class, Jhajjar, District Rohtak, dated the 23rd June, 1926.

Mr. Shamair Chand, for the Appellants.

Mr. Basant Krishna, for Mirza Jalal-ud-din, for the Respondents.

JUDGMENT.—The plaintiffs in this case sued a person Nazir for possession of five *biswansis* of land alleging that Nazir had recently buried a relative of his in this plot of land which belonged to the plaintiffs. Nazir pleaded his own possession first but later on certain butchers of Jhajjar town applied to be made parties in the case alleging that the butcher community were in possession of the piece of land and had been using it as graveyard. Nazir supported them. After some dispute the Court ordered that Noor Muhammad and Abdul Razzak should represent the butcher community and the remaining butchers were ordered to be notified by proclamation under O. I. r. 8 of the Civil Procedure Code. For some reasons or others, however, when the suit was decreed it was decreed against Nazir and against 11 other persons who had applied to be made parties on behalf of the butchers. Ismail, one of these persons had died during the pendency of the suit

and no legal representative of his had ever been brought on the record presumably because only Noor Muhammad and Abdul Razzak were considered to be parties to the suit as representing the entire butcher community. The defendants appealed making Ismail also one of the appellants although he was dead and the learned District Judge dismissed the plaintiffs' suit holding that though the plaintiffs were admittedly owners of the land in dispute which was waste land yet the revenue entries from 1879 to 1924 showed that the butchers had been continuously in possession and, therefore, that the butchers were entitled to remain in possession as the conditions under which they had got possession and could cease to have possession were not known, there being only a reference to the conditions in the exhibit of the *jamabandi* entry which had been put on the record.

The plaintiffs have appealed to this Court and the first question was whether the death of Ismail had made any difference. Counsel for the plaintiffs had applied to bring the legal representatives of Ismail on to the record but he withdrew this application on the ground that Ismail was not a necessary party on the authority of *Udmi v. Hira* (1). Counsel for the respondents had nothing to urge against this when Counsel for appellants withdrew his application and, therefore, the appeal proceeded.

Counsel for the appellants urges that the learned District Judge is wrong in saying that the order of the Tahsildar correcting the revenue entries passed on the 18th of March, 1924, was made behind the backs of the present defendants or without calling upon them to show cause. There is nothing in the copy to show this and the copy refers to the fact that this change was made in *jalsa am*. Further the learned District Judge omitted to consider that the defendants had not pleaded adverse possession in the trial Court but had only claimed a title by prescription to bury their dead. As held in *Mangat Ram v. Siraj-ul-Hasan* (2) following *Gopal Krishna Sil v. Abdul Samad Chaudhuri* (3) there is no such easement known to law. Further the learned District Judge does not find that the defendants are in adverse posses-

(1) 60 Ind. Cas. 111; 1 Lab. 582; 2 Lab. L. J. 762.

(2) 78 Ind. Cas. 152; A. I. R. 1924 Lab. 42; 6 Lab. L. J. 130.

(3) 66 Ind. Cas. 640; 34 C. L. J. 319.

sion but he finds that the defendants are in possession on certain conditions and it is not known whether these conditions have been fulfilled or whether there has been a breach of those conditions, but where the plaintiffs establish their title it is for the defendants to prove how that title is limited *qua* possession. The learned District Judge further found that the present plaintiffs had purchased the land with full knowledge of the revenue record entries. There is nothing on the record to show that the plaintiffs had any knowledge of these entries or their predecessors-in-interest had any such knowledge. But be that as it may, it seems to me that the case of the defendants in the trial Court was simply one of a right acquired by prescription and as there is no such right and as the plaintiffs have proved their title the plaintiffs were entitled to succeed.

I, therefore, accept the appeal and restore the decree of the trial Court with costs throughout.

A. N. A.

Appeal accepted.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 411 OF 1927.

January 10, 1928.

Present :—Mr. Justice Addison.

DINA NATH AND ANOTHER—PLAINTIFFS
—PETITIONERS

versus

BIR SINGH AND OTHERS—DEFENDANTS—
RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 77—Suit for possession against co-tenant—Jurisdiction of Civil Court.

A suit for possession by an occupancy tenant against a co-occupancy tenant as such is cognizable by a Civil Court even though the latter happens to be one of the landlords.

Petition for revision of an order of the District Judge, Hoshiarpur, dated the 2nd April, 1927, affirming that of the Subordinate Judge, Fourth Class, Hoshiarpur, dated the 9th June, 1926.

Mr. *Fakir Chand*, for the Petitioners.

Mr. *Sundar Das*, for the Respondents.

JUDGMENT.—The plaintiffs and one *Lalu* were joint occupancy tenants of land. According to the plaint the tenancy was partitioned between them and an area of 251 *kānals* 3 *marlas* was allotted to the plaintiffs. Though the plaintiffs claim to

have been in possession of this area yet the *khata* entry continued to show joint possession of all the occupancy tenants in the Revenue Records. *Lalu* died and was succeeded as heir by one *Lal Chand*, who is also one of the proprietors of the land. *Lal Chand*'s name was mutated in the Revenue Records in place of *Lalu*'s the occupancy holding still being shown to be possessed jointly. The plaintiffs' case is that this *Lal Chand* has taken possession of the area allotted to them in his capacity of occupancy tenant. They have, therefore, sued in the Civil Courts for a decree against him for possession of the land in question, and in the alternative they have prayed that, if this cannot be granted, they should be given their proper share of the whole *khata*. The two Courts below have held that this is a case of dispossession of an occupancy tenant by a landlord and that the suit is, therefore, cognizable by the Revenue Courts. Against this finding this revision petition has been preferred.

It is quite clear that the case of the plaintiffs is that *Lal Chand*, one of the occupancy tenants, has dispossessed the plaintiffs, who are the other occupancy tenants. It is not their case that they have been dispossessed by the landlords though the occupancy tenant in question is one of the landlords. It is obvious that he does not represent the body of landlords. The suit is against him alone in his capacity of a joint occupancy tenant in the same *khata* with the plaintiffs. As such it is clearly cognizable by the Civil Courts.

In the circumstances I accept the revision, set aside the order of the Courts below and direct the Subordinate Judge Fourth Class, to receive the plaint and proceed with the suit in accordance with law.

R. L.

Petition accepted.

LAHORE HIGH COURT.CRIMINAL REVISION PETITION No. 1544
OF 1927.

December 16, 1927.

Present:—Mr. Justice Jai Lal.

MUHAMMAD ALI AND ANOTHER—ACCUSED
PETITIONERS
versus

EMPEROR—RESPONDENT.

*Police Act (V of 1861), s. 29—'Violation of duty,'
meaning of—Mere neglect, whether offence.*

The expression "violation of duty" as used in s. 29, Police Act, connotes something more than mere non-performance of duty. It may, under certain circumstances, include illegal omission but such omission must be of some positive duty imposed by law and it is the duty of the prosecution affirmatively to prove what, under the circumstances disclosed, a person who is alleged to have been guilty of violation of duty should have done and that he wilfully failed to do that. [p. 771, col. 2; p. 772, col. 1.]

Every negligence does not amount to violation of duty as violation implies a certain amount of volition. [p. 772, col. 1.]

Petition for revision of an order of the Sessions Judge, Ambala, dated the 12th August, 1927, modifying that of the Magistrate, First Class, Ambala, dated the 22nd July, 1927.

Mr. Muhammad Amin, for the Petitioner.

JUDGMENT.—These are two petitions in revision of the order dated the 12th August, 1927, of the Sessions Judge of Ambala whereby he upheld the conviction of the petitioners under s. 29 of the Police Act and sentenced each to a penalty of two months' pay. The petitioners are two Constables of Police employed in the District of Ambala. Muhammad Ali petitioner was directed by the Sub-Inspector to arrest one Qutbu who had been suspected of theft and to produce him before the Sub-Inspector. Muhammad Ali arrested the suspect and obtained the assistance of Wali Muhammad Constable at the *thana* of Bilaspur, and was escorting him to the place where he expected to find the Sub-Inspector. He was, it appears, riding a mare while the Constable Wali Muhammad was actually holding the handcuffs of Qutbu. There were some other persons with this party who apparently had been deputed to accompany these Constables by a *lambardar* at their request. In the way the prisoner escaped.

The petitioners were sent up for trial and were found by the Magistrate guilty of having intentionally allowed Qutbu to escape. On appeal the Sessions Judge has

disbelieved the testimony of the prosecution witnesses and has acquitted the petitioners of the offence of having intentionally allowed the prisoner to escape. He has, however, convicted them of being guilty of a "violation of duty" inasmuch as, according to him, they were guilty of negligence in permitting the prisoner to escape. The following extract from the judgment of the learned Sessions Judge is an indication of what facts he was prepared to find.

"In my view the only important ground of appeal is the fifth, that there is no evidence on the record to prove that the escape of Qutbu was due either to negligence or intention on the part of the appellants. The Chamar witnesses gave a story which appears to be improbable.....In my opinion this evidence is clearly false and the Chamars have concealed the true facts or else did not accompany the party at all. Had the appellants intended to permit Qutbu to escape it is most improbable that they would have asked Gami *lambardar* to furnish three Chamars to accompany them.....I can only conclude, therefore, that the appellants never intended to allow Qutbu to escape. The only question remains whether they permitted him to escape negligently. As already stated there is no evidence at all of the actual manner of escape but the Chamars have said that Muhammad Ali was riding a horse and that Wali Muhammad was holding the handcuffs. In default of any explanation by the appellants as to the actual manner of escape, I think it should be held that the escape was due to the negligence of the two appellants for had Muhammad Ali been on the look out he could have chased the man being on horse-back and had Wali Muhammad been on the look out he would not have lost hold of the handcuffs."

The learned Judge then discusses the question whether "negligent sufferance of escape" is an offence under s. 29 of the Police Act and after answering it in the affirmative on the ground that it falls within the expression "violation of duty" as used in that section upheld the conviction.

Now I have carefully considered the question of interpretation of the expression "violation of duty" as used in s. 29 of the Police Act and am of opinion that it connotes something more than mere non-

performance of duty. The word 'violation' implies something more than mere omission to perform a duty. It may under certain circumstances include 'illegal omission' but such omission must be of some positive duty imposed by law and it is the duty of the prosecution affirmatively to prove what, under the circumstances disclosed, a person who is alleged to have been guilty of violation of duty should have done and that he wilfully failed to do that. In this case the learned Sessions Judge has convicted the petitioners merely on what appears to me to be an assumption that it was for them to establish the circumstances under which Qutbu escaped from their custody.

The circumstances may and probably do raise an inference of negligence but then I am not prepared to hold that every negligence amounts to violation of duty. In my opinion violation implies a certain amount of volition on the part of the accused. The facts found in this case did not raise any presumption of the existence of any consciousness on the part of the petitioners that they were breaking any rules that governed them in the matter of escorting of the prisoner. The negligence was not wilful. After a careful consideration of the circumstances of the case I have arrived at the conclusion that the facts disclosed do not fall within the ambit of s. 29 of the Police Act.

Accepting his petition I set aside the conviction of the petitioners and direct that the penalty if paid be refunded to them.

R. L.

Petition accepted.

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 1786 OF 1927.

December 16, 1927.

Present:—Mr. Justice Dalip Singh.

G. P. O. HOLMES—ACCUSED—PETITIONER
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 225-B—Resistance to lawful arrest—Intention, necessity of.

An offence under s. 225-B, Penal Code, is committed only when the resistance to arrest is intentional. A person who makes the resistance not knowing that he is being, or is about to be, arrested, cannot, there-

fore, be convicted of an offence under the said section. [p. 772, col. 2.]

Case reported by the Sessions Judge, Ambala with his No. 776-G of 31st October, 1927.

Facts appear from the following report of the Sessions Judge:—

REPORT.—On Sunday, 22nd May, 1927, at Kasauli the accused G. P. O. Holmes came out of the Church after the service and as the Military Church Party were preparing to move off he took up a position in the centre of the road near the Church gate and he began to preach in a loud voice and obstructed the departure of the military party. The District Magistrate ordered the arrest of the accused under s. 118, Cantonment Act. The European Inspector of Police, Mr. Phillips, being in plain clothes ordered Sub-Inspector Kuldip Singh to make the arrest. The latter went up to the accused and took him by the hand and tried to remove him but he struggled. With the help of a Head Constable Zakka Husain and Sergeant Grundy he then removed the accused to a bench on the side of the road where he sat and continued shouting. Captain Hepburn then came up to the accused because he was delaying the marching off of the Church party and succeeded in persuading the accused to go down a side road. Captain Hepburn accompanied him for some way and then advised him to go home. Sub-Inspector Kuldip Singh then followed the accused and informed him that he had been arrested and ordered him to come to Police Station. The accused then turned and went back with the Sub-Inspector to the Police Station without any further trouble. The Magistrate has held that during the episode at the Church gate Sub-Inspector Kuldip Singh arrested the accused by placing his hand upon him and saying in Urdu, "I arrest you" and that by continuing to struggle after his arrest had thus been effected the accused committed an offence under s. 225-B, Indian Penal Code.

An offence under s. 225-B, Indian Penal Code is committed only when the resistance to arrest is intentional; that can only be when the person who makes the resistance knows that he is being or is about to be arrested.

In the case under consideration the whole trend of the evidence strongly suggests that the accused had no understanding of

the fact that he was being arrested but supposed that he was merely being pushed aside to allow the troops to march away. That statement of the accused himself to the Magistrate was also to the effect that he had no knowledge of any arrest of himself at the Church gate but that he was arrested later on his way home and that he offered no resistance to that arrest.

The trend of the evidence referred to above is apparent from the following extracts:—

Mr. Phillips Inspector (P. W. No. 1): "Kuldip Singh caught the accused by the arm and said 'I arrest you.'"

Sergeant Grundy, P. W. No. 2: "I never heard the Sub-Inspector utter the words 'I arrest you.'"

I and the Sub-Inspector caught hold of the accused and tried to remove him. He was still preaching when sitting on the bench. He was very much agitated. He was swinging his arms about and nearly knocked me over.

Zakka Hussain, Head Constable P. W. No. 3 "The Sub-Inspector took the accused by the hand and said 'I arrest you,' He said it in Urdu."

Sub-Inspector Kuldip Singh, P. W. No. 4: "I placed my hand on the accused and said 'Holmes Sahib I arrest you,' but he took no notice owing to his excitement. His arrest was ordered after he started preaching."

Captain Hepburn D. W. No. 1 "I should not say that the accused intentionally wished to resist the Police as he was engrossed in his message to the public. The reason why I went up to the accused was because he was delaying the marching off of the Church party and I thought I could persuade him to move out of the way. I think the accused was sitting on the bench on the side of the road when I went up to him. He continued to speak loudly. It was I who suggested that the accused be taken down the road. I had no idea that the accused had been lawfully apprehended, otherwise I should not have interfered. I was ten yards away when the Police went up to Mr. Holmes in the first instance outside the Church."

The accused in his revision petition had laid particular stress on the evidence of Captain Hepburn.

In my opinion, it is clear from the evidence that the accused was so engrossed in his preaching that he continued to

preach even when forced on to a bench by the side of the road and that he was in a state of considerable excitement. In such a condition it is very probable that the words "I arrest you" spoken by the Sub-Inspector in Urdu made no impression on his attention and that he attributed the handling, which he received from the Police Officer to a desire to move him out of the way of the troops rather than to an attempt to arrest him.

It is recommended that the conviction of G. P. C. Holmes under s. 255-B, Indian Penal Code, be quashed and that the fine be remitted. The fine has not yet been paid. The imprisonment in default of payment has been undergone.

ORDER.—The case has been referred by the learned Sessions Judge. The accused was convicted under s. 225-B, Indian Penal Code, and sentenced to pay a fine of Rs. 50 and in default to suffer one month's simple imprisonment.

For the reasons given by the learned Sessions Judge I agree in thinking that the intention which constitutes the essence of the offence under s. 225-B has not been proved against the accused. He has already undergone the imprisonment in default. I accept the reference and quash the conviction and sentence.

R. L.

Revision accepted.

LAHORE HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION

No. 251 OF 1927.

January 6, 1928.

Present:—Mr. Justice Agha Haidar.

MUHAMMAD AZIM *alias* MALLU

AND OTHERS—ACCUSED—PETITIONERS

versus

NIAZ MUHAMMAD—COMPLAINANT—

RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526—Apprehension that Magistrate would not give effect to certain legal objections—Transfer.

A case cannot be transferred on the sole ground that it is apprehended that in the ultimate judgment which the Magistrate would deliver in the case he would not give effect to certain legal objections which might be taken at the trial.

Petition, under s. 526, Criminal Procedure Code, for transfer of the case from the

Court of the Magistrate, First Class, Hissar, to some other Court of competent jurisdiction in the district or in any other district.

Mr. Niaz Muhammad, for the Petitioners.

Mr. Ghulam Mohy-ud-Din, for the Respondents.

ORDER.—This is an application for the transfer of a case which has been pending in the Court below for a very long time. Under my order dated the 18th November, 1927, a copy of the affidavit and the application for transfer was sent to the Magistrate concerned and also to another Magistrate whose name unfortunately seems to have been dragged in the application. Both these Magistrates have submitted very full and satisfactory explanation. I may observe that the case was originally filed in the Court of a Tabsildar, it was transferred to the Court of Sardar Bishan Singh, Magistrate. The applicants now desire to get the case transferred once again from the Court of this Magistrate to that of some other Magistrate. The affidavit read along with the explanation submitted by the two Magistrates does not make out a sufficiently strong case for my taking the extreme step of ordering the transfer of the case from the Court of the Magistrate where it is pending. It is urged by Mr. Niaz Muhammad, the learned Advocate for the petitioners, that his clients have been already acquitted of the same or similar offences with which they are now charged and that under the provisions of s. 403 they cannot be tried again on the same set of facts. The Magistrate has not so far recorded his judgment. If this point has any substance there is not the slightest doubt that the learned Magistrate would give effect to it. But I have never heard of any application for transfer being successfully made simply because it is apprehended that in the ultimate judgment which the Magistrate would deliver in the case, he would not give effect to a certain legal objection which might be taken at the trial. As stated above no substantial ground has been made out and the affidavit of Mr. Muhammad Sharif, the gentleman who is mentioned in my order dated the 18th of November, 1927, is not forthcoming although Mr. Niaz Muhammad gave me to understand that Mr. Muhammad Sharif would give his affidavit in support of the incident mentioned in para. 3 (d) of the application. The case has been hanging on for a very long time and it is time now that it should come to an end so

far as this Magistrate's Court is concerned. I reject this application and at the same time order that this case should be disposed of at the earlier possible opportunity:

R. L.

• Application rejected.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 931 OF 1927.

January 5, 1928.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Agha Haidar.

GHULAM RASUL *alias* PATHAN

AND OTHERS—ACCUSED—

APPELLANTS

versus

EMPEROR—RESPONDENT.

Evidence—Circumstantial evidence as basis for conviction—Deceased last seen alive with accused—Guilt, whether established—Penal Code (Act XLV of 1860), s. 302.

In order to justify the inference of guilt, the circumstantial evidence, where there is no direct evidence, must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. [p. 175, col. 2.]

The circumstance that the deceased was last seen alive in the company of the accused, though it raises a strong suspicion against the accused is not sufficient to establish his guilt beyond doubt. [*ibid.*]

Criminal appeal from an order of the Sessions Judge, Jhelum, dated the 16th August, 1927.

Mr. Nanak Chand, for the Appellants.

Mr. Mackey, Government Advocate, for the Respondent.

JUDGMENT.—On the morning of the 17th March, 1927, at about 7 A. M., the corpse of one Juma, an Awan of the village Saroba in the District of Jhelum, was found lying on the Railway line about a mile from the village. The medical witness, who performed the *post mortem* examination, has deposed that the deceased had sustained several contused wounds, including a contusion 3" wide round the neck, and that his death was due to strangulation.

Three persons, namely, Ghulam Rasul, his father Lal and his brother-in-law Sher, have been convicted of the murder of Juma; and have each been sentenced, under s. 302, Indian Penal Code, to transportation for life. There can be no doubt that the person or persons who killed

Juma by strangling him committed the offence of murder, but the question for determination is whether the guilt of the prisoners has been established beyond reasonable doubt.

There is evidence to the effect that Juma's wife *Musammatt Bhari Sahd* contracted a liaison with *Ghulam Rasul*, and that the latter was anxious to marry her. He had, therefore, an adequate motive to get rid of the husband. But it is doubtful whether his father would help him in murdering an innocent person in order that he might be able to marry the woman.

Coming now to the evidence dealing with the commission of the crime, we find that there is no eye-witness of the affair, and that the case for the prosecution rests entirely upon circumstantial evidence. Apart from the motive referred to above, the following circumstances have been relied upon by the learned Sessions Judge in support of his finding against the prisoners :

(1) On the night of the 16th March, 1927, *Ghulam Rasul* went to Juma's house in order to fetch him and the two left the house together.

(2) Shortly afterwards Juma was seen in the company of *Ghulam Rasul* and the other prisoners.

(3) An about midnight, the prisoners were seen dragging a person near the Railway line.

While there is sufficient evidence to prove the facts that *Ghulam Rasul* fetched Juma on the night in question from his house, and that the deceased was subsequently seen in the company of the three prisoners, we are not prepared to hold that the third circumstance mentioned above has been established. It is to be observed that *Waris*, who deposes to the fact of dragging, did not disclose his story to the Police until three days after the night in question; and that *Ahmad Din*, who, he says, was with him at that time, has not been examined as a witness to corroborate his testimony. *Waris* also states that he informed his cousin *Taja* of what he had seen near the Railway crossing but *Taja* too has not been examined as a witness. In these circumstances, the testimony of *Waris*, uncorroborated as it is by any other evidence on the record, is wholly insufficient to prove the incriminating circumstance deposed to by him.

The case for the prosecution depends

practically upon the solitary circumstance that Juma was last seen alive in the company of the prisoners; but that circumstance, while raising a strong suspicion against them, cannot sustain their conviction. It has been repeatedly laid down that in order to justify the inference of guilt, the circumstantial evidence, where there is no direct evidence, must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. We do not think that the two circumstances proved in this case exclude every reasonable hypothesis other than that the death of Juma was caused by the prisoners. They are not incompatible with the theory that the prisoners had parted company with Juma before he was assaulted and that, as he was in the habit of going out at night in order to commit theft in the fields of other persons he was done to death while he was attempting to commit theft. Be that as it may, there is absolutely no direct or circumstantial evidence to show that the injuries which resulted in the death of Juma, were caused by one or more of the prisoners.

For the aforesaid reasons we hold that the guilt of the appellants has not been established. We accordingly accept their appeal, and setting aside the conviction and the sentences direct that they be released forthwith.

R. L.

Conviction set aside.

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 809 OF 1927.

January 14, 1928.

Present:—Mr. Justice Addison.

EMPEROR—COMPLAINANT—PETITIONER
versus

KHAIRATI LAL—ACCUSED—RESPONDENT.
Criminal Procedure Code (Act V of 1898), ss. 439, 562—Embezzlement—Sentence—Letting off accused on probation of good conduct—Revision—Interference.

Although in a case of embezzlement usually a sentence of imprisonment should be passed, where the trying Magistrate has given the accused the benefit of s. 562, Criminal Procedure Code, the High Court will not interfere with his order in revision especially after the lapse of a long time. [p. 778, col. 1.]

Emperor v. Partab Narain (1), *Abdul v. Emperor* (2), *Emperor v. Jinga Gamaji* (3) and *Emperor v. Mathro* (4), referred to.

Case reported by the Sessions Judge, Delhi, with his No. 400 of 1927.

FACTS appear from the following report of the Sessions Judge:—

REPORT.—The accused, on conviction by Onaudhri Surat Singh, exercising the powers of a Magistrate of the First Class, in the Delhi District, was sentenced, by order, dated 22nd February, 1927, under s. 562, Criminal Procedure Code, to be released on probation of good conduct on his entering into a bond in a sum of Rs. 5,000 with one surety, in order to appear and receive sentence when called upon to do so during a period of two years from that date and in the meantime to keep the peace and be of good behaviour.

The facts of this case are stated at length in my judgment in Criminal Appeal No. 65 of 1927, decided to-day. Briefly stated, the respondent Khairati Lal, while acting as Cashier and Accountant in the Delhi Branch of the Firm of Messrs. Sulzer Bruderer & Co., committed criminal breach of trust in respect of a sum of Rs. 3,949. Actually, the shortage was Rs. 6,141, but for the purpose of a single trial the Magistrate charged the respondent in respect of Rs. 3,949 only. The case appeared to me to be amply proved and the respondent's appeal has been dismissed.

The question of sentence was considered by the trial Magistrate, who wrote:

"The offence under s. 408, Indian Penal Code, is not compoundable and the executing of a pro-note by the accused and creating a civil liability on himself does not absolve him of the criminal liability. However, the intention of the prosecution can be inferred from such proceedings. Mr. Stark detected the deficiency on 11th July, entered into a civil contract, received a sum of Rs. 41 by way of part payment and allowed the accused to continue to handle cash and hold charge of godown up till the 28th August, 1926, the day of accused's arrest. All these factors go to show that Mr. Stark did not want anything else from accused but the replenishing of the money found short. Accused is a young man and a first offender. He has lost a good job, the like of which he cannot have again. He is described by Mr. Stark himself as a high caste Hindu and of a respectable family. Mr. Stark's negligence in not checking the accounts even once and his loose control over his staff

tempted the unlucky accused to misappropriate the money, the responsibility of which he readily took upon himself by executing Ex. P O pro-note and acting upon it by re-paying Rs. 41 towards it. From this I cannot but conclude that accused's intention to misappropriate the money was temporary. He was responsible for the cash in his charge. He has kept the fair cash account very faithfully and has done no fabrication. All this goes to show that accused was feeling his responsibility and was inclined to admit the misappropriation, if detected, before he had made up the deficiency. To his ill-luck something prevailed upon Mr. Stark and moved him to launch the present prosecution on 28th August, one and a half months afterwards. I am afraid Jail punishment will not have any beneficial effect on the accused because his association with criminals will create criminal tendencies in him. Jail which looks very dreadful to persons of respectable families will no more appear as such to them if once they have been there and associated with criminals whom they cannot avoid. For these reasons I do not propose to send the accused to Jail but apply the principle of *locus penitentie* to him, and order that he shall be released under s. 562, Criminal Procedure Code, on probation of good conduct on his entering into a bond in a sum of Rs. 5,000 with one surety in order to appear and receive sentence when called upon to do so during a period of two years from this date and in the meantime to keep the peace and be of good behaviour".

There is hardly a word of this with which I agree, except where mere facts are mentioned. To speak of "Mr. Stark's negligence in not checking the accounts even once and his loose control over his staff" as tempting "the unlucky accused to misappropriate the money" is, I maintain, to look at the affair from the wrong point of view. The very fact that the appellant was at once the cashier and the accountant made it all the more incumbent on him to keep a careful watch in the interests of his employers, from whom he gained his livelihood. The executing of the pronote cannot be described as a virtuous act on his part. The Magistrate, again, is wrong in concluding that the "accused's intention to misappropriate the money was temporary." I have shown in my judgment

in the criminal appeal that the appellant indulged in a prolonged and systematic career of embezzlement, appropriating more and more as time went on and concealing the shortage by false entries whenever he had to hand over charge before going on leave. The fact that Mr. Stark gave him a *locus poenitentiae* has nothing to do with the administration of criminal justice. Mr. Stark was merely compounding a felony, and it cannot with reason be described as the appellant's ill-luck that Mr. Stark should have eventually decided to prosecute.

Khairati Lal is a Brahman, 36 years old. He is described as being of good family. He is a first offender. The Magistrate styles him as a young man, but that is hardly accurate. Even if his birth and status be taken into consideration, it is, I maintain an abuse of the provisions of s. 562, Criminal Procedure Code, that a crime of this magnitude, extending over so long a period and committed with deliberation and guile, should be treated in the way that it has been treated by the Magistrate. I would press strongly for a substantive term of imprisonment; with or without fine, and I forward the records to the Hon'ble Judges of the High Court for orders.

Mr. Raj Krishna, for the Government Advocate, for the Petitioner.

Lala Moti Sagar, R. B., for the Respondent.

ORDER.—Khairati Lal, a Brahman of Delhi, aged about 36 years, was convicted under s. 408, Indian Penal Code, of embezzling Rs. 3,940 while acting as a Cashier and Accountant of the Delhi Branch of a piece good firm. For reasons given by the Magistrate he was released under s. 562, Criminal Procedure Code, on probation of good conduct on entering into a bond of Rs. 5,000 with one surety for two years. The learned Sessions Judge has dismissed his appeal and has referred the case to this Court for enhancement of the sentence, as in his opinion in this case a substantive term of imprisonment, with or without fine was necessary.

Khairati Lal joined the firm about 1921. He seems to have started his defalcations in December, 1924 and he embezzled the amount mentioned in the charge between that date and October, 1925. After the latter date the defalcations continued. They were detected on the 11th July, 1926.

The fair cash book was properly kept but the rough cash book was not in order. Both were kept by Khairati Lal. It was owing to carelessness on the part of manager in not comparing the cash book with the cash balance that the defalcations were possible. When the manager on the 11th July, 1926, first detected the offence he evidently did not desire to prosecute Khairati Lal. Instead of doing so he got a promissory note for the amount and Khairati Lal in fact repaid Rs. 41 as the first instalment. On the 28th of August, 1926, the manager changed his mind and instituted criminal proceedings. The trial lasted from September, 1926 to the 22nd February, 1927. It was thus nearly a year ago when the order under s. 562, Criminal Procedure Code, was passed.

The learned Counsel appearing for Khairati Lal did not contest the finding of the Courts below that he was guilty, but he urged that the discretion vested in the Magistrate should not be set aside at this length of time even though I was of opinion that this was a case in which a sentence of imprisonment should have been passed. It was held in *Emperor v. Partab Narain* (1) that it was not a sufficient ground for interference on revision that a person given the benefit of the section in question was discovered later to be a previous convict. In *Abdul v. Emperor* (2) the Punjab Chief Court refused to interfere with an order passed under s. 562 in the case of a conviction under s. 457, Indian Penal Code, which was an offence of a serious nature, though at that time s. 457 did not fall within s. 562. In *Emperor v. Jinga Gamaji* (3) a servant, who had stolen gold and silver ornaments and who had been convicted under s. 381, Indian Penal Code, was given the benefit of this section and the High Court refused to interfere. The maximum sentence under s. 381 is the same as under s. 408, namely, seven years, while these offences are of a similar nature.

In my opinion this was a serious case. Khairati Lal was in a position of trust and failed therein. The defalcations went over a fairly long period. Nevertheless s. 562 certainly applied in every respect except

(1) 88 Ind. Cas. 1054; A. I. R. 1925 Oudh 673; 2 O. W. N. 593; 26 Cr. L. J. 1278.

(2) 6 Ind. Cas. 639; 19 P. W. R. 1910 Cr.; 11 Cr. L. J. 389.

(3) 86 Ind. Cas. 70; A. I. R. 1925 Bom. 192; 27 Bom. L. R. 111; 26 Cr. L. J. 694.

the circumstances in which the offence was committed. Though these circumstances were such that imprisonment might well have been given I do not think that it would be proper to interfere with the Magistrate's discretion at this length of time. It would not be in the interest of justice to send him to Jail now. The Sind Judicial Commissioners [*Emperor v. Mathro* (4)] refused to interfere in a case somewhat similar to the present except that in the case before them a great part of the stolen property had been recovered at the instance of the accused, a consideration which they took into account. In this case it is obvious that Khairati Lal wished to repay and started to do so. He also gave a promissory note which was accepted in the first instance. Taking all the above circumstances into consideration, though I agree that usually imprisonment should be given in cases of embezzlement, I must decline to interfere in the present case and I direct the records to be returned.

The revision petition put in on behalf of Khairati Lal was not pressed and is dismissed.

B. L.

Application dismissed.

(4) 92 Ind. Cas. 693; 27 Cr. L. J. 309; A. I. R. 1926 Sind 101; 20 S. L. R. 7.

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 1757 OF 1927.
January 6, 1928.

Present.—Mr. Justice Harrison.

ALAM AND OTHERS—ACCUSED—PETITIONERS
versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 204—Summoning accused piecemeal, legality of.

There is nothing either irregular or improper in a Magistrate first issuing process for one of the accused and then changing his mind and issuing process for all the accused before taking further evidence. [p. 779, col. 1.]

Case reported by the District Magistrate, Gujrat, with his No. 1550 of 1927.

FACTS appear from the following report of the District Magistrate:—

REPORT.—Alam, Sardara, and *Musamm*at Baima applicants file an application against the order of Chaudhri Ranjha Khan, Magistrate First Class, dated 30th August, 1927, summoning them as accused

to answer a complaint filed by one Mahanda under s. 353, Indian Penal Code, in which complainant stated that *Musamm*at Fatima aged 13-14 years is his daughter, that two months previously the accused kidnapped her from his guardianship and are keeping her for illicit intercourse. That a report was made to the Police and the accused promised to give back the girl but subsequently declined. After recording the complainant's statement the Court issued process against Raja accused alone under s. 363, Indian Penal Code, on 15th August, 1927. On the next day of hearing (30th August, 1927) Raja accused did not appear in Court and the Court ordered warrants to issue against the other three accused.

So far as I can see the order of the Magistrate was not justified by any evidence before him. When he issued the order summoning the present applicants he had no further evidence than the statement of complainant which had been made before him on 15th August, 1927. On that date (15th August, 1927) the Magistrate saw cause only to summon one of the accused. The Magistrate has given, as his reason, for issuing the summonses against the other accused, that it appears that they are abetting Raja accused but this reason is not based on any evidence. The action of the Magistrate in first summoning one accused only on 15th August, 1927, and later on 30th August, 1927, summoning three others without recording any further evidence against them seems arbitrary and not in accordance with the procedure laid down in s. 204, Criminal Procedure Code. I cannot find any definite provision in the Code prohibiting a Magistrate from summoning accused persons at any stage in the case, but it is desirable that a ruling should be obtained on this point, as the procedure in the present case seems objectionable. I, therefore, accept the application for revision and under s. 438, Criminal Procedure Code, forward the case to the Hon'ble Judges of the High Court for their orders.

Malik Muhammad Amin, for the Petitioners.

Mr. Abdul Rashid, Assistant Legal Remembrancer, for the Respondent.

ORDER.—A complaint was lodged under ss. 363, 363/109, Indian Penal Code, against four persons. The Magistrate examined the complainant and issued a bailable warrant for one accused only

namely, Raja, who was said to be the principal offender. On the date fixed for hearing that warrant was found to have been returned with the report that the accused had disappeared with the girl. The Magistrate thereupon ordered warrants to issue for the other three accused.

The case has been referred by the District Magistrate of Gujrat on the ground that the second order appears to him to be arbitrary and inasmuch as no further note was recorded after the first order had been passed the procedure was not that contemplated in s. 204, Criminal Procedure Code, As I understand it the view taken by the District Magistrate is that it is irregular or illegal for a Magistrate to issue process piecemeal for the various accused persons in a complaint case unless he has taken some further evidence before issuing the second order. I do not think there is anything either irregular or improper in a Magistrate first issuing process for one and then changing his mind and issuing process for all the accused and here the Magistrate gives his reason, which may be good or bad, but anyhow is a reason. He thought the disappearance of principal accused pointed to the truth of the whole story as told by the complainant and without any further waste of time, he proceeded against all the accused.

I do not think any reason has been shown for interference, and I dismiss the application for revision.

R. L. *Application dismissed.*

LAHORE HIGH COURT.
CRIMINAL MISCELLANEOUS PETITION
No. 255 OF 1927.
January 13, 1928.

Present:—Mr. Justice Zafar Ali.
RAM DIYA AND OTHERS—ACCUSED
—PETITIONERS

versus
EMPEROR—RESPONDENT.

Practice—Criminal trial—Conducting trial on public holiday, propriety of—Transfer of case—Criminal Procedure Code (Act V of 1898), s. 526.

It is highly objectionable on the part of a Magistrate to commence a trial on a gazetted public holiday and to examine all the prosecution witnesses on such day.

Where a Magistrate did so in compliance with the request of a Police Officer:

Held, that there was sufficient ground for transfer inasmuch as the act of the Magistrate was sufficient to create an impression in the mind of the accused that he would not have a fair and impartial trial.

Petition for transfer of the case from the Court of the Magistrate First Class exercising enhanced powers under s. 30 of the Criminal Procedure Code, Rohtak, to some other competent Magistrate for disposal.

Mr. D. C. Ralli, for the Petitioner.

Mr. Abdul Rashid, Assistant Legal Remembrancer, for the Respondent.

ORDER.—This is an application under s. 526 of the Code of Criminal Procedure for the transfer of a case which is now pending in the Court of Sardar Dilbagh Singh, Magistrate First Class at Rohtak.

As appears from the record of the case, the petitioners are charged with an offence punishable under s. 304, Indian Penal Code. They were produced before the said Magistrate for the first time on the 4th of October, 1927, which was a public holiday. He proceeded to record evidence because a Police Officer asked him to do so. After examining one witness he adjourned the case to the next day i.e., the 5th of October, which was also a public holiday being the *Dushera* day and he examined the remaining witnesses on that day.

It was highly objectionable on the part of the Magistrate to commence the trial on a gazetted public holiday and to examine all the prosecution witnesses on a public holiday. As he did so in compliance with the request of a Police Officer, it was sufficient to create an impression in the mind of the accused that they would not have a fair and impartial trial at his hands.

I, therefore, accept this application and direct the District Magistrate to send the case to some other Magistrate subordinate to him who may be competent to try it.

R. L. *Application accepted.*

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 2304 OF 1927.
December 15, 1927.

Present:—Mr. Justice Zafar Ali.
NUR KHAN AND OTHERS—DEFENDANTS
—APPELLANTS

versus

FAQIR ABDULLAH AND ANOTHER
—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 142—Suit

for possession—Plaintiff alleging possession and dispossession—Onus of possession within 12 years—Land remaining uncultivated for certain harvests, effect of, on defendant's possession—Jamabandi—Entry as tenant, meaning of.

Where in a suit for possession the plaintiff alleges possession and dispossession the onus of proving that he has been in possession, within 12 years of the suit lies on him even though the defendants are entered in revenue papers as tenants.

Where a person is shown to have been in possession of land for a number of years, the mere fact that the land was not cultivated during certain harvests does not make him out of possession during that period.

The fact that a person is entered as a tenant in the *jamabandi* merely shows that he is not the owner and that he is in cultivating possession thereof. It does not necessarily show that he is in possession with the permission of the owner.

Second appeal from a decree of the District Judge, Mianwali, dated the 16th June, 1927, reversing that of the Subordinate Judge, Fourth Class, Mianwali, dated the 25th April, 1927.

Mr. S. R. Laul, for the Appellants.

Mr. Ghulam Mohy-ud-Din, for the Respondents.

JUDGMENT.—The land in suit about 4 *kanals* in area was allotted to plaintiffs on a partition which was effected in 1910 and the *jamabandi* of 1911-12 shows that they were in cultivating possession thereof in that year. It appears, however, that they were dispossessed by the defendants in *Rabi* 1913. In the *jamabandi* of that year the defendants were entered as tenants under the plaintiffs, but it is nobody's case that the defendants occupied the land with the permission of the plaintiffs. In a *jamabandi* a person who is not the owner of the land but is in cultivating possession thereof is shown as a tenant-at-will because there is no column therein for describing him as a trespasser. There are columns for owners and tenants only. From *Rabi* 1913 the defendants have all along been in possession the present suit was instituted on the 6th October, 1926, that is more than 12 years after dispossession. The trial Court, therefore, dismissed the suit as barred by time. On appeal the learned District Judge decreed the suit holding that the defendants were tenants under the plaintiffs upto 19th March 1915 on which date the *Patwari* made a note in the crop-inspection register that they were in possession as trespassers, but the plaintiffs have now here stated that the defendants had been in occupation upto March, 1915, as tenants under them. Their case was that the

defendants had taken unlawful possession of the land. As the plaintiffs allege possession and dispossession the question that was rightly put in issue was "whether the suit was within time". The onus of proving that they had been in possession within 12 years before suit lay upon the plaintiffs but they failed to discharge it. If the land remained uncultivated for two harvests, that is *Rabi* 1915 and *Kharif* 1916 it cannot be said that it was not in the possession of the defendants for that period. They continued to be in possession from 1913 though they omitted to cultivate the land for those harvests. The case is on all fours with that reported as *Mian Muhammad v. Sharaf Shah*, (1). I, therefore, accept the appeal and reversing the judgment and decree of the lower Appellate Court restore that of the trial Court. The plaintiffs to pay the defendants' costs throughout.

B. L.

A. N. A.

Appeal accepted.
(1) 89 Ind. Cas. 687; 1 Lah. Cas. 558.

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 576
OF 1927.

IN

CIVIL APPEAL No. 1293 OF 1927.

January 13, 1928.

Present :—Mr. Justice Tek Chand.

D. JOHNSTONE, NOTARY PUBLIC OF
LAHORE—DEFENDANT—PETITIONER
versus

Musammat JAN BIBI—PLAINTIFF AND
C. P. GUPTA—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 5
—Appeal—Stay of execution—Decree-holder not possessed of property, whether ground for stay of execution.

The bare fact that the decree-holder is a woman possessed of no property is no ground for staying execution of the decree during the pendency of an appeal. Appellant's interest can be sufficiently safeguarded by the respondent furnishing security for restitution.

Petition, under O. XLI, r. 5, Civil Procedure Code, for stay of execution proceedings in the lower Court pending the decision of the appeal case noted above by the High Court.

Original Suit No. 162-1 of 1925 decided by the Subordinate Judge, Second Class, Lahore dated the 22nd February, 1927.

Mr. Ram Lal Anand, for the Petitioner.

Mr. J. G. Sethi, for the Respondents.

ORDER.—The plaintiff-respondent,

Musammam Jan Bibi, has obtained a money decree against the defendant-appellant, carrying future interest at Re. 1 per cent. per mensem. She having applied for execution of the decree the appellant has moved this Court to stay execution on the ground that the decree-holder is a woman possessed of no property. This, however is no ground for stay of execution. The appellant's interests can be amply safeguarded by taking security for restitution from the respondent.

Accordingly I direct that *Musammam Jan Bibi*, plaintiff-respondent, shall execute the decree under appeal only after she has furnished security to the satisfaction of the lower Court for the refund of the decretal amount together with interest at Re. 1 per cent. per mensem, in the event of the appeal being accepted.

There will be no order as to costs of to-day's hearing.

R. L.

Order accordingly.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 834 OF 1923.

April 28, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Jai Lal.

DAYA RAM AND OTHERS—DEFENDANTS—
APPELLANTS

versus

HARCHARN DAS—PLAINTIFF GAURI
DIAL AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Hindu Law—Joint family—Alienation by father—Absence of legal necessity—Suit by son to set aside alienation—Alienee, whether entitled to refund of consideration.

A Hindu son is entitled to get a decree setting aside an alienation, by his father of joint family property, which has not been effected for legal necessity or for the payment of an antecedent debt, without any condition being imposed upon him to refund the consideration paid by the alienee to the father. [p. 781, col. 2.]

Badam v. Madho Ram (2), *Kali Charn v. Jaggu* (3) and *Sreenivasa Aiyangar v. Kuppuswami Aiyangar* (5), followed.

Koer Hasmat Rai v. Sunder Das (1) and *Amir v. Kahan Chand* (4), dissented from.

Second appeal from a decree of the Additional District Judge, Hoshiarpur, dated the 18th January, 1923.

Lala Moti Sagar, R S, Messrs. Mehr Chand Mahajan and Hargopal, for the Appellants. Messrs. Jagan Nath Aggarwal and Badri Das, for the Respondents.

JUDGMENT.—This appeal arises out of an action brought by a member of a

joint Hindu family governed by the Mitakshara Law to impeach a sale of the co-parcenary property made by his father. The District Judge, concurring with the Court of first instance, has held that the alienation was not for legal necessity or for payment of the antecedent debts of the father; and while finding that the whole of the consideration passed he has granted a decree setting aside the alienation.

The vendees have preferred a second appeal to this Court, and the question debated before us is whether the plaintiff should, before recovering the property, refund the purchase money unless he shows that the money was raised by the father for immoral or illegal purposes. The contention urged by the appellants is supported by the judgment of a Division Bench of the Calcutta High Court in *Koer Hasmat Rai v. Sunder Das* (1), but that ruling has not been followed by other High Courts. The rule laid down by this Court is to the effect that the decree in favour of the son should not be conditional on his refunding to the vendees the amount paid by them to the father, *vide Badam v. Madho Ram* (2). To the same effect is another judgment of a Division Bench of this Court, *vide Kali Charn v. Jaggu* (3). There are no doubt observations to the contrary in the judgment of *Amir v. Kahan Chand* (4) but it appears that the judgment in *Badam v. Madho Ram* (2), was not brought to the notice of the learned Judges who decided that case. The Madras High Court also has dissented from the doctrine laid down by the Calcutta High Court in *Koer Hasmat Rai v. Sunder Das* (1), and has affirmed the rule that a son is entitled to get a decree setting aside the alienation of the joint family property without any condition being imposed upon him to refund the consideration paid by the alienee to the father, *vide Sreenivasa Aiyangar v. Kuppuswami Aiyangar* (5).

The balance of the authorities is opposed to the contention raised by the appellants, and we are not prepared to dissent from the rule laid down by this Court in *Badam*

(1) 11 C. 396; 10 Ind. Jur. 26; 5 Ind. Dec. (N. S.) 1023.

(2) 66 Ind. Cas. 19; 2 Lah. 338; A. I. R. 1922 Lah. 241.

(3) 67 Ind. Cas. 89.

(4) 73 Ind. Cas. 818; A. I. R. 1923 Lah. 255; 5 Lah. L. J. 431.

(5) 64 Ind. Cas. 698; 44 M. 801; 14 L. W. 76; (1921) M. W. N. 630.

v. *Madho Ram* (2). We accordingly dismiss the appeal with costs.

G. A.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2648 OF 1926.

November 19, 1927.

Present :—Mr. Justice Tek Chand.

RALLA RAM—DEFENDANT—APPELLANT

versus

MUHAMMAD AYUB KHAN—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Execution of decree—Attachment—Objection disallowed—Suit by objector—Burden of proof.

Where an unsuccessful objector to attachment of property in execution of a decree institutes a suit under O. XXI, r. 63, Civil Procedure Code, the onus is upon him to prove that the order of the Executing Court is wrong, and that the property belongs to him.

Second appeal from a decree of the District Judge, Rawalpindi, dated the 31st August, 1927, reversing that of the Sub-Judge, Fourth Class, Rawalpindi.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Feroze-ud-Din*, for the Respondent.

JUDGMENT.—The defendant-appellant having obtained a money decree against one Abdul Aziz proceeded to attach certain goods in a shoe-maker's shop working under the name and style of Muhammad Ayub Khan and also certain money which was due by the Military Department to the said shop. The judgment-debtor's brother-in-law Muhammad Ayub objected to the attachment alleging that the judgment-debtor had no interest in the property attached and that he was the sole owner thereof. The Executing Court allowed the objection in part and held that one half of the attached property belonged to the objector, but that the other half belonged to the judgment-debtor.

Thereupon the objector Muhammad Ayub instituted the present suit under O. XXI, r. 63, Civil Procedure Code, for a declaration that one half of the property, against which attachment was allowed to continue belonged to him and that the judgment-debtor Abdul Aziz had nothing to do with it. The suit was originally decreed by the trial Court, but was dismissed by the District Judge on appeal. In second appeal, Mr. Justice LeRossignol set aside the decree of the District Judge on the ground that it proceeded partly upon inadmissible evidence and remanded the case to the trial Court

for a fresh decision after giving the defendant-decree-holder an opportunity to produce evidence in rebuttal of the plaintiff's case.

After remand fresh evidence was led and the trial Court dismissed Muhammad Ayub's suit holding that he had failed to discharge the onus which lay upon him to prove that he was the sole owner of the attached property. This judgment was set aside on appeal by the learned District Judge and the defendant has preferred a second appeal to this Court.

In deciding the case the learned District Judge seems to have assumed that the onus of establishing that the judgment-debtor Abdul Aziz was a partner with Muhammad Ayub plaintiff in the shop of Muhammad Ayub Muhammad Khan lay upon the decree-holder defendant and he has decided the case on that basis. It is hardly necessary to point out that this view of the law is clearly erroneous. The objector Muhammad Ayub had failed in the Executing Court so far as his objection in respect of one half of the property which is now in dispute and it was he who had instituted the present suit under O. XXI, r. 63. Therefore, the onus lay upon him to prove that the order of the Executing Court was wrong. Further this suit had been dismissed by the trial Court and he had appealed to the District Judge and for this reason also the onus lay very heavily on him to show that the trial Court's judgment was wrong and his contention correct. As the question of onus is of vital importance in this case, especially in view of the fact that the learned District Judge has held that much value could not be attached to the oral evidence produced by either side, his finding cannot be sustained and must be set aside.

The learned Counsel for the respondent referred to the order of Mr. Justice LeRossignol dated the 4th of February, 1926 remanding the case and contended that after the remand it lay upon the defendant-appellant to disprove the plaintiff's contention. This, however, is a wholly erroneous reading of that judgment. The learned Judge could not and did not shift the onus when only a part of the evidence had been heard, and after remand the trial Court rightly dealt with the case as if the onus was on the plaintiff.

Both Counsel have brought to my notice certain documentary evidence which has

not been referred to by the District Judge in his judgment and Mr. Shamair Chand prayed that this Court should go through the evidence and come to an independent finding. But I cannot accede to this request. The learned District Judge should re-hear the case and decide the case on the entire evidence on the record bearing in mind that the onus lies on the plaintiff to prove his contention.

I accordingly accept the appeal, set aside the judgment and decree of the District Judge and remand the case to him for re-decision in accordance with law. Court-fee will be refunded and other costs will be costs in the cause.

G. A.

Appeal accepted.

LAHORE HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION

No. 219 OF 1926.

February 10, 1927.

Present:—Mr. Justice Jai Lal.

AMAR NATH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer, policy of law relating to—Expression of opinion on same facts in previous case, whether ground for transfer.

The policy of law relating to transfer of criminal cases is to inspire confidence in the minds of accused persons in the administration of justice and in the integrity of the Magistracy. The superior Courts are expected to have due regard to the susceptibilities of the accused persons and if they are satisfied that there are reasonable grounds, that is, grounds which a reasonable person placed in the position of an accused person considers to be sufficient, for entertaining an apprehension that the accused will not have a fair and impartial trial in the Court of a Magistrate then an order for transfer should be made. [p. 784, col. 1.]

The mere fact that in a previous case against other accused under the same section and almost on identical facts the Magistrate convicted the accused then before him is no ground for transferring a case. [p. 784, col. 2.]

Joharuddin Sarkar v. Emperor (4) and *Rajani Kanta Dutta v. Emperor* (5), followed.

Badan Singh v. Emperor (1), *Chandramani Sarma v. Kunja Rendi* (2) and *Emperor v. Hargobind* (3); distinguished.

Petition, under s. 526 of the Criminal Procedure Code and s. 107 of the Government of India Act, for transfer of the case from the Court of the Magistrate First Class, Lahore, to any other Court of competent jurisdiction.

Mr. Bhagat Ram Puri, for the Petitioner.

Diwan Ram Lal, Assistant Legal Remembrancer, for the Respondent.

ORDER.—This is an application under s. 526 of the Criminal Procedure Code, for transfer of a case under s. 477-A of the Indian Penal Code pending against the applicant in the Court of Lala Nand Lal Manchanda, Magistrate First Class, and is made on the ground that in a previous case against others under the same section and almost on identical facts the Magistrate convicted the accused then before him and sentenced them to various terms of imprisonment and, therefore, that the Magistrate having already expressed an opinion on the merits of the case the applicant does not expect an independent and unprejudiced expression of opinion in this case. This was the only ground urged before me, the other grounds of the application having been abandoned.

It appears that the applicant Amar Nath was a Director of the Amritsar National Bank Limited which has gone into liquidation. As a result of investigation held during the liquidation proceedings it was decided to prosecute the Directors and others connected with the management of the Bank under s. 477-A for preparing a false balance sheet and for making wrong entries in the statutory report. The applicant, it is alleged, absconded but the others were tried and convicted. He has now been apprehended and sent up for trial under s. 477-A for preparing a false balance sheet and for making wrong entries in the statutory report before the same Magistrate. The question that I have now to decide is whether by the mere fact that the Magistrate has in the case of other persons held on the evidence then produced before him that the balance sheet was false and that the entries in the statutory report were wrong debars him from trying the present applicant. It is not denied that evidence in this case will mainly be the same that was produced in the previous cases though it may be possible for the present accused to raise pleas in his defence which were not raised by the accused in the previous cases. My attention has not been drawn to any passage in which the Magistrate in his previous judgments directly dealt with the case of the applicant or expressed a definite opinion against him. It was at the same time inevitable that the name of Amar Nath should incidentally be mentioned in connection with certain entries which were to be dis-

discussed in those cases. On the facts, therefore, I hold that the Magistrate has not expressed any definite opinion any where in the previous cases against Amar Nath directly, though there is no doubt that the facts of the previous cases and this case are practically identical and that this case will have to be decided mainly on the same prosecution evidence. A large number of authorities were cited on both sides. So far as the principles underlying the transfer of criminal cases from the Courts of Magistrates are concerned there appears to be no controversy. The policy of the law is to inspire confidence in the minds of the accused persons in the administration of justice and in the integrity of the Magistracy. The superior Courts are expected to have due regard to the susceptibilities of the accused persons and if they are satisfied that there are reasonable grounds, that is, grounds which a reasonable person placed in the position of an accused person considers to be sufficient, for entertaining an apprehension that the accused will not have a fair and impartial trial in the Court of Magistrate then an order for transfer should be made. It is the application of this principle that is the subject of controversy in the case before me. Counsel for the applicant cited the case of *Dhanra Lal v. Crown* (Criminal Miscellaneous No. 146 of 1925) in which Zafar Ali, J., transferred a case from the Court of a Magistrate under almost identical circumstances. The full facts of that case are not mentioned in the judgment of the learned Judge in view of the fact that the Counsel for the Crown was unable to say that the apprehension on the part of the accused person was unreasonable. Moreover, in that case the Magistrate in his former judgment had expressed the opinion that there was ample evidence against the petitioner for transfer of the case. This by no means is the case in the present case. In *Badan Singh v. Emperor* (1) a case was transferred from the Court of the Magistrate as he had on a previous occasion expressed his opinion against the accused who was the petitioner for transfer and in *Chandramani Sarma v. Kunja Rendi* (2) the Magistrate had expressed an opinion on the defence evidence in another case and such evidence was prosecution evidence in the subsequent case

(1) A. I. R. 1924 Lah. 257; 5 Lah. L. J. 520.

(2) 4 C. W. N. 824.

between the same parties which was sought to be transferred from his Court. Order for transfer was made in this case also. The facts in both these cases are distinguishable from the present case.

On the other hand *Emperor v. Har-gobind* (3), *Jaharuddin Sarkar v. Emperor* (4) and *Rajani Kanta Dutta v. Emperor*, (5), appear to be authorities against the applicant. The first of these judgments related to two cross-cases of riot, in which the Magistrate having disposed of one of the cases commenced the trial of the second. An application for transfer was made on the ground that in the first case the Magistrate having expressed an opinion unfavourable to the accused in the second case was not competent to try the latter case. The application for transfer was dismissed. In the second of the cases cited above the facts were identical with those of this case. It appears that some of the accused had already been convicted on the same evidence by the Sessions Judge before the remaining accused were placed before him for trial and convicted by him. An objection was taken before the Appellate Court that the Judge having expressed an opinion on the evidence in a previous case was not competent to try the second case. The objection was overruled. The only distinction that it may be possible to draw between that case and the case now before me is that in that case there was no application for transfer made to the High Court but an objection to the competency of the Sessions Judge to take cognizance of the case was taken on appeal. On page 719* of the report, however, the learned Judges held that an application for transfer under the circumstances mentioned would have been rejected. In the last of the cases cited above it was held that the mere expression of opinion against the accused on other evidence in another case does not debar a Magistrate from trying a criminal case against the same accused. In my opinion I would not be exercising a sound discretion, if I were to transfer the present case merely because the Magistrate has on a previous occasion tried other cases against other accused on similar evidence and convicted them.

I must, therefore, dismiss this application.

R. L. *Application dismissed.*

(3) 12 Ind. Cas. 652; 33 A. 583; 12 Cr. L. J. 564.

(4) 31 C. 715; 8 C. W. N. 910; 1 Cr. L. J. 804.

(5) 3 Ind. Cas. 88; 36 C. 904; 10 Cr. L. J. 244.

*Page of 31 C. — [22.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 470 OF 1924.

November 2, 1926.

Present.—Mr. Justice Reilly.

VELU PILLAI AND ANOTHER—PLAINTIFFS

NOS. 2 AND 3—APPELLANTS

versus

THE SECRETARY OF STATE FOR
INDIA IN COUNCIL THROUGH THE
COLLECTOR OF MADURA AND OTHERS

—DEFENDANTS—RESPONDENTS.

[Inam—Service inam—Resumption by Government on ground of land having been dissociated from office in fact, legality of.]

Where the Government resume a service inam, the motive of the Government in making the resumption and their conduct after the resumption do not affect the legality or illegality of their action. [p. 786, col. 1.]

Where a land which had been granted in inam by the Government for proper service in a temple is found to have been for a long time entirely dissociated from the office for the support of which it had been granted and no part of the income of the land was going towards the remuneration of the office-holder, which had to be provided otherwise by the temple trustee and the service did not continue to be performed according to the conditions of the grant within the meaning of rule III (1) of the Inam Rules:

Held, that it was open to the Government to resume the inam and that such resumption was not illegal. [ibid.]

Shankarlal Tapidas v. Secretary of State for India (1) and *Secretary of State for India v. Gulam Mahaboo Khan Sahib* (2), distinguished.

Second appeal against the decree of the Court of the First Additional Subordinate Judge, Madura, in A. S. No. 24 of 1922, preferred against that of the Court of the District Munsif, Madura, in O. S. No. 82 of 1920.

Mr. K. Rajah Iyer, for the Appellants.

The Government Pleader, for the Respondents.

JUDGMENT.—This suit relates to an inam granted for the support of the piper of a temple at Madura. Defendant No. 12 held the office until 1892, when he was dismissed. Plaintiff No. 1 was then appointed by the trustee of the temple and held office until 1914. After him plaintiff No. 3 held office for about 2 years; and since 1916 plaintiff No. 2 has held the office. In 1916, about 3 months after plaintiff No. 2 came into office, the Government resumed the inam, granted pattas for the inam land to the persons in possession of it and ordered that the assessment collected on the land should be paid to the piper in office for the time being, so long as he did his work satisfactorily. In this suit plaintiffs Nos. 1 to 3 pray for a declaration that the

transfer of the land by the Government from inam to ayan is illegal and invalid and for the recovery of the land from the defendants in possession. The suit was dismissed by the District Munsif. Plaintiff No. 1 died while the suit was before the District Munsif. Plaintiffs Nos. 2 and 3 appealed; but the Subordinate Judge confirmed the District Munsif's decree. Plaintiffs Nos. 2 and 3 again appeal.

The extract from the Inam Register of 1863 contained in Ex. XII shows that the inam was a permanent hereditary grant and that it was then confirmed under Rule III (1) of the Inam Rules (Rule III (2) appears to be a misprint) that is, it was to be continued so long as the service continued to be performed according to the conditions of the grant. It appears that defendant No. 12 alienated the whole of the inam land; and it has been found that plaintiff No. 1 was never in possession in any way during the 22 years he held the office, from 1892 to 1914, nor has either plaintiff No. 2 or plaintiff No. 3 ever been in possession. It is contended for the plaintiffs that the resumption of the inam by the Government in 1916 was illegal, because, though the office-holders were out of possession of the inam land, the piping service was being done. The argument is that it is no concern of the Government who gets the benefit of the inam or who does the piping service: so long as the service is done satisfactorily by anyone in the world, the Government cannot resume the inam. Two cases are quoted in support of this position viz., *Shankarlal Tapidas v. Secretary of State for India* (1), and *Secretary of State for India v. Gulam Mahaboo Khan Sahib* (2). The Bombay case is not similar to this case and turned on the construction of a Bombay Act and of the sanad concerned. In *Secretary of State for India v. Ghulam Mahaboo Khan Sahib* (2) it was found that the objects of the trust were being substantially carried out with the income of the trust property and that, therefore, the resumption of the inam on account of some alienation was unjustifiable. In the present case no part of the income of the inam land had been devoted to the object of the grant for at least 24 years before the resumption. Plaintiff No. 1 during the whole period he was piper got his remuneration, not from the inam land,

(1) 51 Ind. Cas. 910; 43 B. 583; 21 Bom. L. R. 668.

(2) 51 Ind. Cas. 362; 42 M. 673; 9 L. W. 587; 37 M. L. J. 71; (1919) M. W. N. 730.

but from a salary paid to him by the temple trustee, and so did plaintiff No. 3. Plaintiff No. 2, it appears, has received also the assessment on the *inam* land since its resumption by the Government, who acted in the matter not for their own benefit but in the interests of the office. The motive of the Government in making the resumption and their conduct after the resumption, however, do not affect the legality or illegality of their action. But I agree with the learned Government Pleader that, when the Government found that for a long period the *inam* land had been entirely dissociated from the office for the support of which it had been granted and that no part of the income of the land was going towards the remuneration of the office-holder, which had to be provided otherwise by the temple trustee, the service did not continue to be performed according to the conditions of the grant within the meaning of Rule III (1) of the Inam Rules. It is to that rule that the plaintiffs appeal, and it is unnecessary for me now to consider the force or validity of the Board's Standing Order No. 54. I agree with the finding of the lower Courts that the resumption of the *inam* was not illegal.

That is enough to dispose of this appeal. But I may mention that plaintiff No. 1, for whom no representative has been brought on record, appears to have had no right to maintain this suit as he was out of office long before the suit was instituted. Moreover it appears that, though he belonged to the *inamdār* family, he was not the next in succession to defendant No. 12 and did not succeed to the office but was appointed to it by the temple trustee; and apart from that it also appears that it was at his instance that the resumption proceedings were started. Plaintiff No. 3 was out of office before the suit was instituted, and it is not now suggested that he had any right to maintain it. The suit is now pressed only for plaintiff No. 2. He is connected with plaintiff No. 1 by having married plaintiff No. 1's brother's granddaughter but does not appear to belong in any way to the *inamdār* family. Exhibit N shows that he was appointed by the temple trustee on probation in August, 1916, and was confirmed in April, 1917. He has no claim to hold the office by hereditary right and for that reason alone cannot maintain this suit. Apart from that the plaintiffs Nos. 2 and 3 professed to

base their right on a "Will and settlement and other documents executed and left in their favour by the 1st plaintiff" which could have given them no such right. None of the plaintiffs, therefore, had any right to maintain the suit.

The appeal is dismissed with costs—2 sets, one for defendant No. 1 and one for the other contesting defendants.

V. N. V.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No.

194 of 1926.

August 3, 1927.

Present :—Mr. Justice Madhavan Nair and
Mr. Justice Ouzgenven.

RAMAPPA NAIDU AND ANOTHER—

PETITIONERS NOS. 2 AND 3—

APPELLANTS

versus

LAKSHMANAN CHETTIAR

AND OTHERS—RESPONDENTS.

Will—Construction—Provision for erecting choultry and carrying on worship—Balance of income to be utilised for family purposes—Properties, whether absolutely dedicated to trust or merely burdened with trust—Provincial Insolvency Act (V of 1920), s. 4—Properties burdened with trust, whether vest in Official Receiver.

A Hindu, by his Will, enjoined his son to build a choultry to instal the Kula Deivam in it for the purpose of family worship, and to conduct a charity, meeting the expenses from the income of the properties. The *patta* for the properties was directed to be transferred in the name of the deity worshipped in the choultry. There was a further provision to the effect that the testator's son and his heirs "from generation to generation according to the rule of primogeniture should, without alienating the properties in any manner, enjoy them paying *sircar kist* therefor and conduct the charity and utilise the balance of the income for family purposes." The last sentence of the Will contained a provision that the testator's son was to inherit all his other properties. It did not appear there were any other properties given to the son, but it was found that the expenditure for the charities even on a lavish scale could not consume any considerable portion of the income and a very large part of it would be left intact for the enjoyment of the family :

Held, on a proper construction of the Will,

(1) that the dominating purpose and intention of the testator in executing the Will was to provide for the members of his family, the maintenance and conduct of the charity having only a subsidiary importance; [p. 789, col. 2.]

(2) that the properties covered by the Will were not

properties absolutely dedicated to a trust but were only properties burdened with a trust; [*ibid.*]

(3) that on the adjudication of the son as insolvent, the properties vested in the Official Receiver for the benefit of the creditors. [*ibid.*]

Appeal against an order of the District Court, Negapatnam, dated the 31st March, 1926, in I. A. No. 661 of 1924, in I. P. No. 10 of 1924.

Mr. C. S. Venkatachariar, for the Appellants.

Mr. S. T. Srinivasagopalachariar, for K. S. Desikan, for the Respondents.

JUDGMENT.—This is an appeal against an order passed by the District Judge of East Tanjore under s. 4 of the Provincial Insolvency Act declaring that the properties forming the subject-matter of this appeal would vest in the Official Receiver for the benefit of the creditors.

The dispute relates to about 68 acres and odd of property which belonged to one Chinna-swami Naidu. He died leaving a Will in favour of his son in which, generally speaking—we will refer to the contents of the Will in detail later—he called upon his son to maintain a choultry and carry on in it the worship of their family deity meeting the expenses from the income of the property, with liberty to utilise the balance of the income for family purposes. His son became an insolvent. The children of the insolvent, the appellants before us, maintain that these properties are trust properties, while the Official Receiver and the creditors contend that the properties belonged to the insolvent with a charge for carrying out the trust mentioned in the Will. If the properties are dedicated to a trust absolutely, it is clear that the Official Receiver cannot claim them; on the other hand, if the properties are only burdened with a trust, they would vest in the Official Receiver for the benefit of the creditors. The question, for our decision, is whether the properties covered by the Will, Ex A are trust properties or whether they are properties belonging to the insolvent with a charge for carrying out the trust mentioned in the Will.

The answer to this question depends upon the correct construction of the Will, Ex. A. It runs in the following terms: "On the site which is situate to the north of my shop and house and for which I have performed the *manai muhurtham* ceremony, my son Gopalakrishnan, shall with the stones, tiles and timber in my

possession, construct a choultry spending an amount to the extent of Rs. 40) from and out of the outstandings set out in schedule A, and instal in the aforesaid choultry the picture of Sri Gopalakrishnan, now kept and worshipped by me in the house as Kula Deivam (family deity). The Monyam, the Karnam and the Tahsildar will be pleased to transfer the *patta* for the *nunja*, *punja*, etc, properties of the value of Rs. 8,300 set out in schedule A in the name of the said deity Gopalakrishnaswamiar, after my death, and my son Gopalakrishnan and his heirs from generation to generation according to the rule of primogeniture, shall, without alienating the properties in any manner enjoy them paying sircar *kist* therefor and conduct the charity mentioned in schedule C and untilise the balance of the income for family purposes. If there be several heirs to my son, the seniors shall enjoy the aforesaid properties and after deducting the amount for charity and sircar *kist*, distribute the balance of the income amongst the heirs according to their shares, and shall never divide the properties. No one except the heirs shall be entitled to ask for an account of the said income. My daughter Janaki and her husband Rangaswami Naidu shall after my death enjoy with all rights the immoveable property of the value of Rs. 800 set out in schedule B as *stridhanam* property. The balance of Rs. 500 remaining after deducting Rs. 400 for the construction of the choultry out of Rs. 900 the amount of outstandings set out in schedule A, shall be vested in the name of the said Gopalakrishnaswami and shall be augmented by my son and his heirs. If there be, by act of Providence, no income for the payment of sircar *kist*, the said sircar *kist* shall be paid from and out of the accretions of the aforesaid amount. In case my son or his heirs, owing to their negligence, fail to augment the income and pay the sircar *kist*, efforts shall be made for payment out of the above amount so as to prevent the land being brought to sale by the sircar. My son Gopalakrishnan shall inherit all my other properties." The nature of the charity mentioned in schedule C will be referred to later.

The property set out in the schedule consists of 61 acres 85 cents, of *nunja* lands, 2 acres 17 cents of *punja* lands, 3 acres and 40 cents of *maniam* lands, 6 houses about 12 tamarind trees, 18) coconut trees

and 177 palm trees. Mr. Venkatachariar argues that the following feature of the Will conclusively shows that the properties referred to in it are trust properties: (1) The son is enjoined to build a choultry to instal the Kula Deivam in it for the purpose of family worship, and to conduct a charity meeting the expenses from the income of the properties, (2) the patta for the schedule properties are directed to be transferred in the name of the deity worshipped in the choultry, and (3) the last sentence in the Will makes a special provision that his son Gopalakrishnan shall inherit all his other properties. It will have been noticed that the Will contains an important provision regarding the enjoyment of the surplus income; it states that the testator's son and his heirs "from generation to generation according to the rule of primogeniture shall without alienating the properties in any manner enjoy them paying sircar *kist* therefor and conduct the charity mentioned in schedule C and utilise the balance of the income for family purposes;" and provision is also made for the management and distribution of this balance of income among the heirs. This feature is pointed out by the respondent as showing that the real intention of the testator in making the gift was to make a provision for his family, though he called upon his son to conduct the charity and the worship from out of the income of the properties. We have to construe all these clauses together and come to our conclusion as to whether the properties covered by the Will are properties dedicated to trust absolutely or whether they are only properties belonging to the insolvent burdened with a trust of carrying out the charity mentioned in the Will.

Various cases have been brought to our notice with reference to the construction of the Will. In all those cases, the decisions turned upon the construction of the terms of the document in each case. In *Mujib-un-nissa v. Abdur Rahim* (1) Lord Robertson said: "Their Lordships have, however, considered the question whether even assuming it to have been registered, the deed is, according to its terms, a valid deed of *wagf*. It will be so if the effect of the deed is to give the property in substance to charitable

uses. It will not be so if the effect is to give the property in substance to the testator's family." This passage lays down the general test to be applied to cases of this description. Is the effect of the deed to give the properties in substance to charitable uses or is its effect to give the properties in substance to the testator's family. In *Sonatun Rysack v. Sreemutty Juggut-soondree Dossee* (2) a Hindu gave all his properties by a Will to his family idol with a direction that the properties should not be divided by his sons but that they should enjoy the surplus profits from generation to generation. Lord Turner, J., was of the opinion: "that although the Will purports to begin with an absolute gift in favour of the idol, it is plain that the testator contemplated that there was to be some distribution of the property according as events might turn out." In *Ashutosh Dutt v. Doorga Churn Chatterjee* (3) a case of a gift by a lady of certain property for the support of the daily worship of an idol with a direction that the surplus if any should be utilised by the family, the Privy Council held that the property was only burdened with a trust and not absolutely dedicated although there was a provision in the Will that the heirs should have no powers of alienation over the properties bequeathed. In *Har Narayan v. Surja Kunwari* (4) the Privy Council had to construe a Will which contained two directions (1) that the moveable and immoveable property of the testator shall be considered to be the property of a certain idol and (2) that the surplus after defraying the expenses of the temple and the pay of the servants shall be used by the heirs to meet their own expenses. Their Lordships' view was that by this Will the testator did not intend to give the property absolutely to the idol. In *Jadu Nath Singh v. Thakur Sita Ramji* (5) and *Ramanadan Chettiar v. Vava Levvai Marakayar* (6) two cases

(2) 8 M. I. A. 66; 2 Suth. P. C. J. 37; 1 Sar. P. C. J. 721; 19 E. R. 455.

(3) 5 C. 438; 6 I. A. 182; 5 C. L. R. 296; 4 Sar. P. C. J. 58; 3 Suth. P. C. J. 694; 3 Ind. Jur. 571; 3 Shome L. R. 32; 2 Ind. Dec. (N. S.) 888 (P. C.).

(4) 63 Ind. Cas. 34; 43 A. 291; 25 C. W. N. 961; 14 L. W. 633; 48 I. A. 143 (P. C.).

(5) 42 Ind. Cas. 225; 39 A. 553; 21 C. W. N. 953; 22 M. L. T. 52; 20 O. C. 200; 19 Bom. L. R. 687; (1917) M. W. N. 605; 26 C. L. J. 309; 4 O. L. J. 586; 44 I. A. 187 (P. C.).

(6) 39 Ind. Cas. 235; 40 M. 116; 32 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C. L. J. 224; 21 M. L. T. 215; 21 C. W. N. 521; 1 P. L. W. 394; 19 Bom. L. R. 401; 44 I. A. 21 (P. C.).

(1) 23 A. 233; 28 I. A. 15; 5 C. W. N. 177; 11 M. L. J. 56; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829 (P. C.).

strongly relied on by the appellant, the Privy Council held having reference to the terms of the deeds, that the dominating purpose and intention shown in the documents was to create a trust, though there were provisions in the deeds for the benefit of the heirs of the grantors.

Applying the principles of these decisions, we think that the learned Judge has construed the Will in this case correctly. It is obvious from the nature of the charity that its maintenance will not cost any considerable sum. The details of the charity to be carried on are thus stated in schedule O to the Will: "for presenting food and performing worship every day for my family deity Sri Gopalakrishnan installed in the choultry mentioned in this Will, a Brahmin should be made to reside therein. He should be given 39 *kalams* of paddy every year and the said worship must be carried on. On the *dwadasi* day of each of the two fortnights of the month not less than five Brahmins should be given food. As there is a *chatra-mainiam* a watershed must be maintained in the said choultry from 10 days before the *chitrapurva* to the end of the hot season and water must be served to all persons who come there. If the Brahmin appointed for doing these things fails to conduct himself properly, my son Gopalakrishnan and his heirs should dismiss the said Brahmin and appoint a substitute. The choultry should be retiled and repairs should be carried out every year." These are the various items on which expenditure had to be met from the income of the property already mentioned. It is obvious that the charity even if it is conducted on a lavish scale cannot consume any considerable portion of the income. We are satisfied that after meeting these expenses a very large amount of the income will be left intact for enjoyment by the family. Though the *patta* of the properties in schedule A has been transferred in the name of the deity, in our opinion, the effect of it is cut down by the provision relating to the enjoyment of the surplus by the members of the family. It was argued that the obvious intention of the testator inferable from the last sentence of the Will that "Gopalakrishnan shall inherit all my other properties" was to dedicate the properties in question to the deity the son having been provided for in another way. But it has

not been shown satisfactorily what properties have been given to Gopalakrishnan. Having regard to all the circumstances, we take the view that the dominating purpose and intention of the testator in executing the Will was to provide for the members of his family. The maintenance and conduct of the charity was only of subsidiary importance. We are, therefore, of opinion that the properties covered by the Will are not properties absolutely dedicated to a trust but are only properties burdened with a trust.

It is then argued that even so, these properties cannot be sold by the Official Receiver as they are not properties of the insolvent, being free from liability to attachment in view of the decision in *Bishen Chand Basawat v. Nadir Hossein* (7). Reading that judgment carefully we are not prepared to accept this argument. We think the properties, in that case were treated as absolute trust properties, which, as we have already pointed out cannot be said about the properties we are dealing with in this case. We are, therefore, of opinion that the appellants cannot succeed in excluding these properties from vesting in the Official Receiver for the benefit of the creditors.

This appeal will, therefore, be dismissed with costs.

V. N. V.

Appeal dismissed.

(7) 15 C. 329; 15 I. A. 1; 12 Ind. Jur. 170; 5 Sar. P. C. J. 113; 7 Ind. Dec. (N. S.) 803 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 999 of 1926.

October 10, 1927.

Present:—Mr. Justice Ananthakrishna Aiyar.

ABDUL GHANI SAHIB AND OTHERS—
PLAINTIFFS—PETITIONERS

versus

N. P. R. M. V. R. M. SUBRAMANIA
CHETTIAR AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, rr. 8, 11
—Representative suit on behalf of community—
Application for leave—Defendant, right of, to object
to leave on the ground that plaintiffs do not possess
confidence of community—"Numerous," meaning of—

Consultation of other members of community, whether necessary.

On an application for leave to sue in a representative capacity on behalf of a community under O. I. r. 8, Civil Procedure Code, it is not competent to the defendants to raise the contention that the plaintiffs do not possess the confidence of the community as regards the conduct of the suit. In a proper case, if necessary, the Court may under O. I. r. 11, give the conduct of the suit to such persons as it deems proper, and the Court could also add as parties any persons who wish to be on the record *eo nomine*, if proper grounds are made out for the course being taken. [p 791, col. 1]

Where the number of persons interested in a suit is 100, they are sufficiently "numerous" within the meaning of O. I. r. 8. [p 791, col. 2.]

It is not necessary that in a representative suit the plaintiffs should prove that they consulted the community or obtained the opinion of the majority in support of the suit. [*ibid.*]

Sivathal Periyava Nadar v. Nana, Chuna, Velmuruga Nadar (6), followed.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif, Koilpatti, dated the 27th September 1926, in I. A. No. 471 of 1926, in O. S. No. 165 of 1926.

Mr. T. L. Venkatarama Iyer, for the Petitioners.

Mr. T. M. Ramaswami, for the Respondents.

JUDGMENT.—This is a revision petition filed by the plaintiffs in Suit No. 165 of 1926 on the file of the District Munsif's Court of Koilpatti against an order passed by the learned District Munsif by which he declined to grant leave to the petitioners-plaintiffs to institute the suit on behalf of the village community under O. I. r. 8 of the Civil Procedure Code. The brother of the 1st defendant claiming title to certain properties under purchase from the alleged original owners—V. M. Brothers—instituted a suit against the present 2nd defendant as manager of the endowment and got a decree in his favour.

In the present plaint, the plaintiffs, three Muhammadans of the locality, alleged that the decree in the prior suit was not binding upon the trust, and the plaintiffs prayed to have the appropriate reliefs granted to them in respect of the matter. At the time of filing the plaint, the plaintiffs also put in an application under O. I. r. 8 of the Civil Procedure Code for permission to be allowed to sue on behalf of the village community interested in the matter. Defendants Nos. 1 and 5 (Oshettias) are the main contesting defendants. They opposed the application. The learned District Munsif

has upheld the objections of defendants Nos. 1 and 5 and he has dismissed the application filed under O. I. r. 8 by the plaintiffs.

The main arguments mentioned in the order of the lower Court may be noticed. The first argument is that the plaintiffs have not proved that the community concerned has got confidence in the plaintiffs. In fact the defendants contend that the community concerned has no confidence in the plaintiffs and that accordingly the plaintiffs are not entitled to be granted the permission prayed for. In answer to this, I may say that O. I. r. 8 has been enacted for the benefit of the defendants only to this extent, namely, to prevent multiplicity of suits against them. The question whether the community concerned has got confidence in the plaintiffs as regards the proper conduct of the suit, or not, is not a matter with which the contesting defendants Nos. 1 and 5 members of a totally different community, are concerned, and it is not a point for them to take. The law has provided sufficient safeguards in case the community concerned resolve to conduct the suit in any other manner, such as by taking the conduct of the suit from out of the hands of the plaintiffs or otherwise. I may in this connection refer to the decision of the Privy Council in the Kamudi case, *Sanakaralinga Nadan v. Rajeswara Dorai* (1). There a suit was instituted under s. 30 of the old Civil Procedure Code which corresponded to O. I. r. 8 of the present Code. After the first Court granted a decree in favour of the plaintiff, the plaintiff on record thought it proper to compromise with the contesting defendants. Then the *cestui que trust* and other persons who were also interested in the institution and consequently in the proper conduct of the suit—wanted to be allowed to be made themselves parties and also to have the further conduct of the litigation taken out of the hands of the original plaintiff, who by compromising with the defendants after obtaining a decree, showed himself to be no longer worthy of the confidence of the community concerned. The Privy Council at page 250 of I L. R. 31 Mad. make this observation :

"After the case had been decided in his favour by the Subordinate Judge, this person (the original plaintiff) thought fit to

(1) 31 M. 236; 12 O. W. N. 946; 4 M. L. T. 101; 18 M. L. J. 387; 10 Bom. L. R. 781; 8 C. L. J. 230; 35 I. A. 176 (P. C.).

profess that he now saw that he and the Judge were wrong; and he asked that the judgment should be altered, so as to defeat his own action. A very sordid motive for this surrender was specifically asserted and has not been disproved. The Court, on being applied to, very properly re-inforced the cause of the worshippers of the temple by joining certain new plaintiffs to the original plaintiff" and allowed the persons to further conduct the litigation. The decision of the High Court on an application filed by such new people to be made parties and the reasons which generally guide the Court in granting such application will be found referred to in *Narayanamasami Gurukkal v. Vellusamy Tever* (2). Under the Code—under O. I, r. 11—the Court may give the conduct of the suit to such persons as it deems proper, and the Court also could add as parties any persons who wish to be on the record *eo nomine*, if proper grounds were made out for that course being taken. For the above reasons, I am of opinion that the learned District Munsif was not right in the first reason that he gave for not allowing permission asked for in this particular case.

The second reason given by the District Munsif is that he cannot say that the number of villagers concerned is "numerous" within the meaning of O. I, r. 8. What particular number would really constitute "numerous" within the meaning of O. I, r. 8 need not be definitely laid down in this particular case. There is evidence that about a hundred people are interested in this matter and the learned District Munsif himself says: "There are not over 100 Muhammadans even according to the petitioners." The Munsif evidently thinks that '100' is not a sufficient number to justify the appellation "numerous" within the meaning of this rule, I am not able to agree with him. If authority is necessary on such a point, fortunately in Mulla's Commentaries under O. I, r. 8, the learned commentator mentions a case decided by the English Courts, *Andrews v. Salmon* (3) where it seems to have been held that where the number of defendants was thirty, it was considered as "numerous" within the meaning of the corresponding English Rule, O. XVI, r. 9 of the Supreme Court Rules. Having regard to the facts before

me, namely, that the number of persons interested in this suit would be about 100, I have no doubt that this is a case to which O. I, r. 8 should be held to be applicable.

Then it was argued that the plaintiffs have not adduced evidence that they consulted the community or that, they have got the opinion of the majority in their favour, before filing the suit. The extreme view held in Bombay [*vide Harkisondas Shival v. Chhaganlal Narsidas* (4)] has not been followed in Madras. See *Katha Pillai v. Kanakasundaram Pillai* (5) and *Sivathal Periyava Nadar v. Nana, Chuna, Velmuruga Nadar* (6). As has been remarked in these Madras cases, it is not possible to have the opinion of every member of the community as regards the advisability of instituting the suit, ascertained before filing such a suit. Usually, there are factions in communities, and even if otherwise, it often happens that there are very honest differences of opinion in the matter of filing such suits. In fact, the case of *Sivathal Periyava Nadar v. Nana, Chuna, Velmuruga Nadar* (6), specifically states that it is not necessary that the plaintiffs should prove that they consulted the community or obtained the opinion of the majority in support of the suit.

The learned District Munsif states finally that the granting of permission may inflict great hardship on the community. As at present advised, I am not able to appreciate this argument. Either the community is in favour of filing the suit or it is not. If it is in favour of filing the suit it could not have any cause for complaint. If, on the other hand, the community is not in favour of such a suit, then the only persons who would really suffer would be the plaintiffs whose suit would ultimately be dismissed and the plaintiff would have to pay costs of the defendants. As has been remarked by Srinivasa Aiyangar, J., in *Hameed Labbai v. Mahamud Khatter Pillai* (7) the object of filing such a petition and obtaining permission under it is to prevent the defendants from being vexed by further suits by other members of the community. Thus if the community be not in favour of such a suit all that the defendants have to care is to meet the present plaintiffs and succeed

(4) 33 Ind. Cas. 264; 40 B.L. 158; 18 Bom. L. R. 1.

(5) 45 Ind. Cas. 423; 8 L. W. 160; 24 M. L. T. 20; (1918) M. W. N. 791.

(6) 61 Ind. Cas. 618; 30 M. L. T. 47.

(7) 86 Ind. Cas. 1022; A. I. R. 1925 Mad. 985.

(2) 12 M. L. J. 355.

(3) (1868 W.N. 102).

In this suit, I am not now concerned with the other rights, if any, of the community in respect of this matter. For these reasons, I am not able to appreciate this argument either of the learned District Munsif.

My attention was also drawn to an observation in the recent Full Bench decision of this Court in *Sonachalam Pillai v. Kumaravela Chettiar* (8), where the Court, after quoting a sentence from the decision in *Market v. Knight Steamship Co.* (9) remarks, that it is not necessary in cases of suits filed under O. I. R. 8, to obtain the permission or consent of the community concerned.

Finally it was argued by Mr. T. M. Ramaswami Aiyar, the learned Vakil for the respondent, that the more appropriate remedy that the plaintiffs would be entitled to is to file a suit, after obtaining the necessary sanction, under s. 92 of the Civil Procedure Code. I will assume for the present that the plaintiffs would be entitled to that remedy also, but as remarked by Bacon, Vice-Chancellor in *Bryant v. Bull* (10):

"There may be other remedies, there may be 500 or 5,000 other remedies, but if this one remedy which the applicant has invoked be one of them, there is no reason why he should not have recourse to this one out of the 5,000." On principle one cannot agree that the defendants should be the judge to dictate the choice of the remedies on behalf of the plaintiffs.

For these reasons I think that the order passed by the learned District Munsif is erroneous and should be set aside as I think that he has failed to exercise his jurisdiction in the matter in accordance with legal principles applicable to the case. I think the petitioners are entitled to their costs in this Court. Costs of the petition in the lower Court will abide the result of the suit.

V. N. V.

Order set aside.

(8) 107 Ind. Cas. 625; A. I. R. 1928 Mad. 77; 54 M. L. J. 8; I. L. T. 40 Mad. 23; 27 L. W. 216.

(9) (1910) 2 K. B. 1021 at p. 1039; 79 L. J. K. B. 939; 103 L. T. 369.

(10) (1879) 10 Ch. D. 153 at p. 156; 48 L. J. Ch. 325; 39 L. T. 470; 27 W. R. 246.

MADRAS HIGH COURT.

APPEALS AGAINST APPELLATE ORDERS NOS. 125 TO 140 OF 1924.

September 6, 1927.

Present:—Mr. Justice Madhavan Nair and Mr. Justice Jackson.

GIRIDHARDOSS CO., AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

PARA APPADURAI AND OTHERS

—DEFENDANTS—RESPONDENTS.

Decree—Forfeiture clause, whether can be relieved against in decrees which are not by consent.

A provision for forfeiture for non-payment in a decree cannot be relieved against unless the decree is a consent decree. [p. 793, col. 1.]

Where a decree in favour of a landlord directed the defendants-tenants to pay the arrears of rent within a particular time, and in default the defendants were to be evicted and the plaintiff put in possession, and the defendants defaulted to pay:

Held, that the plaintiff was entitled to enforce the clause for possession and the forfeiture could not be relieved against. [p. 793, col. 2.]

Appeals against the orders of the District Court, North Arcot, in Appeal Suits Nos. 210, 213 to 218, 222, 225, 229, 231 to 233, 235 239 and 245 of 1923 preferred respectively against those of the Court of the District Munsif, Ranipet.

Mr. A. C. Sampath Ayyanger, for the Appellants.

Mr. S. A. Seshadri, for the Respondents.

JUDGMENT.—The learned District Judge is in error in thinking that a provision for forfeiture for non-payment in a decree can be relieved against unless the decree is a consent decree. It will be found in all cases where relief has been granted, the decrees were consent decrees. On account of this error I am unable to accept the District Judge's judgment in these cases.

But before disposing of these cases finally, I must call for a finding by the lower Appellate Court in each of the appeals before me on the following points:—

Whether any moneys were due, if so, how much, by the tenant or tenants on 20th February, 1920, under cl. (4) of the decree (in A. S. No. 49 of 1919 on the file of the Court of the Temporary Subordinate Judge of Vellore), and when, if at all, such sums were paid by the tenants into Court or to the landlords. Plaintiffs have filed a list, schedule A, with an affidavit setting forth this amount, the correctness of which will, however, have to be tested. In construing the words "arrears of rent" in cl. (4) of the decree, they will be taken to include

rent for *Faslis* 1324 to 1326 with mesne profits or damages claimed in the shape of rent as cl. (1) of the decree puts it *for any portion of these faslis*.

Findings will be submitted in four weeks. Time allowed for objections is seven days.

After the return of the findings of the lower Appellate Court upon the issue referred for trial, the Court delivered the following

JUDGMENT.—These appeals arise out of applications filed by landholders for enforcing the terms of a decree fixing a certain time for payments and ordering eviction of the tenants from the land in default of payments within that time. The decree that is sought to be executed (decree in A. S. No. 49 of 1919) Temporary Sub-Court, Vellore, after directing the defendant to pay rent to the plaintiffs mesne profits and costs in para. 4 stated: "that if the defendants pay plaintiffs the arrears of rent together with interest at 6 per cent. per annum and costs in both Courts on or before 20th February, 1920, he be relieved as against forfeiture and in case of default the defendant be evicted and the plaintiffs be put in possession of the respective land." The respondents before us not having paid their dues under the decree before the 20th of February, 1920, the plaintiffs applied for enforcing the terms and getting possession of the property. It has now been found by the lower Courts that the payments made by the respondents were after the specified date, namely, 20th February, 1920. These payments were all accepted by the plaintiffs. The lower Courts construing the decree as a consent decree allowed relief against forfeiture and dismissed the plaintiffs' applications. It is now argued that since the decree is not a consent decree no relief against forfeiture can be granted. No decision has been brought to our notice where relief against forfeiture has been granted in connection with decrees other than consent-decrees. The case in *Krishnarao Pandurang Barve v. Balvant Kashav Patil* (1) must be treated as a decision on the special facts of that case.

The main argument on behalf of the respondents is that the plaintiffs have already received money due to them under the decree and that, therefore, it is not open

(1) 89 Ind. Cas. 217; 27 Bom. L. R. 678; A. I. R. 1925 Bom. 401.

to them to proceed with these applications. On a construction of the decree, we think it is open to the plaintiffs to enforce payment of the money even if the respondents did not pay, by resorting to Court. Therefore, the fact that they have received the amounts when paid by the respondents cannot be allowed to influence the decision of the case. It is undisputed that default has been made by the respondents. The plaintiffs are now asking that effect may be given to the forfeiture clause in consequence of this default. A good deal was said on behalf of the respondents to the effect that there was a delay in getting the decree from the Court and within the limited time left to them they could not possibly have made the payments in time. If they were pressed for time, the obvious course for them was to resort to the Court that passed the decree and get an extension of time. That they have not done. In the circumstances, the only conclusion we can arrive at is that inasmuch as the defendants had defaulted in making the payments, cl. 4 of the decree should be given effect to. Therefore, we would set aside the orders of the lower Courts and ask the first Court to take up the applications on file and dispose of them according to law. The respondents will pay the appellants' costs.

We fix the fee at Rs. 15 in each case.

It is not denied that in three of the appeals (Appeals Nos. 132, 135 and 137) payments were made before the 20th of February, 1920, they are, therefore, dismissed.

V. N. V.

Orders set aside.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 58 OF 1926.
September 12, 1927.

Present:—Mr. Justice Ramesam
and Mr. Justice Cornish.

R. A. ARUNACHELA IYAH—APPELLANT
versus

LOUIS DREYFUS & Co.—RESPONDENTS.

Contract Act (IX of 1872), s. 251—Partnership for trading purposes—Dubash agreement with arbitration clause by one partner without consent of others, whether binding on firm—Arbitration—Arbitrator, right of, to decide binding nature of reference—Arbitration Act (IX of 1899)—Umpire, whether bound to state case to Court on questions of law—Obtaining legal opinion independently of parties, whether misconduct.

A partner in an ordinary trading concern has no power in the absence of authority to bind the firm by a Dubash agreement containing a clause for submission to arbitration. [P. 798, col. 1.]

Stead v. Salt (1), *Ram Bharose v. Kallu Mal* (3) and *Datoobhoy v. Valtu* (4), relied on.

A limited Tribunal such as that of an Arbitrator or Umpire has no jurisdiction to decide finally whether the reference to arbitration is itself valid and binding on all the parties before it. [p. 797, col. 1.]

Under the Arbitration Act, an Umpire is not bound at the instance of one of the parties to the reference to state a case to the Court on questions of law arising for decision. [p. 800, col. 2.]

It is legal misconduct on the part of an Umpire who is not a lawyer to take independent legal opinion without reference to the parties on a matter arising for decision before him. [p. 801, col. 1.]

[Case-law considered.]

Under the Arbitration Act unlike the Civil Procedure Code, it is not necessary to convert an award into a decree of Court that there should be an order that it should be filed. Where a notice of motion to set aside an award is dismissed, the award becomes a decree and a right of appeal arises. [p. 801, col. 2.]

Per *Cornish, J.*—It is incumbent on an arbitrator who takes legal or other expert advice, which may influence his determination of the matter submitted to him for arbitration to inform the parties of his intention to do so and of the question upon which the advice is taken, since otherwise the parties have no assurance that the advice is material, or given on a correct statement of the case, or that the arbitrator has not, in effect, simply surrendered his responsibility for deciding the question in arbitration to the opinion of his legal or other adviser. [p. 804, col. 2.]

Appeal from the judgments of Mr. Justice Waller, dated the 30th April, 1925, and 6th May, 1926 and the order dated the 5th May, 1926, passed in the exercise of the Ordinary Original Civil Jurisdiction.

In the matter of the Indian Arbitration Act IX of 1899 and in the matter of the Arbitration between Louis Dreyfus & Co., and R. K. Rajagopala Ayyar and Brothers and R. S. Arunachela Iyah.

Messrs. Nugent Grant and K. S. Krishnaswami Aiyangar, for the Appellant.

Mr. Vere Mockett for the Respondents.

JUDGMENT.

Ramesam, J.—This is an appeal from an order of our brother Waller, J., sitting on the original side on a notice of motion taken up by the appellant in connection with an arbitration under the Indian Arbitration Act, IX of 1899.

It will now be convenient to set forth the history of the transactions giving rise to the arbitration and the further proceedings in Court. There was a firm of merchants known as R. K. Rajagopala Ayyar and brothers consisting of R. K. Rajagopala Ayyar and his cousin (not strictly brother) R. A. Arunachela Iyah.

When exactly the partnership was formed is not clear. A firm of French merchants known as Louis Dreyfus & Co., who are the respondents before us, having their Head Office at Karachi in Sind (Bombay Presidency) have a branch at Madras managed through their agent Mr. Hartman. In 1918 Rajagopala Ayyar happened to go to Northern India on pilgrimage and he visited the Head Office of Messrs. Dreyfus & Co., and there entered into a Dubash agreement, dated 25th April, 1918. Under this agreement Messrs. Dreyfus & Co. were to make offers for the purchase of ground-nuts, castor seeds and any other article required by them to Rajagopala Ayyar and Brothers who were known as Dubashes and they were to be at liberty to accept such offers and they were to deliver the goods free on board at Madras or any one of three other ports, in performance of the contract. Clause 15 of the agreement provided that if any difference should arise between the parties the matter should be referred to arbitration which was to be governed by the Indian Arbitration Act of 1899. After he returned from Karachi certain contracts were completed by acceptance. Most of these were in August and a few in September. The present dispute before us relates to four of those contracts numbered as 15, 16, 18 and 19, dated 27th and 28th August, 1918. In the letters of acceptance relating to those contracts the last sentence is "Conditions as per agreement with you, dated the 25th April, 1918". But these letters are signed by R. K. Rajagopala Ayyar and Brothers, it not being clear who is the person who actually put the signature for the firm. About the end of September the other partner Arunachela Iyah proposed to the agent Mr. Hartman that another person should be appointed Dubash in the place of Rajagopala Iyah and another agreement should be drawn up accordingly as Rajagopala Ayyar was mismanaging the business. Mr. Hartman did not consent, but he produced the written agreement of 25th April, and asked Arunachela Iyah to sign it but the latter refused. Negotiations for a new arrangement went on for sometime; meanwhile Rajagopala Iyah fell dangerously ill and while he was in his death bed on 3rd November, a new agreement was prepared and signed. This agreement consists of seven clauses, the first four relating to the performance of

the old contracts and the next three relating to new Dubashes. On 4th November Rajagopala Ayyar died. Sometime after a formal draft of a new Dubash agreement was prepared but it was never executed. In September, 1920, the agent of Messrs. Dreyfus & Co., after calling upon Arunachela Iyah to name an Arbitrator which he refused, nominated Mr. Goffe and Mr. Spencer as their arbitrators to settle the differences. They differed and referred the matter to an Umpire named Mr. Chettle on 6th February, 1921. Mr. Chettle then gave his award on 21st February, 1921.

On 10th August, 1921, Arunachela Iyah took out a notice of motion on the original side to set aside the award and all other proceedings therein. The matter came before Phillips, J., and he set aside the award by judgment, dated 6th September, 1921. He held that the Umpire's action was irregular as he sent no notice to Arunachela Iyah. There was an appeal against the judgment of Phillips, J. This was O. S. Appeal No. 96 of 1921*. The appeal came on before Sir Walter Schwabe, C. J., and Wallace, J., who remitted the award for further consideration and as the original Umpire Mr. Chettle was not available another Umpire Mr. Rae was appointed. Mr. Rae has given his award on 19th February, 1923. Again a notice of motion was taken by Arunachela Iyah to set aside the award on 23rd and 26th February, 1923. The matter came on before our brother Waller, J. He dismissed the application and Arunachela Iyah appeals.

Meanwhile, on 2nd February, 1922, Arunachela Iyah filed a suit for damages for breach of the fresh contract. This was C. S. No. 102 of 1922. This was tried by Coutts-Trotter, J., as he then was and was dismissed. There was an appeal by Arunachela Iyah. This appeal was O. S. A. No. 58 of 1923. It came up before Phillips and Odgers, JJ. It was also dismissed. The widow of Rajagopala Ayyar also filed a suit for refund of certain monies against the same company. This was C. S. No. 601 of 1922. Messrs. Dreyfus & Co. applied for stay of further proceedings on the ground that the matter was pending before the Umpire. This application came on before our brother Kumaraswami Sastriar, J., and he ordered that, as the matter

involved important questions of law they should be reserved for consideration by the Court, and only then the arbitrator should proceed with the matter. The further history of this suit O. S. No. 601 of 1922 need not be stated here as it has no bearing on the appeal before us. I have set forth these proceedings in connection with O. S. A. No. 96 of 1921 and 58 of 1923 and a portion of C. S. No. 601 of 1922, because all the relevant documents connected with the matter before us are printed in one or other of these proceedings and evidence has also been adduced in them. No further evidence has been taken in the present proceeding and both before Waller, J., and in the appeal before us records of the appeals and the suit were freely referred to by either side without any objection by the opposite party. The documents in O. S. A. No. 96 of 1921 were not marked with any letters or numbers indicating the identity of the exhibit. In O. S. A. No. 58 of 1923 most of the documents were exhibited and there is also a good deal of oral evidence available.

The original Dubash agreement of 25th April, 1918, is Ex. A in that suit. The fresh agreement of 3rd November, 1918, is Ex. H. The draft of the new Dubash agreement is Ex. K. It also appears from the evidence of Arunachela Iyah in that suit that the original partnership between the Rajagopala Ayyar and Arunachela Iyah was formed for the purpose of carrying on business in connection with (1) salt and (2) military contracts (*Vide* deposition of Arunachela Iyah as P. W. No. 1).

Several objections were taken before Waller, J., to the validity of the award by the Umpire, but they were disallowed. In the appeal before us, Mr. Grant, the learned Counsel for the appellant, repeated all the objections. When analysed they fall into two categories. The first set relating to the jurisdiction of the Arbitrators and the Umpire and the second set relating to the alleged misconduct (legal not moral) of the Umpire. These objections will have now to be considered *seriatim*. On the question of the jurisdiction of the Arbitrators and the Umpire, four objections have been taken: (1) that one partner, in the absence of express authority, is not legally entitled to enter into a Dubash agreement of the kind we have in this case with a third party so as to bind his co-partners. It is, therefore, argued that the agreement of 25th

*See 70 Ind. Cas. 353.—[*Ed.*]

April, 1918, does not bind Arunachela Iyah and, therefore, there was no valid reference to arbitration. (2) It is said that the agreement of 25th April, 1918, was superseded by the agreement of 3rd November and as this new agreement did not contain a clause of arbitration there is no binding agreement between the parties entitling a reference to arbitration. (3) It is said that there is no dispute between the parties as all the contracts Nos. 15, 16, 18 and 19 have been performed in pursuance of the modified terms of the agreement of 3rd November, and this is alleged to have been conceded by Mr. Hartman. (4) It is said that when the order of Kumaraswami Sastriar, J., in O. S. No. 601 reserved certain important questions of law for the Court, the Umpire ought not to have decided the same questions which were raised before him on the objections of Arunachela Iyah. This last point, it is said, affects the jurisdiction of the Umpire and also amounts to a misconduct on the part of the Umpire. Besides the above item of misconduct it is also argued that the Umpire is guilty of two other items of misconduct: (1) He took independent legal opinion without the knowledge and behind the back of Arunachela Iyah and (2) though he was asked to state a case to the Court on questions of law he refused to do so.

Coming now to the first of the objections above set forth, namely, that one partner cannot bind another partner by a Dubash agreement made without his consent and, therefore, there was no valid reference to arbitration, Waller, J., held that an arbitration clause is a necessary and usual part of the Dubash agreement and, therefore, that s. 251 of the Contract Act is satisfied. Arunachela Iyah filed a statement of objections on 15th January, 1923, before the Umpire. The third objection covers this point. There is a pencil note in the margin by Mr. Rae to the effect that Dubash agreements contain an arbitration clause. But there is no other formal decision on this matter in his award. The objection was taken by Arunachela Iyah not only in 1923 but from the very beginning. In the first notice of motion which he took out in August 1921 in paras. 5 and 6 of his affidavit he alleged that a written agreement was for the first time produced before him in September, 1918 and he refused to sign it and because he refused to be bound by it the fresh agreement of 3rd November, 1918, was executed. In the

counter-affidavit of Mr. Hartman, para. 4 he refers to the objection of Arunachela Iyah and there is no denial of the allegation in Mr. Hartman's affidavit that Arunachela Iyah came to know of the agreement of 25th April, 1918, for the first time in September, 1918, and that he immediately refused to recognise it and sign it. One party alleged that the first agreement was dropped and, therefore, the fresh agreement of 3rd November was substituted for it, while Mr. Hartman stated in his affidavit that the first agreement was not superseded. Again in the notice of motion taken out in February, 1923, practically the same allegations were made by Arunachela Iyah in paras. 4 and 5 of his affidavit where he says that he found that the said Rajagopala Ayyar entered into contracts without his knowledge and consent and a new person should be taken as Dubash and a fresh Dubash agreement should be drawn up (para. 4 of the affidavit); that when Mr. Hartman produced in September, 1918, the agreement of 25th April, 1918, signed by Rajagopala Ayyar without his knowledge and consent he learnt of the agreement for the first time (para. 5); that he then repudiated the authority of Rajagopala Ayyar to bind him and disputed liability under the Dubash agreement (para. 6). In the counter-affidavit of Mr. Hartman the fact that Arunachela Iyah became aware of the agreement of 25th April, 1918, for the first time in September, 1918, was not denied and the fact that Arunachela Iyah demanded a fresh agreement to be drawn up in the place of the former was expressly admitted. As pointed out by my brother in his judgment, Mr. Hartman in his evidence also admitted that no enquiry was made as to the position of Arunachela Iyah when the agreement of 25th April was made. Phillips, J., when he considered the first notice of motion did not deal with this matter, but in appeal there are some expressions of opinion by Schwabe, O. J., and Wallace, J. Schwabe, O. J., said; "In my judgment the contract of November cannot supersede the old contract *altogether* for the simple reason that R. K. Rajagopala Ayyar was not a party to the new agreement at all. His partner Arunachela Iyah is a party but he is so on his own behalf and not on behalf of the firm. I cannot say that the old firm is a party to the new agreement and, therefore, the old agreement continues in force. Whether or not the claims made under the old contract are

good claims is a matter which will be one of the chief questions which the Umpire will have to decide. All such points are open to the Umpire to decide and I want to say nothing which will in any way fetter his conduct. " As I understand this, his Lordship was of opinion that so far as Rajagopala Ayyar was concerned the agreement of 25th April, 1918, was never superseded, as Arunachela Iyah only was a party to the new agreement. He did not express any opinion on the question whether the agreement was binding on Arunachela Iyah. He left it in doubt whether the old agreement continues in force by leaving the question whether contracts under the old agreement were good claims, to the arbitrator. He has abstained from expressing any opinion on the question whether the old agreement is binding on Arunachela Iyah. In my view he has expressed no kind of final opinion on the matter now being argued. Wallace, J., also said the same thing. He said that whether the new agreement superseded the old agreement was a matter not for this Court at present to settle. Mr. Mockett for the respondent attempted to argue strenuously that Schwabe, C. J., and Wallace, J., left the matter to the Umpire. To a certain extent this is true, but they never said that the Umpire's decision is the final decision on the matter nor that it will not be open to the Court to consider it hereafter. In fact the use of the word "at present" by Wallace, J., shows that they were anxious not to consider the matter then. The point is whether a limited Tribunal such as that of an arbitrator or Umpire has any jurisdiction to decide a matter of this kind finally. That Tribunal, while it may express an opinion, cannot have the last word. If it were so, by a wrong decision it may be conferring on itself jurisdiction which it has not. It is for the Civil Court to find whether there was a proper reference to arbitration and whether the matters were validly before the Arbitrators and the Umpire. If there was no proper agreement binding on Arunachela Iyah then there was no valid reference, the reference being one sided. Section 14 of the Arbitration Act says that if the Court finds that an arbitration or award has been improperly procured the Court may set aside the award. If there is no agreement binding on Arunachela Iyah to submit to arbitration, then the arbitration procured

by Messrs. Dreyfus & Co. was improperly procured. The section says that the Civil Court has to consider the matter. Mr. Mockett does not deny this, but he says that Schwabe, C. J. and Wallace, J., left it to the Umpire for his final decision. I do not find that they have done so. They left it to his temporary decision but never made him the final judge in the matter, nor could they do so. There was an appeal to His Majesty in Council against the decision of Schwabe, C. J., and Wallace, J. After the papers were printed and forwarded to England when the matter came up before the Board of the Judicial Committee none appeared for the appellant and the Board recommended to His Majesty in Council that the appeal ought to be dismissed. This was also the order of His Majesty in Council. I do not see how the dismissal of the appeal to His Majesty in Council improves or carries the matter further than the judgment of Schwabe, C. J., and Wallace, J. The result of the dismissal of the appeal was that the decision of Schwabe, C. J., and Wallace, J., remitting the award to the Umpire became final, and no question can be considered to be decided which they did not decide in their judgment. As I have already said they never decided the question whether there was an agreement binding on Arunachela Iyah and compelling him to submit to arbitration. Waller, J., for the first time considered it. Section 251 of the Contract Act says: "Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member binds his co-partners" This is practically the same as s. 5 of the Partnership Act (English Act of 1890) which says that "the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member." The test according to both the provisions is whether entering into a Dubash agreement with an arbitration clause is usual with partnerships of the kind entered into between Arunachela Iyah and Rajagopala Ayyar and not whether an arbitration clause is usual in Dubash agreements. The question is not what is usual with Dubash agreements but what is usual with partnerships like the one here. The Arbitrator, and also Waller, J., observed that an arbitration clause is usual with Dubash agreements. Though there is no evidence on the matter

perhaps it is true, but this is not the test to be considered. Waller, J., has not considered whether entering into a Dubash agreement with an arbitration clause is usual with partnerships like that of Rajagopala Ayyar and brothers. There is no material on record to support the contention that it is so usual. The partnership of Rajagopala Ayyar and Brothers is like any other trading partnership of merchants in this country. I have already observed that the partnership was originally formed for salt and military contracts. It does not appear necessary to carry on this business that a Dubash agreement with an arbitration clause should be entered into, or even where the business of the partnership extended to dealing in castor seeds and groundnuts does it appear necessary to enter into Dubash agreement with an arbitration clause. This is the view taken in Russel on Arbitration 11th Edition, page 22, and Redmond on Arbitration, page 16. The leading case in England *Stead v. Salt* (1) was followed in *Adams v. Bankhart* (2). These cases have been followed in India in numerous decisions, *vide Ram Bharose v. Kallu Mall* (3), *Datoobhoy v. Vallu* (4), *Mohamad Akbar v. Dwarka Nath Sarkar* (5), *Chandooru Punneyya v. Venu-gopala Rice Factory Co. Ltd.* (6) and *Venkatachellam Chetty v. Ramanathan Chetty* (7).

In my opinion the respondents have misunderstood the real construction of s. 251. I am unable to agree with the decision of Waller, J., as to the construction of s. 251 and on this ground I come to the conclusion that there was no agreement binding on Arunachela Iyah compelling him to submit to arbitration. But if for any reason my conclusion cannot be accepted, there is a further reason why Arunachela Iyah cannot be said to be bound to enter into an arbitration. When he mentioned in September, 1918, that he learnt of this agreement of April for the first time and refused to sign it and thereby

repudiated it and suggested a fresh agreement, Messrs. Dreyfus & Co. far from saying that the old agreement bound him acted upon the suggestion and all the parties executed a fresh agreement, dated 3rd November, marked as Ex. H, in C. S. No. 102 of 1922. According to this agreement No. 1 of the old contracts was to be cancelled (cl. 4); the performance of all outstanding contracts should be extended up to February 1919 (cl. 2); two other merchants, Narayana Ayyar & Sons and Kuppaswami Ayyar should stand sureties for their fulfilment (cl. 3). No reference need be made to cl. 1. So far as the old contracts are concerned, this is as complete a new agreement as can be imagined. It was signed by Mr. Hartman on behalf of Messrs. Dreyfus & Co. by Arunachela Iyah and by the two sureties, namely, Kuppaswami Ayyar and Narayana Ayyar & Sons. It amounted to a complete dropping of the old agreement so far as Arunachela Iyah was concerned. I am not at all suggesting here that the old agreement may not continue to bind Rajagopala Ayyar and his heirs, executors and assigns. It certainly bound him and his widow but so far as Arunachela Iyah was concerned, the object of the new agreement was to enter into a new arrangement which Arunachela Iyah should not be able to repudiate. In fact, I think that entering into this agreement amounts to acceptance of Arunachela Iyah's repudiation of the agreement of 25th April, 1918. This is the view of Coutts-Trotter, J., in his judgment in C. S. No. 102 of 1922. There he said: "It is necessarily implied in this judgment that I regard the agreement of April as superseded by that of November". Then he held by reason of supersession that that suit was barred by limitation. This is a decision between the parties and, therefore, *res judicata*; but apart from any *res judicata* I agree with Coutts-Trotter, J.'s opinion that, so far as Arunachela Iyah was concerned the old agreement was dropped. His repudiation was accepted by Messrs. Dreyfus & Co., and a new agreement which he could not repudiate was brought into existence. This is of course not inconsistent with the decision of Schwabe, C. J., in the other case where he said that the old agreement was not superseded so far as Rajagopala Ayyar was concerned. The Judges in the two cases were looking at the supersession from

(1) (1825) 3 Bing. 101; 130 E. R. 452; 10 Moore 389; 3 L. J. (o. s.) C. P. 175; 28 R. R. 602.

(2) (1835) 1 C. M. & R. 681; 5 Tyr. 425; 1 Gale 48; 4 L. J. Ex. 69; 149 E. R. 1254; 40 R. R. 670.

(3) 22 A. 135; A. W. N. (1900) 12; 9 Ind. Dec. (N. S.) 1120.

(4) 1 Bom. L. R. 828.

(5) 6 Ind. Cas. 63; 11 C. L. J. 658; 14 C. W. N. 1106.

(6) 43 Ind. Cas. 508; 22 M. L. T. 520; 7 L. W. 114; (1918) M. W. N. 51.

(7) 59 Ind. Cas. 501; 39 M. L. J. 269; 12 L. W. 228; (1920) M. W. N. 502.

different points of view. In my opinion so far as Arunachela Iyah is concerned, Messrs. Dreyfus & Co. found it worth while not to raise the question that the old agreement was binding on Arunachela Iyah and rather than go to litigation on the matter they accepted the repudiation and promptly entered into a new arrangement so far as he was concerned, of course they never dropped the old agreement so far as Rajagopala Ayyar and his wife were concerned and it is still kept in force. That being so, in that part of the new agreement relating to the old contracts, namely, cls. 1 to 4, there is absolutely no clause compelling Arunachela Iyah to go to arbitration. It is true that so far as the new Dubash agreement for future transaction dealt with by cls. 5 to 7 is concerned, a formal agreement was drafted and was intended to be executed (See Ex. K) and this contained an arbitration clause. But this related only to future transactions and not to past transactions. So far as past transactions are concerned it is not likely that Arunachela Iyah while complaining of the agreement of the 25th April, 1918, would have submitted to the arbitration clause. But it is not a question of likelihood. We do not find any agreement containing such a clause binding on him. The only agreement binding on him in respect of the old contracts is the agreement of 3rd November and there is no arbitration clause in it. For this reason also I think there is no agreement compelling Arunachela Iyah to submit to arbitration so as to make the proceedings before the Arbitrators and the Umpire valid proceedings. In this connection I am bound to mention one fact. After the appellant's arguments were closed, on the second day of the respondents' argument, the learned Counsel for the respondents sought to file in evidence two letters exactly like the four letters, dated 27th and 28th August relating to the four contracts now in dispute but differing from them in one respect, i. e., they were signed by Arunachela Iyah. They contained the same last sentence as in the other letters which I have already mentioned. No affidavit is filed along with this oral application. It is said that these letters are on the file of the suit C. S. No. 558 of 1924 (a suit for refund of certain monies by Rajagopala's widow) and is admitted that their existence was known for the last nine months. While I am of opinion that no case has been made out for the admission of

further evidence in appeal, it also seems to me that they do not advance the case for the respondents. They only show that Arunachela Iyah knew by the date of these letters of an agreement of 25th April. These letters are dated 25th September and it is conceded on all hands that by 25th September he learnt of the existence of the agreement of 25th April. These two letters relate to the other contracts and not to the contracts now in question.

So far as the contracts now in dispute are concerned, it is impossible to spell out any ratification, assuming that Arunachela Iyah knew of the existence of the agreement of 25th April, which is not clear from the letters, nor was any ratification suggested before Waller, J. We, therefore, refuse to admit additional evidence at this stage. On the two grounds I have mentioned I am of opinion that there was no valid reference to arbitration and on this ground the appeal must succeed.

But it would be convenient to give our opinion on the further matters argued before us. The next matter argued is that there is no dispute as to whether all the contracts have been properly performed by Narayana Ayyar & Sons and Kuppewami Ayyar. Mr. Hartman in his deposition admitted that Kuppewami Ayyar has satisfied his share of the agreement but not Narayana Ayyar & Sons so far as their share was concerned. There is on the record of C. S. No. 102 of 1922 a document Ex. Y, a receipt executed by Narayana Ayyar & Sons in favour of Messrs. Dreyfus & Co. This is in final settlement of all claims on contracts between themselves and on contracts Nos. 21 and 23 (a) for 1000 tons each, or a total of 2,000 tons, relating to Rajagopala Ayyar & Sons. This document has nothing to do with the contracts now in dispute. The Counsel for the appellant wishes to infer that somehow a complete discharge was given to Narayana Ayyar & Sons even in respect of the suit contracts. Here I may observe that though cl. 3 of the agreement apportions the shares of Narayana Ayyar & Sons and Kuppewami Ayyar as half and half, it is not strictly half and half. Kuppewami Ayyar's contract related to 900 tons and Narayana Ayyar's related to about 1,220 tons. A portion of contract No. 15 (his portion) was performed leaving a small part relating to 27 tons unperformed, but the other three contracts remained totally unfulfilled. On this part

of the case, therefore, I agree entirely with the contention of the respondents that there was no concession by Mr. Hartman that these contracts were duly fulfilled. This point must, therefore, be decided against the appellant.

The next question raised is that the Umpire had no jurisdiction to consider the questions of law arising in the case because in C. S. No. 60 of 1922 Kumaraswami Sastriar, J., passed an order reserving questions of law to be considered by the Court. In support of this contention the case of *Doleman v. Ossett Corporation* (8), was relied on by the learned Counsel for the appellant. In that case a suit was filed, though there was an outstanding agreement to refer to arbitration. The defendants did not apply for stay of proceedings. Subsequently an award was made purporting to decide matters which were the subject of the action and then the defendants pleaded that the award was a bar to the plaintiff's suit. Fletcher Moulton and Farwell, L. J.J., held that, after the suit was filed if the defendants failed to apply for stay the arbitrators became *functus officio*. Fletcher Moulton, L. J.'s reasons are given at length at page 269*. The whole reasoning is based on the ground that once the Court has seisin of the dispute the jurisdiction of the arbitrators to hear and decide matters of the action is ousted. At page 271* it was observed: "There is a complete breach of that (arbitration) clause so far as that particular dispute is concerned..... the Court has the sole and exclusive jurisdiction to decide the dispute". At page 272* also it was observed "there was a complete breach of the obligation of the contract so far as the disputes in question are concerned". The subject-matter of C. S. No. 60 of 1922 and the subject-matter of the arbitration are different. Therefore, I do not think that the jurisdiction of the arbitrator was ousted on this ground. This point also must, therefore, be decided against the appellant.

I now come to the items of misconduct. The first ground urged is practically identical with the point last considered. It is contended that even if the jurisdiction of the Arbitrators is not ousted, at any rate it is misconduct on the part of

the Umpire to proceed to consider questions of law after the order of Kumaraswami Sastriar, J.. The order of Kumaraswami Sastriar, J., was certainly brought to the notice of the Umpire. This was referred to in objections Nos. 15, 16 and 17 of Arunachela Iyah before Mr. Rao. However much it might have been prudent for the Umpire to have reserved such questions, I do not think it can be said to be a misconduct if he did not think fit to do so for the reasons I have already given, namely, that the subject-matters are different. This items of legal misconduct, therefore, fails.

The next item of misconduct relied on is that the Umpire ought to have stated a case to the Court on questions of law. This was raised in para. 18 of the objections of Arunachela Iyah. The appellant's Counsel relies on *In re Palmer and Hosken* (9). Section 10 of the Indian Act while giving power to the arbitrators to state a special case for the opinion of the Court differs in this respect from the English Act. Section 19 of the English Act makes it obligatory on the part of the arbitrator to state a special case if directed by the Court. It has been held that this section impliedly confers on a party to the arbitration the right to apply to the Court for such an order. See *In re Palmer and Hosken* (9). But this is wanting in the Indian Act. Mr. Krishanaswami Ayyangar replying on this part of the case strenuously contended that this is all the greater reason why it should be held that the Umpire's refusal to state a case should be held to be a misconduct, as it involves an erroneous exercise of his discretion. He contends that whereas in England there is an immediate remedy available to the party so that a perverse refusal may be corrected, in India there is no such remedy, and it ought, therefore, to be held to be a misconduct, *a fortiori* especially when a Judge of the High Court thought that the questions ought to be reserved for the consideration of the Court. There is some force in this argument. Still, on the language of the Indian Act I am unable to agree with the appellant's contention whatever hardship my conclusion may entail upon parties to arbitration. I, therefore, decide this point also against the appellant.

(8) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.

*Pages of (1912) 3 K. B. —[Ed.]

(9) (1898) 1 Q. B. 131; 67 L. J. Q. B. 1; 77 L. T. 350; 46 W. R. 49.

The next item of misconduct relied on is that the arbitrator has taken independent legal opinion. It is conceded before us by both sides that until the award of Mr. Rae was delivered which states "after taking independent legal opinion having decided that the alleged agreement, dated the 3rd November, 1918 at no time constituted a concluded contract....." it was not known to either party that such independent opinion was taken by Mr. Rae. The appellant's Counsel relied on Russel on Arbitration, 10th Edition, page 404. It is there pointed out that a lawyer Arbitrator may discuss a question of law with a legal friend, but in the case of layman, advice should not be obtained in the absence of the parties unless both parties agree that the arbitrator should so inform their mind. The respondents' Counsel relied on several English cases which it is unnecessary to refer to at length. His contention is that unless the arbitrator substitutes the opinion of another for his own, consulting another does not amount to a misconduct; for example see *Ellison v. Bray* (10). But on the other hand, Lord Denman, C. J., in *Dobson v. Groves* (11) observes at page 243*, "The proceeding is quite different from that of consulting a legal friend on the framing of the award; that is legitimate: but here the conference is on something to be done by the consulting party, as arbitrator, on the matters referred: it turns upon a point in the cause on which a bias may be given to his mind without the possibility of its being removed". At page 244* he again observes: "When once the case is brought within the general principle by a possibility that the arbitrator's mind may have been biased, there is a sufficient objection." The same view was taken by Sir John Edge in *Daya Kishen v. Dharam Das* (12). Relying on these cases, I hold that there has been legal misconduct on the part of the Umpire in taking independent opinion on the question whether the agreement of 3rd November was a concluded agreement or whether it superseded the earlier agreement so far as Arunachela Iyah is

concerned. On this ground also I would set aside the award.

In the result I would allow the appeal reversing the decision of Waller, J., and set aside the award on the ground that the Umpire had no jurisdiction and is also guilty of misconduct (legal).

There is one other point to which I should now refer. The learned Counsel for the respondents argued that this appeal is not competent because Waller, J.'s order while dismissing the notice of motion does not direct that the award should be filed. Waller, J.'s order was passed on 6th May, 1926. The present appeal was filed on 19th July the re-opening day of the High Court after vacation. Sometime after the appeal was filed, an order was passed by Srinivasa Ayyangar, J., directing the award to be filed. The respondents contend that an appeal should have been filed against that order. I think the order of Srinivasa Ayyangar, J., was passed under some misconception. Section 15 of the Act says: "An award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to the re-consideration of the Arbitrators or Umpire, or sets it aside) be enforceable as if it were a decree of the Court." No order directing that the award should be filed is necessary. Under the Civil Procedure Code the matter is different. The person who wants to convert an award into a decree of Court has to apply for an order that it should be filed, and after notice and hearing the objections of the opposite side such an order has to be made. Here no such order is necessary. Therefore, the moment Waller, J., disallowed the notice of motion of Arunachela Iyah the award became a decree of Court and he is perfectly justified in appealing. The objection, of course, is purely technical and it amounts to this, that the appeal is filed a little too soon and not a little too late. But, even if my view is not correct, the order of Waller, J., amounts to a preliminary order and the order of Srinivasa Ayyangar, J. amounts to a final order. It has always been held in this Court that an appeal against a preliminary order if allowed makes an appeal against the final order on the same grounds unnecessary, though another appeal may have to be filed if it has reference to what happened after the preliminary order was passed,

(10) (1864) 9 L. T. 730.

(11) (1844) 6 Q. B. 637; 115 E. R. 239; 14 L. J. Q. B. 17; 66 R. R. 502.

(12) 4 A. L. J. 159; A. W. N (1907) 75.

*Page of 115 E. R. - [Ed.]

See *Ramien v. Veerappudian* (13). Either way there is no substance in this objection and it is overruled. The objection is in the nature of a preliminary objection but was not taken in that form; otherwise I ought to have dealt with it in the opening part of my judgment, but the matter is of no importance in the view I take. The appellant will have his costs. We certify for two Counsel taxed costs on both sides.

Cornish, J.—I agree that this appeal should be allowed. The question is whether the arbitration clause of the April 25th, 1918, agreement remained enforceable after the conclusion of the 3rd November, 1918. Memorandum of agreement must, in my opinion, be regarded as determined by the finding of Couts-Trotter, J., in O. S. No. 102 of 1922 between the parties to this appeal.

It was an issue in that suit, "was the agreement, dated the 25th April, 1918, superseded by an agreement dated 3rd November, 1918"? And the learned Judge found that the November agreement did supersede the April agreement. The word "supersede" is ambiguous, but it is clear from the judgment that what is meant is that the November agreement was substituted for the April agreement, and was not merely supplementary to the April agreement. Against this finding there are the opinions expressed by Phillips, J., and by Schwabe, O. J., and Wallace, J., in an earlier phase of the litigation which has sprung from this April agreement. In those proceedings, which were taken to set aside the award, Phillips, J., in setting aside the award on the ground of legal misconduct on the part of the Umpire, doubted if the April agreement was superseded by the November agreement; but he declined to decide the question as all the facts were not before him. On appeal Schwabe, O. J., and Wallace, J., set aside Phillips, J.'s order, and remitted the matter to the Umpire. But the learned Judges of the Appellate Court did not profess to decide the question whether the November agreement superseded the April agreement. Indeed Wallace, J., in his judgment says that the occasion had not then arisen for deciding it. And when Schwabe, O. J., ex-

pressed the opinion that the old agreement was not "altogether" superseded by the November agreement, it appears to me that he meant to indicate that the April agreement would be binding on the parties to it, notwithstanding that it might have been superseded by the November agreement so far as the appellant was concerned. There is no inconsistency between that opinion and the subsequent finding in O. S. No. 102 of 1922.

On the second question it has, in my view, been established that when Rajagopala Ayyar entered into the Dubash agreement of the 25th April, 1918, he had no authority to bind his partner, the appellant, by the arbitration clause, cl. 15 of the agreement. Admittedly, the agreement was signed by Rajagopala Ayyar alone at Karachi. And though the agreement was expressed as made on behalf of the Firm of Rajagopala Ayyar and Brother, consisting of Rajagopala Ayyar and the appellant, nobody in the respondent Company apparently made any enquiry whether Rajagopala Ayyar had authority to bind the firm. Mr. Hartman who was at Karachi when the agreement was signed, and who came down to Madras to manage the respondents' branch office there, brought the agreement with him, but in his evidence in O. S. No. 102 of 1922 he said that he did not make any enquiry into this matter.

The appellant's evidence in O. S. No. 102 of 1922 is that Rajagopala Ayyar entered into the agreement without his knowledge or consent, and that he did not know the terms of the agreement until he was shown it by Mr. Hartman on the 7th September, 1918, at Madras. This statement of the appellant, repeated in his grounds of objections to the arbitration, and in his affidavit in support of his motion to set aside the final award, has never, as far as I can discover, been contradicted; and I see no reason for disbelieving it.

Now, it is clear that a partner in a trading concern, such as the partnership between Rajagopala Ayyar and the appellant has been shown to be, has no power in the absence of authority to bind the firm by a submission to arbitration: see *Stead v. Salt* (1), *Ram Bharose v. Kallu Mal* (3), *Datoobhoy v. Vallu* (4). The Umpire, however, has apparently inferred an implied authority from the practice of including an arbitration clause in Dubash

(13) 14 Ind. Cas. 294; 37 M. 455 at p. 458; 11 M. L. T. 69; 22 M. L. J. 217; (1912) M. W. N. 117 & 530.

agreements. He has noted against para. 3 of the appellant's statement of objections (where the appellant objected that Rajagopala Ayyar had no authority to agree to refer my matter in dispute to arbitration), the following remark—"All Dubash agreements contain arbitration clause". It may be that it is usual in agreements between merchants and their Dubashes to include an arbitration clause. But assuming it to be so, that would not make Rajagopala Ayyar's act in agreeing to cl. 15" an act (to use the words of s. 251, Indian Contract Act) usually done in carrying on the business of such a partnership"—that is, the particular partnership which was existing between Rajagopala Ayyar and the appellant. But it has been contended for the respondents that the appellant's conduct shows that he had accepted and acquiesced in the terms of the agreement. Exhibits B and C show that the appellant was on August 24th and 25th taking a part in respect of certain contracts made by Rajagopala Ayyar in pursuance of the Dubash agreement. It is not disputed that the appellant provided the Rs. 20,000, the amount of the deposit required of the Dubashes by cl. 12 of the agreement. The appellant says he paid this money before he was shown the agreement by Mr. Hartman on the 7th September, 1918, though the payment was made after his first interview with Mr. Hartman at Pondicherry in August. The appellant has also stated that he knew nothing of the business relations between Rajagopala Ayyar and the respondents until August, 1918, when he was introduced to Mr. Hartman at Pondicherry. At the last moment of the hearing of this appeal, copies of two letters addressed to the respondents, and signed by the appellant, have been produced. These letters relate to the purchase of ground-nuts (Nos. 22 and 23 in the list of contracts furnished to us) and are dated 24th and 25th September, 1918, and they state "conditions as per agreement with you dated 25th April, 1918." It is by no means a necessary implication from the fact of the appellant having undertaken the liability of contracts made in pursuance of the April agreement, that he must be taken to have accepted the arbitration clause of that agreement. The appellant has sworn that when he first met Mr. Hartman at Pondicherry in August, 1918 he objected to the contracts which Rajagopala Ayyar had made with one V. T. Narayanaswami and warned

Mr. Hartman that V. T. Narayanaswami was not a satisfactory customer; and that it was during his second interview with Mr. Hartman at Madras, when he again disputed the V. T. N. contracts, that Mr. Hartman showed him the terms of the agreement. The appellant has further sworn that Mr. Hartman when he showed him the agreement asked him to sign it, and that he told Mr. Hartman that he would not sign it because the terms were so hard and unworkable. Mr. Hartman admits that the appellant warned him that V. T. Narayanaswami was an unsatisfactory person, with whom to have dealings; further, he does not dispute that he showed the appellant the agreement at the interview in Madras, but he says that he does not think that he asked the appellant to sign it. Then we come to Ex. F, the appellant's letter to the respondents, dated 25th September, 1918, requesting some relief from the losses which had been incurred over the V. T. N. contracts and suggesting that Rajagopala Ayyar should be replaced by a more competent business man. This letter was the starting point for negotiations which terminated in the memorandum of agreement, dated 3rd November, 1918. It is remarkable that at no stage of these negotiations was there any suggestion by the respondents of invoking cl. 15 of the April agreement to decide the question of the appellant's liability or the extent of his liability for the contracts. Too much stress should not be laid on this point; but it does seem to me to support the position that the appellant's objections to the terms of the agreement had made it a matter of doubt for the respondents whether he has consented to be bound by the arbitration clause of the April agreement. The appellant's letter of the 25th September gave the respondents the opportunity of putting that question to the test. Instead, they proceeded as if the agreement had contained no such thing as any arbitration clause. In the circumstances I do not think, on the evidence before us that we should be justified in holding that the appellant had adopted or ratified cl. 15 of the agreement. Assuming, therefore, that we are wrong in holding that the April agreement has been rescinded by the November agreement, I am of opinion for the foregoing reasons, that cl. 15 of the April agreement was not enforceable against the appellant, and that the award must, so far as he is concerned, be set aside.

It is now necessary to consider the appellant's contention that the award should be set aside on account of the Umpire's alleged legal misconduct. This allegation is based on two principal grounds: first, that the Umpire refused to state a case for the opinion of the Court when required by the appellant so to do; and, second, that the Umpire (as admitted in his award) took "an independent legal opinion" on the questions submitted to his arbitration without notice to or the knowledge of the appellant. With regard to the first of these grounds reliance has been placed on s. 10, Indian Arbitration Act, 1899 which provides that an "Umpire acting under a submission shall, unless a different intention is expressed therein,—

(b) have power to state a special case for the opinion of the Court on any question of law involved."

This section is taken from s. 7 of the English Arbitration Act of 1889, and under that section the arbitrator's powers are permissive and not obligatory. (See Russell on Arbitration, 11th Edition, page 55). There is not in the Indian Act a provision corresponding to s. 19 of the English Arbitration Act of 1889 which enables the Court, at the instance of a party to direct the Umpire to state a case. But it has been argued that inasmuch as s. 10 gives the Umpire a discretionary power to state a case, he is under a duty to exercise that power judicially and reasonably, and that if he fails in this duty he is guilty of misconduct so as to attract the power of the Court under s. 14 of the Act to set aside the award. It so happens that in a suit O. S. No. 601 of 1922 brought by the widow of Rajagopala Ayyar against the respondents, Kumaraswami Sastriar, J. had directed that the questions of fact in that particular dispute should not be decided by the arbitrator until the questions of law, one of which was an issue on the binding character of the arbitration clause in the April agreement, had been decided by the Court. The appellant called the Umpire's attention to this direction. I certainly think that the Umpire would, in the circumstances, have been well-advised to have stated a case. But s. 10 left it to his discretion, and I do not think that because the Umpire refused to do what a more cautious person might have done, or because he failed to appreciate the relevance of the Court's direction in O. S. No. 601 to the matter before him, he can

be held guilty of misconduct. On the second ground I think it must be held, on the authority of *Dobson v. Groves* (11), that the Umpire was guilty of legal misconduct in taking "an independent legal opinion", without the knowledge of the parties. In this case, as in that, the Umpire's honesty of purpose is beyond question. But he did something (to quote from Lord Denman's judgment) "upon the subject of the reference that may have improperly biased his mind, without a possibility of its being removed by any explanation which might have been afforded, if the other side had been called upon to take a part in the proceedings." The principle is, that it is incumbent on an arbitrator who takes legal or other expert advice, which may influence his determination of the matter submitted to him for arbitration, to inform the parties of his intention to do so and of the question upon which the advice is taken. Otherwise the parties have no assurance that the advice is material, or given on a correct statement of the case, or that the arbitrator has not, in effect, simply surrendered his responsibility for deciding the question in arbitration to the opinion of his legal or other adviser. For this reason, and assuming that the award is binding on the appellant, I hold that the award should be set aside.

V. N. V.
A. N. A.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1113 OF 1925.

November 1, 1927.

Present:—Justice Sir Kumaraswami Sastri, Kt., and Mr. Justice Wallace.

B. RAJA RAJESWARA MUTHU
RAMALINGA SETHUPATHY AVERGAL
THROUGH HIS AUTHORIZED Dewan RAJA M.
DINAKAR BAHADUR—PLAINTIFF—
PETITIONER

versus

SHUNMUGHA NADAN AND ANOTHER—
DEFENDANT'S NOS. 2 AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (20)—Civil Rules of Practice (Mad.), r. 4 (11)—"Signed" in reference to vakalats and affidavits, whether includes "stamped."

By virtue of s. 2 (20) of the Civil Procedure Code

and r. 4 (11) of the Civil Rules of Practice (Mad.) in the case of affidavits and *vakalats* the use of a stamp bearing the name of the party is sufficient even where the party is able to sign. There is no difference in this respect between pleadings and affidavits, and *vakalats*.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise an order of the Court of the District Munsif, Paramakudi, dated the 11th August, 1925, in S. C. S. No. 104 of 1922, on the file of the Court of the District Munsif, Manamadurai.

Mr. S. Sundaraja Iyengar, for the Petitioner.

JUDGMENT.—Having regard to the definition of the word 'signed' in s. 2 (cl. 20) of the Civil Procedure Code and to the fact that under r. 4 (11) of the Civil Rules of Practice, the same definition has to be applied in the case of affidavits and *vakalats*, we think that the use of a stamp bearing the name of the party is sufficient even in cases where he is able to sign. Even under the old Code of Civil Procedure of 1877 it was held in the *Maharaja of Benares v. Debi Dayal Noma* (1) that inability to sign was not necessary in order to enable a person to use a stamp. The definition of 'signed' in the present Code is to the effect that except in cases of judgments or decrees 'signed' includes stamped. There is nothing to show that any difference can be drawn between *vakalats* and affidavits and pleadings. We set aside the order of the District Munsif and direct him to receive and file the papers returned if they are otherwise in order.

V. N. V.

Order set aside.

(1) 3 A. 575; A. W. N. (1881) 36; 2 Ind. Dec. (N. s.) 345.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1052 OF 1924.

March 23, 1927.

Present:—Mr. Justice Devadoss.

GOVINDASWAMI UDAIYR AND ANOTHER

—DEFENDANTS—APPELLANTS

versus

ANNAMALAI UDAIYAR AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908). O. XXII, r. 3, O. XXXIV, r. 1—Suit on mortgage—Death of mortgagee—Some of several legal representatives not brought on record—Suit, whether abates in part—Decree for entire amount, legality of—Questions

inter se between legal representatives of deceased mortgagee, whether can be gone into.

Where on the death of a plaintiff, no legal representative is brought on the record, the suit would abate; but where some only of several legal representatives come on the record and they contend that some other persons are not legal representatives, even though their contention may be found to be untrue, that would not make the whole or any portion of the suit abate in favour of the defendants. [p. 806, col. 1.]

Kadir Mohideen Marakkayar v. Muthukrishna Ayyar (1), followed.

Where a mortgagee brings a suit on the mortgage for the whole amount due, the mere fact that on the death of the mortgagee one of the legal representatives of the mortgagee is not brought on the record within the time prescribed, would not entitle the mortgagors to contend that the suit abates as regards his share. The legal representatives who are on record would represent all who are entitled to share in the estate of the deceased and are entitled to a decree for the whole amount. [p. 806, col. 2.]

In a mortgage suit it is unnecessary to go into the question which may arise between the legal representatives of a deceased mortgagee as to whether some of them or all of them are entitled to the whole of the interest of the deceased mortgagee. [p. 806, col. 1.]

Second appeal against a decree of the Subordinate Judge, Negapatam, in Appeal Suit No. 109 of 1923.

Mr. K. Bhashyam Ayyangar, for the Appellants.

Mr. K. Rajah Aiyar, for the Respondents.

JUDGMENT.—Defendants Nos. 1 and 2 are the appellants. The suit is on a mortgage against defendants Nos. 1 and 2 the mortgagors and other defendants. The Subordinate Judge has given a decree for the full amount in favour of respondents Nos. 1 and 2. The mortgagee was the father of plaintiffs Nos. 2 and 3 who died pending the suit. Plaintiffs Nos. 2 and 3 sought to be made legal representatives on the ground that they and their father were undivided and defendant No. 5 their brother was divided from his father. Notice of this was given to defendant No. 5 who was already a party to the suit as he had acquired some right under Ex. II. He did not contest the application though he appeared by a Vakil. Plaintiffs Nos. 2 and 3 were made legal representatives of plaintiff No. 1 and they proceeded with the suit. The District Munsif gave a decree for two-thirds of the mortgage amount. On appeal the Subordinate Judge has given a decree for the full amount. Two points are raised before me by Mr. Bhashyam for the appellant. The first point is that the suit has abated as regards the defendant No. 5's share. It is diffi-

cult to appreciate this contention. Under O. XXII, r. 3, the legal representatives of a deceased plaintiff or the sole surviving plaintiff should apply to be made parties to the action, and if they do not come in within the time allowed, the suit would abate. In this case plaintiffs Nos. 2 and 3 did make an application within the time as the legal representatives of plaintiff No. 1 and defendant No. 5 who was on the record, was given notice of the application. If one of the legal representatives does not choose to be brought on the record as the representative of a deceased plaintiff his share in the suit does not thereby abate. If no legal representative is brought on the record, no doubt, the suit would abate but where some legal representatives come on the record and they contend that some other persons are not legal representatives, even though their contention may be found to be untrue, that would not make the whole of the suit or any portion of the suit abate in favour of the defendants. This is very clear on principle and I may refer in this connection to *Kadir Mohideen Marrakkayar v. Muthukrishna Ayyar* (1), where this point was decided.

The next point raised is that the suit must be dismissed because plaintiffs Nos. 2 and 3 state that defendant No. 5 was not a legal representative and that the statement is found to be untrue. The Subordinate Judge very properly left the contest between plaintiffs Nos. 2 and 3 and defendant No. 5 to be brought out in a future proceeding. In a mortgage suit it is unnecessary to go into the question which may arise between the legal representatives of a deceased plaintiff as to whether some of them or all of them are entitled to the whole of the interest of the deceased plaintiff. Mr. Bhashyam's argument is that this should not have been done, but on the finding that defendant No. 5 is also interested in the decree amount, the suit should have been dismissed because he was not brought on the record as plaintiff in time. This argument overlooks the fact that defendant No. 5 was on record on the date of plaintiff No. 1's death and he was given notice by plaintiffs Nos. 2 and 3 when they made an application to be brought on the record as the legal representatives of their deceased father. The cases in *Sunitabala Debi v.*

Dara Sundari Debi (2) and *Sakhiuddin Saha v. Sonaula Sarkar* (3) have no application to the present case. Where there are two or more mortgagees who are tenants-in-common, one mortgagee cannot bring a suit without making the other mortgagees parties to the action. If they do not wish to join as plaintiffs, they should be made defendants but if any of the mortgagees have parted with their rights in favour of the mortgagors, a decree should be given only in respect of the portion outstanding against the mortgagors. But where as in this case the mortgagee himself brings a suit on the mortgage for the whole amount, the mere fact that one legal representative of the mortgagee is not brought on the record, let us say for argument's sake, within the time prescribed would not entitle the mortgagors to contend that the suit abates as regards his share and a decree should not be given for the whole of the amount in favour of persons who are brought on the record as legal representatives. This argument seems to me to be on the face of it untenable. The legal representatives who are on record represent all who are entitled to share in the estate of the deceased plaintiff. The Subordinate Judge is perfectly justified in making the order he made and the second appeal fails and is dismissed with costs.

V. N. V.

Appeal dismissed.

- (2) 53 Ind. Cas. 131; 47 C. 175; 37 M. L. J. 483; 17 A. L. J. 997; (1919) M. W. N. 821; 22 Bom. L. R. 1; 24 C. W. N. 297; 11 L. W. 227; 46 I. A. 272; 2 U. P. L. R. (P. C.) 2.
(3) 45 Ind. Cas. 986; 22 C. W. N. 641; 27 C. L. J. 453.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 109 OF 1927,

AND

CIVIL MISCELLANEOUS PETITION NO.

1033 OF 1927.

March 24, 1927.

Present:—Mr. Justice Odgers and
Mr. Justice Curgenven.

C. T. NARASA REDDI—APPELLANT

versus

Hajee TAR MAHOMED AYUB SAIT—

RESPONDENT.

Letters Patent (Mad.), cl. 15—Order refusing transfer of suit from one subordinate Court to another, whether judgment—Appeal.

An order of a Single Judge of the High Court, refusing to transfer a suit from the file of the City Civil Court to a District Munsif's Court is not a judgment and is not appealable.

Letters Patent appeal against an order of Mr. Justice Jackson, dated the 22nd February, 1927, in C. M. P. No. 4451 of 1926, praying for transfer of O. S. No. 275 of 1926 from the file of the City Civil Court, Madras, to that of the District Munsif's Court, Vellore, to be tried along with O. S. No. 312 of 1926 on its file.

Petition for stay of trial of O. S. No. 275 of 1926 on the file of the City Civil Court, Madras, pending disposal of Letters Patent Appeal No. 10 of 1927 on the file of the High Court.

Mr. Watrap S. Subrahmaniam Iyer, for the Appellant.

Mr. G. Krishnaswami Iyer, for the Respondent.

JUDGMENT.

Odgers, J.—This is a Letters Patent Appeal from the order of Mr. Justice Jackson, dated the 22nd February, 1927, refusing to transfer the suit of the plaintiff, Hajee Tar Mahomed Ayoob Sait from the City Civil Court to the Court of the District Munsif of Vellore. Hajee Tar Mahomed and the defendant in the City Civil Court suit, O. T. Narasa Reddi, did business together and the City Civil Court suit alleges that the defendant owes the plaintiff a sum of about Rs. 1,300. Subsequently O. T. Narasa Reddi filed a suit in the Vellore Court against Hajee Tar Mahomed Ayoob Sait alleging that, on the other hand, a sum of about Rs. 700 was due to himself. Narasa Reddi moved the High Court to transfer the City Civil Court suit to the Vellore Court. This was refused and the matter now comes before us on Letters Patent Appeal. Now the question is whether this is a matter within the purview of the Full Bench case in *Tuljaram Row v. Alagappa Chettiar* (1). This case has recently been considered and its meaning expressed by the present Chief Justice and Mr. Justice Ramesam in the *Official Assignee of Madras v. Ramalingappa* (2). The present learned Chief Justice recognised that the question is a difficult one and adopts the language of Sir Arnold White i. e., "If its effect, whatever its form

may be, and whatever may be the nature of the application in which it is made is, to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause". And later the learned Chief Justice observes that: "if the effect of the order is to allow the proceedings to go on, it is impossible to say that it satisfies the test laid down by Sir Arnold White in the Full Bench case." Now on the objection that no Letters Patent Appeal lies, it appears to me that applying this principle matters are left exactly as they were and that it is that which distinguishes this case from the case in *Krishna Reddy v. Thanickachala Mudali* (3) (Sir Walter Schwabe and Mr. Justice Ramesam) which is a case similar in this way, namely, that the order of a Judge is there said to be a judgment within cl. 15 of the Letters Patent and therefore appealable, and this is put on the ground that in that case the Judge by his order put an end to the case as it stood in Chingleput and conferred jurisdiction on this Court in respect of that particular case. It seems to me that the case before us is different and that the order of the learned Judge does not put an end to any of the rights of the parties and the effect of the order now appealed from is to allow the proceedings to go on. I, therefore, think that on this ground it must be held that the Letters Patent Appeal so far as the order refusing to transfer is concerned does not lie and the party has no right to have the case transferred. The Letters Patent Appeal is dismissed with costs.

The C. M. P. No. 1033 of 1927 is also dismissed but without costs.

Curgenvven, J.—I agree. It may be conceded that an order transferring a suit would amount to a judgment within cl. 15 of the Letters Patent on the ground explained by Sir Walter Schwabe, Chief Justice, in *Krishna Reddy v. Thanickachala Mudali* (3), namely, that it terminates the case in one Court and creates a jurisdiction in the other to try it. The learned Chief Justice's view was based primarily upon the construction put upon the word 'judgment' in the Full Bench case, *Tulja-*

(1) 8 Ind. Cas. 310; 35 M. L. J. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1.

(2) 94 Ind. Cas. 456; 50 M. L. J. 361; 23 L. W. 592; (1926) M. W. N. 366; A. I. R. 1926 Mad. 554; 49 M. 539.

(3) 73 Ind. Cas. 1054; 49 M. 136; 45 M. L. J. 153; (1923) M. W. N. 681; A. I. R. 1924 Mad. 90.

ram Row v. Alagappa Chettiar (1), and applying that construction it seems to me that the nature of the order now under consideration was not put to an end to any right which the party enjoyed to have the suit transferred because in fact he had no such right, but that it was simply to leave matters as they were before the application was made. In *Asher v. Gopalaratnam* (4), Kumaraswami Sastri, J., considered the effect of certain orders refusing to grant various prayers, such as for the issue of a commission, the raising of an issue, or to amend the pleadings, and in the actual matter before him, which was a refusal of an application to grant inspection, he held that it would come within the same category and so would be unappealable, basing his judgment upon the test propounded in the Full Bench case. Similarly in *Official Assignee of Madras v. Ramalingappa* (2) the present learned Chief Justice applying the same definition, concluded that if the effect of the order in question is to allow the proceedings to go on as before it does not amount to a judgment within the clause. I think the order in this case answers to the same test and accordingly that it is not appealable. I agree, therefore, that the appeal should be dismissed with costs. The civil miscellaneous petition also will be dismissed but without costs.

V. N. V.

A. N. A.

(4) 100 Ind. Cas. 649; 52 M. L. J. 192; (1927) M. W. N. 162; 25 L. W. 483; A. I. R. 1927 Mad. 409.

*Appeal dismissed.***MADRAS HIGH COURT.**

APPEAL AGAINST ORDER NO. 454 OF 1926.

August 3, 1927.

Present :—Mr. Justice Madhavan Nair and
Mr. Justice Cargenven.

RAMANATHAN CHETTIAR BY POWER

AGENT ULAGANATHA PILLAI—

DEFENDANT NO 4—APPELLANT

versus

V. RY. SETHURAM MADIGE RAO

SAHIB AND OTHERS—PLAINTIFFS NOS. 1

AND 2—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Registration Act (XVI of 1908), ss. 17, 49—Mortgage-deed—Provision for cash payments to be endorsed—Lease by mortgagor to mortgagee—Varthamanam by mortgagee providing for appropriation of lease amount in partial discharge

of mortgage—Varthamanam, admissibility of, in evidence, without registration—Variation of terms of mortgage-deed—Mortgage—Sub-mortgage—Sub-mortgage takes subject to state of accounts between mortgagee and mortgagor.

Properties held by a lessee were hypothecated by the lessor to the lessee under a deed which contained the following recital:—"Unless credit entry is made herein in respect of payments of amounts which may be made on account of this bond, a statement (plea) that they have been made otherwise is not sustainable." On the same day the lessee executed a *varthamanam* by which he undertook to pay out of the rents Rs. 200 to charity and to credit the balance towards the hypothecation bond. In a suit by the mortgagor for accounts:

Held, (1) that since the *varthamanam* was in writing and did not vary the terms of the bond it was not inadmissible in evidence under s. 92, Evidence Act; [p. 809, col. 2.]

(2) that the document only provided for the discharge of the mortgage-debt and did not require registration. [*ibid.*]

Neelamani Patnaik Mussadi v. Sukaduva Behara (1), followed.

Where a mortgage is transferred by way of sub-mortgage without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and the mortgagee at the date of transfer. [p. 810, col. 1.]

Dixon v. Winch (2), *Mathews v. Wallwyn* (3), *Parker v. Clarke* (4), *Turner v. Smith* (5) and *Neelamani Patnaik Mussadi v. Sukaduva Behara* (1), relied on.

Appeal against an order of the Court of the Subordinate Judge, Tanjore, dated the 7th October, 1926, in A. S. No. 41 of 1926. (A. S. No. 13 of 1926 on the file of the District Court, West Tanjore) preferred against that of the Court of the District Munsif, Tiruvadi, in O. S. No. 238 of 1924.

Messrs. S. Varadachari and Rajagopalan, for the Appellants.

Mr. S. Rangachari, for the Respondents.

JUDGMENT.—This appeal is against an order passed by the Subordinate Judge, Tanjore, in A. S. No. 13 of 1926 remanding O. S. No. 238 of 1924 to the District Munsif, Tiruvadi, for disposal according to law.

Fourth defendant is the appellant. The plaintiffs-respondents are the owners of properties described in schedules A and B of the plaint. On 19th October, 1917, they leased the properties in schedule A to the 1st defendant for seven years from 7th July, 1918, on a rent of Rs. 600 per annum (See Ex. D) and also executed a mortgage to him for Rs. 1,525 hypothecating the B schedule properties (See Ex. B, dated 21st November, 1918). Exhibit B contained the following recital:—"Unless credit entry is made here in respect of payments of amounts which may be made on account of this bond, a

statement (plea) that they have been made otherwise is not sustainable. On the same date as Ex. B the 1st defendant executed a *varthamanam* (Ex. C) to the plaintiffs agreeing to pay Rs. 200 out of the rents for a certain charity, to pay also the cist and to credit the balance of the rents towards the hypothecation bond. The plaintiffs alleged that the 1st defendant failed to pay Rs. 200 for the conduct of the charity and the assessment due in respect of the lands and that by crediting the rents as provided for in Ex. C towards the mortgage-bond, the bond was fully discharged. On these grounds they instituted the O. S. No. 238 of 1924 for taking accounts in respect of the lease and the mortgage-bond, for the recovery of the bond duly cancelled as having been discharged and also for the balance of rent that may be found due by the 1st defendant after setting off the amount of the mortgage-bond towards the rent. Defendants Nos. 2 to 4 were added as parties as they had got a sub-mortgage over the properties. Without going into the merits of the case, the learned District Munsif held that the *varthamanam* Ex. C is inadmissible in evidence, that it is not binding on defendants Nos. 2 to 4 and that the suit as framed was not sustainable in law. He, therefore, dismissed the plaintiffs' suit. On all these points the learned Subordinate Judge differed from the District Munsif and in the result, remanded the suit for disposal according to law.

The points arising for decision are (1) whether the agreement Ex. C is inadmissible in evidence and (2) whether it is binding on defendants Nos. 2 to 4.

Point No. 1.—Exhibit C is an unregistered document and it provides for the payment of the mortgage-debt. The material portion of it is as follows:—“.....out of the lease amount of Rs. 600 payable by me to you every year I shall pay annually Rs. 200 for the charity and the cist due on the lands and the balance towards the discharge of the mortgage-debt.....” It is argued that Ex. C is inadmissible in evidence under s. 92 of the Indian Evidence Act and also under s. 17, cl. (b) of the Indian Registration Act. With reference to s. 92, the argument is that the provision made in Ex. C for the payment of the mortgage-debt is in variation of the express terms as regards payment contained in Ex. B, the mortgage-bond.

We cannot accept this argument. We do not think that this is a case to which s. 92 of the Indian Evidence Act could apply. In the first place, Ex. C is not an oral agreement. It is a written agreement, and further, it cannot be said to be a variation of Ex. B at all. The recital in Ex. B, which we have already extracted, is to the effect that if actual cash payments towards the discharge of the mortgage-debt are made, only those payments endorsed on the bond will be accepted as true payments. This does not by any means prevent the parties from making provision for another method of discharging the mortgage-debt. The mortgage document Ex. B does not state that the discharge of the debt can be made only by making cash payments. If it did contain a statement to that effect, then the provision in Ex. C would be a variation of such a recital. Exhibit C was executed on the same date as Ex. B. If the parties had intended actual cash payments to be the only method of discharge as is now contended for on behalf of the appellants, then they would not have, with that provision in mind, executed on the same date the *varthamanam* which provides for a different method of discharge. Even apart from this consideration, construing the terms of Exs. B and C, we have no doubt that Ex. C cannot be said to be a variation of Ex. B. The argument that Ex. C is inadmissible under s. 92 of the Indian Evidence Act must, therefore, be rejected.

We should also reject the argument that Ex. C is inadmissible in evidence as it is unregistered and as it purports to extinguish the mortgage-bond Ex. B. There is nothing in the document to show that the mortgage was actually extinguished by it. As pointed out in *Neelamani Patnaik Mussadi v. Sukaduva Behara* (1): “There is a clear distinction between a discharge of a debt and the extinguishment of mortgage interest, though one may be the result of the other. Where a receipt, in terms, only discharges the debt, it cannot be brought under s. 17 (b) of the Registration Act.” In view of this reasoning, as Ex. C only provides for the discharge of the mortgage-debt, we think it need not be registered.

Point No. 2.—The next point for consideration is whether Ex. C is binding

(1) 60 Ind. Cas. 255; 43 M. 803 at p. 806; 12 L. W. 269.

upon defendants Nos. 2 to 4, the sub-mortgagees. The law is well-settled that "where a mortgage is transferred without the privity of the mortgagor the transferee takes subject to the state of account between the mortgagor and the mortgagee at the date of transfer." [See *Dixon v. Winch* (2)]. Dr. Ghose in his book on Mortgages, Vol. I, page 353, thus summarises the result of the English decisions on this point: "an assignee of a mortgage is bound to give credit for all moneys received by his assignor, and if he takes a transfer without enquiring from the mortgagor, he does so at his own risk as regards the state of account." [See *Mathews Wallwyn* (3), *Parker v. Clarke* (4) and *Turner v. Smith* (5)]. See also *Neelamani Patnaik Mussadi v. Sukaduva Behara* (1). The rule is the same whether the assignment is by way of transfer of the original mortgage or by way of sub-mortgage, see *Ashburner on Mortgages*, page 441, and the cases cited therein. In this case the plaintiffs, the mortgagors were not consulted by the sub-mortgagees before they accepted the sub-mortgage. If they had done so, they would have known about Ex. C and the arrangement contained in the discharge of the mortgage-debt in that document. "A transferee who does not inquire of the mortgagor as to the state of account between the mortgagor and the transferor cannot retain his security as against the mortgagor if in fact the mortgagor has paid off the transferor." *Turner v. Smith* (5). Whatever is equivalent to payment as between mortgagor and mortgagee is good as against the assignee. The decision in *Dixon v. Winch* (2) was relied on by the appellant in support of his argument that the sub-mortgagees in this case are not bound by Ex. C. In that case it was held that the payment of the mortgage-debt to the mortgagee was not effectual as against the transferee and that the mortgage must be treated as still subsisting in favour of transferee because the Court of Appeal found from the circumstances of the case which showed that the mortgagor and the mortgagee were parties to a deliberate

fraud, that the mortgagor must be treated as having had notice of the transfer of the mortgage. That decision is, therefore, inapplicable to the facts of the present case. It is not suggested in this case that the mortgagor had any notice of the transfer by the 1st defendant of the sub-mortgage executed in favour of defendants Nos. 2 to 4. In these circumstances we agree with the learned Subordinate Judge that Ex. C is binding on defendants Nos. 2 to 4. The case, therefore, must be tried on the merits.

The lower Court's decree reversing the decision of the District Munsif and remanding the suit for disposal according to law by the District Munsif is right and this civil miscellaneous appeal is, therefore, dismissed with costs.

V. N. V.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 136 OF 1923.

February 2, 1927.

Present :—Justice Sir Kumaraswami Sastri, Kt., and Mr. Justice Curgenvin.

S. S. A. S. ARUNACHALAM

CHETTIAR—PLAINTIFF

—APPELLANT

versus

A. M. MUHAMMAD SALIHU

MARAKKAYAR AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 13 (b)—Foreign judgment—"Decision on merits", meaning of—Ex parte judgment on mere proof of service, whether decision on merits—Suit on such judgment, maintainability of—Burden of proof.

An *ex parte* judgment obtained in a Foreign Court in accordance with the rules of procedure of that Court under which where the defendant is *ex parte* the plaintiff is entitled to a decree merely on proving that the defendant has been properly served, is not one obtained on the merits of the case within the meaning of s. 13 (b) of the Civil Procedure Code, and a suit on such foreign judgment cannot be maintained in British India. [p. 813, col. 1.]

Keymer v. Viswanatham Reddier (1), *Oppenheim v. Mahomed Haneef* (2) and *Janoothassan Sait v. Mahomad Ohuthu* (3), followed.

In such a case the burden of proving the unsustainability of the suit does not fall on the defendant. [*ibid.*]

Appeal against a decree of the Court of the Subordinate Judge, Tanjore, in O. S. No. 49 of 1919.

Mr. K. Rajah Ayyar, for the Appellant.

(2) (1900) 1 Ch. 736; 69 L. J. Ch. 465; 82 L. T. 437; 48 W. R. 612; 16 T. L. R. 276.

(3) (1798) 4 Ves. Jun. 118; 31 E. R. 82.

(4) (1861) 30 Beav. 54; 7 Jur. (N. S.) 1267; 9 W. R. 877; 54 E. R. 809; 132 R. R. 180.

(5) (1901) 1 Ch. 213; 70 L. J. Ch. 144; 83 L. T. 704; 49 W. R. 186; 17 T. L. R. 143.

Messrs. A. Krishnaswami Ayyar and P. S. Chandrasekara Ayyar, for the Respondents,

JUDGMENT.

Kumaraswami Sastri, J.—Plaintiff is the appellant. The plaintiff's father had dealings with defendants Nos. 1 to 4 who are Muhammadan merchants who carried on business in 1914 and 1915 in Colombo. Defendants Nos. 1, 2 and 4 by their agents and the 3rd defendant personally executed a bond in favour of the plaintiff's father for Rs. 75,000 on the 29th of September, 1914, and also created a sub-mortgage in respect of a mortgage document executed in their favour by third persons. The plaintiff's father filed Suit No. 41867 of 1915, in the District Court in Colombo on the 25th of May, 1915, and obtained an *ex parte* decree on the 18th of June, 1915, which is filed as Ex. A in this case. The decree states that the defendants did not appear either in person or by Proctor or by Counsel although duly served with summons. The property which was sub-mortgaged was sold in execution on the 10th of January, 1916, and was purchased by the plaintiff for a sum of Rs. 100 and finding that he could not obtain anything more by execution in the Colombo Court, the plaintiff (his father having died) meanwhile filed a suit in the Sub-Court of Tanjore on the foreign judgment and prayed for a decree for Rs. 56,765-4-11 the balance due under the judgment and decree of the Colombo Court. Various pleas were raised but it is only necessary to consider the plea that no suit would lie on the judgment of the Colombo Court as that judgment was not on merits. The Subordinate Judge dismissed the suit.

It is argued by Mr. Raja Ayyar for the appellant that the proceedings of the Colombo Court show that the decree was not *ex parte* but was on the merits, that the decree though passed without examination of witnesses was really on the merits, that even if it were not so he was entitled in this suit to prove his claim and that it was on the defendants to show that the plaintiff's claim in respect of the amount which he sues to recover is unfounded. So far as the first point is concerned, it is clear that the suit was not decided on its merits. The procedure in the District Court of Colombo is that where no defence is entered, an affidavit of service is filed and judgment follows. In the present case

the defendants though served did not enter appearance or file any written statement. Thereupon the plaintiff filed an affidavit of service and a decree followed as a matter of course. Reference was made to Ex. D a certified copy of processes and their returns in Suit No. 4186 of 1915, on the Colombo District Court but there is nothing there to show that any evidence was recorded or that the Court went into the merits though the defendants were *ex parte*. All that appears from Ex. D is that when the case came on on the 9th June, it was called and the defendants who were said to be served were absent and that an *ex parte* trial was fixed for the 18th of June. On the 18th of June, the case was called and an affidavit of service was filed. On the 16th of July, a decree *nisi* was passed and on the 20th of July, the case was called, the defendants were absent and a decree absolute was made. Under the rules an affidavit of service had to be filed and the affidavit filed on the 18th of June, was simply an affidavit of service. No evidence was recorded as regards the merits of the claim. In fact as was pointed out before, the decree which was passed states that the defendants did not appear. There can be little doubt that the decree was not on the merits but was an *ex parte* decree.

The next question is whether a decree could be passed on the foreign judgment. Section 13 of the Civil Procedure Code enacts that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except in the cases mentioned in cls. (a) to (f) of the section. The clause which is material in the present case is cl. (b) which refers to judgments not given on the merits of the case. The argument of Mr. Rajah Ayyar is that if it was given on the merits, it would be conclusive and would operate as *res judicata* but that if it was not on the merits the parties would be at liberty to proceed as if the case was open, the plaintiff adducing evidence in support of his claim and the defendants raising defence that the trial should proceed as if it was an ordinary suit. I am unable to accede to this contention which is opposed to all the authorities. I think the matter is concluded by the decision of their Lordships of the Privy Council in

Keymer v. Viswanatham Reddiar (1). This was a case where a suit was filed in England by Keymer against Viswanatham Reddi claiming a sum of money due on certain bills drawn. Defence was entered. The plaintiff obtained leave to administer certain interrogatories to the defendant which the defendant omitted to answer. Thereupon an application was made to the Court in England to strike out the defence and enter judgment and a judgment was given. Upon that judgment a suit was filed in Madras and the defence was that as the judgment of the English Court had not been given on the merits of the action a suit could not be maintained on the foreign judgment under s. 13 sub-cl. (b) of the Civil Procedure Code. A decree was passed by Bakewell, J., but on appeal Sir John Wallis, C. J., and Seshagiri Ayyar, J., allowed the appeal and dismissed the suit with costs. An appeal was preferred to the Privy Council and their Lordships of the Privy Council affirmed the decree of this High Court. The Lord Chancellor in giving judgment, after referring to the facts, observed:—

"It appears to their Lordships that no such decision as that can be regarded as a decision given on the merits of the case within the meaning of s. 13, sub-s. (b). It is quite plain that that sub-section must refer to some general class of cases and Sir Roberts Finlay was asked to explain to what class of cases in his view it did refer. In answer he pointed out to their Lordships that it would refer to a case where judgment had been given upon the question of the Statutes of Limitation, and he may be well-founded in that view. But there must be other matters to which the sub-section refers, and in their Lordships' view it refers to those cases where, for one reason or another, the controversy raised in the action has not in fact been the subject of direct adjudication by the Court."

In *Oppenheim v. Mahomed Haneef* (2) a judgment was passed on an award in England under O. LIV, r. 14 of the Rules

of the Supreme Court, the defendant being *ex parte*, and an action was brought on the foreign judgment in this Court; Coates Trotter, J., held that the action on the judgment of the Court in England could not, having regard to the decision in *Keymer v. Viswanatham Reddiar* (1), be maintained as the judgment was entered in default of appearance and the action had not been tried on the merits. He, however, gave a decree for the amount specified in the award. So far as the view taken by the learned Judge as to the non-maintainability of the suit, no objection was taken before the Privy Council. The argument of Mr. Raja Ayyar that *Keymer's case* (1) can be distinguished on the ground that the defence was struck out for not answering the interrogatories and judgment entered whereas in the present case the decree was passed *ex parte* which argument seems to have been accepted in *Janoothassan Sait v. Mahomed Ohuthu* (3) cannot stand in view of the judgment of a Full Bench of this Court in *Mahomed Kasim & Co. v. Seeni Pakir* (4) decided on the 1st of September, 1926. The authorities on the subject have been referred to by the Referring Judges in their order of reference and it was held that the only test is whether the suit was disposed of on the merits. The learned Chief Justice in dealing with a similar argument observed:—

"As I understand Mr. Alladi Krishnaswami Ayyar's argument, he says that it is not like the case of the defendant's defence being struck out for not answering interrogatories or being out of time or anything of the kind; for that may be held not to be a defence on the merits because *ex hypothesi* the position is the defendant was precluded from going into the alleged merits which he had set up and he says it is quite different where the defendant does not appear at all because that is a clear intimation by him that he admits the validity of the plaintiff's claim and that is just as good as if the plaintiff has actually proved it by evidence. I think the decision of their Lordships of the Privy Council impliedly excludes any such distinction and I regret to say that I cannot agree with the attempt made by

(1) 38 Ind. Cas. 683; 40 M. 112; 15 A. L. J. 92; 21 M. L. T. 78; 32 M. L. J. 35; 5 L. W. 342; 19 Bom. L. R. 206; 21 C. W. N. 358; 25 C. L. J. 233; 10 Bur. L. T. 175; 44 I. A. 6 (P. C.).

(2) 74 Ind. Cas. 616; 45 M. 496; 26 C. W. N. 642; 16 L. W. 33; 30 M. L. T. 291; 4 U. P. L. R. (P. C.) 36; A. I. R. 1922 P. C. 120; (1922) M. W. N. 396; 43 M. L. J. 422; 24 Bom. L. R. 1245; 36 C. L. J. 444; 49 I. A. 174 (P. C.).

(3) 82 Ind. Cas. 425; 47 M. 877; 47 M. L. J. 356; 20 L. W. 677; A. I. R. 1925 Mad. 155.

(4) 100 Ind. Cas. 555; 52 M. L. J. 240; 25 L. W. 307; A. I. R. 1927 Mad. 285; 50 M. 261 (F. B.).

two learned Judges of this Court to draw this distinction in *Janoothassan Sait v. Mahomed Ohuthu* (3) and I think that that case must be regarded as no longer law."

As was pointed out in this case the rules of the Supreme Court of Penang provide that where the defendant does not appear, judgment can be given without trial and without taking evidence if it is proved that the defendant was properly served with the notice of action. The Ceylon Oode which has been referred to in the course of the argument before us contains identical provisions and no distinction can be made on the ground that the provisions of the law are different. I think the decision of the Full Bench above referred to really concludes the matter so far as we are concerned.

I think s. 13 clearly limits the cases where a foreign judgment can be sued upon and that if the case falls within any of the exceptions, no suit would lie. There is no authority to support the argument of Mr. Raja Ayyar that a foreign judgment if it falls within cl. (b) of the exceptions imposes a *prima facie* liability and that the plaintiff will in the absence of the proof by the defendant of the unsustainability of the suit be entitled to a decree. His argument is that whereas in the case of the other clauses the suit would have to be dismissed, in the case of cl. (b) the suit would have to go on and be tried on the merits. This is not supported by any authority and is opposed to the decisions I have referred to above. I am of opinion that the judgment of the Colombo District Court which was obtained under the rules of that Court which enact that where the defendant is *ex parte* the plaintiff is entitled to a decree merely on proving that the defendant was properly served is not a judgment obtained on the merits of the case and that s. 13, cl. (b) bars a suit on that judgment.

The appeal fails and is dismissed with costs.

Curgenvven, J.—The circumstances of this case are not, I think, distinguishable from those of the Full Bench case, *Mahomed Kasim & Co. v. Seeni Pakir* (4), to which I was a party, because it is clear from an examination of the records of the suit in the Colombo Court that the decree and judgment were not given 'on the merits of the case' in the sense that no evidence was taken in support of the averments in

the plaint. Some attempt has been made to found an argument upon the word 'conclusive' in s. 13, and to contend that, although a judgment otherwise than upon the merits may not be conclusive, it yet shifts the onus on to the party against whom it was recorded. But in the first place we are precluded by the Full Bench decision from accepting any such doctrine, and, apart from that consideration, if the adjudication which the foreign judgment embodies is not conclusive it cannot be in any intelligible sense an adjudication at all for the purposes of the subsequent litigation. It can thus form no cause of action, and the parties are relegated for their cause of action, to the original obligation.

I agree, therefore, that the appeal should be dismissed with costs.

V. N. V.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 287 OF 1927

AND

CIVIL MISCELLANEOUS PETITION No. 3590 OF 1927.

October 26, 1927.

Present :—Justice Sir Kumaraswami Sastri, Kt., and Mr. Justice Wallace.

SATAKA MUHAMMAD AND ANOTHER—
PETITIONERS—APPELLANTS

versus

M. HAYATH BATCHA SAHIB AND

ANOTHER—DEFENDANTS—RESPONDENTS.

Letters Patent (Mad.), cl. 15—Civil Procedure Code (Act V of 1908), s. 115—Interlocutory orders in revision petitions, appealability of.

Orders passed on applications in civil revision petitions are dealt with by the High Court in the exercise of revisional jurisdiction and are, therefore, not appealable under cl. 15 of the Letters Patent of the Madras High Court. [p. 814, col. 2.]

Letters Patent appeal against an order of Mr. Justice Curgenvven, dated the 23rd September, 1927, and passed in C. M. P. No. 2003 of 1927 praying for stay of execution of the decree of the Court of the District Munsif, Tirupathur, in O. S. No. 322 of 1923 pending disposal of C. R. P. No. 672 of 1927 presented to the High Court to revise an order of the Court of the District Munsif, Tirupathur, dated the

19th April, 1927, in I. A. No. 151 of 1927 in the said O. S. No. 322 of 1923 and petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing stay of execution of a decree of the Court of the District Munsif, Tirupathur, in O. S. No. 322 of 1923, pending disposal of L. P. A. No. 287 of 1927.

Mr. P. G. Krishna Aiyar, for the Appellants.

JUDGMENT.—This is an appeal against an order of Curgenven, J., refusing to stay execution in a civil revision petition filed under s. 115 of the Code of Civil Procedure and s. 107 of the Government of India Act.

The first question is whether a Letters Patent Appeal would lie against the order under cl. 15 of the Letters Patent which as it is now amended expressly states that there is no appeal against an order made in the exercise of the High Court's revisional jurisdiction. It is conceded that no appeal would lie against an order passed by the High Court in the revision petition itself. It seems to us then that there can be no appeal against any interlocutory orders passed in the revision petition. Where a civil revision petition is filed and interlocutory applications are made in the civil revision petition for reliefs, the High Court can only act in its exercise of revisional jurisdiction in dealing with those applications. It is difficult to see how an appeal would lie having regard to the express provisions of the Letters Patent which preclude appeals against orders passed in the exercise of revisional jurisdiction. There is no authority for the proposition that the orders, on applications filed in a civil revision petition filed under the revisional jurisdiction of the High Court are passed in the exercise of its appellate jurisdiction and that it is only the final order passed in the revision petition that is passed in the exercise of its revisional jurisdiction. It is difficult to see how there can be any application apart from the civil revision petition filed in the High Court as a party could not, without filing a civil revision petition in the High Court ask for stay of execution of the decree in the lower Court. The authorities as regards the appealabil-

ity of orders passed in revisional jurisdiction prior to the amendment of the Letters Patent offer us no help whatever. The very object of the amendment was to put an end to appeals from orders passed by the High Court in its revisional jurisdiction. We think it is clear that all orders passed in applications in civil revision petitions are dealt with by the High Court in the exercise of revisional jurisdiction and that orders passed in the exercise of that jurisdiction are not appealable under the Letters Patent.

The appeal fails and is dismissed with costs.

The petition for stay (C. M. P. No. 3590 of 1927) also is dismissed with costs, one set.

V. N. V.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 264 OF 1927.

October 31, 1927.

Present:—Mr. Justice Devadoss.

MUTHIAH SERVAI AND OTHERS—
DEFENDANTS NOS. 2 TO 5—PETITIONERS

versus

V. K. R. SOMASUNDARAM
CHETTIAR—PLAINTIFF—
RESPONDENT.

Mortgage—Mortgage by son—Suit against father and son—Plea of self-acquisition by father, whether can be gone into.

Where in a suit against the members of a joint Hindu family on a mortgage executed by one of them, the father of the mortgagor pleaded that the property mortgaged was his own self-acquisition and that the mortgagor had no right to the property:

Held, that the father could not be said to be a stranger to the transaction and that the question whether the property was the father's self-acquisition or not ought to be determined in the suit. [p. 815, col. 1.]

Kalkantharam Rukmani Ammal v. Ka Ki Anakma Naidu (1), distinguished.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to re-

wise an order of the Court of the Subordinate Judge Sivaganga, in I. A. No. 341 of 1926, in O. S. No. 100 of 1925.

Mr. T. R. Srinivasa Rajagopala Aiyangar, for the Petitioners.

Mr. V. Ramasami Iyer, for the Respondent.

JUDGMENT.—This is an application to revise the order of the Subordinate Judge Sivaganga refusing to raise an issue at the instance of the second defendant. The second defendant is the father of the first defendant. The suit is on a mortgage-bond executed by the first defendant in favour of the plaintiff. The second defendant raised several contentions, one of which was, that the property mortgaged was his own self-acquisition and that the first defendant had no right to the property. The Subordinate Judge framed several issues, the first was "Is the bond sued on, true, and duly attested, supported by consideration and binding on defendants Nos. 2 to 5." The issue that is sought to be raised now is whether the hypotheca is the self-acquired property of second defendant in which the first defendant has no interest. The learned Subordinate Judge relying upon a decision of this Court in *Kalkantharam Rukmani Ammal v. Ka Ki Anakma Naidu* (1) has disallowed the second defendant's application. In a mortgage suit it is not proper that the title of a person who claims adversely to the mortgagor should be gone into. But the present case is distinguishable on the facts from the case in *Kalkantharam Rukmani Ammal v. Ka Ki Anakma Naidu* (1). This is a case in which the members of a joint family are sued on a mortgage-bond on the ground that the amount of the mortgage was borrowed for family purposes and, therefore, the debt is binding on them. The second defendant is the father of the first defendant and they both according to the plaintiff's allegation are members of a joint-family. That being so, it cannot be said that the second defendant is a stranger to the transaction. If the debt was for the benefit of the joint family, or if the first defendant acted for the second defendant then it would be binding on the whole family and the hypotheca, whether it was self-acquisition of the second defendant or not, would

become liable. Therefore the decision in *Kalkantharam Rukmani Ammal v. Ka Ki Anakma Naidu* (1) cannot apply to the facts of this case. Considering the circumstances of the case, I think it is but fair that this issue ought to be raised and determined in course of the suit and should not be left to be determined in execution. Issue No. 1 relates to the liability of the second defendant for the plaint debt. Inasmuch as the second defendant has not chosen to ask for the issue at the time when issues were settled but has waited for nearly ten months, I think he should be made to pay the costs of the plaintiff up to date. I, therefore, set aside the order of the Subordinate Judge and direct him to raise an issue with regard to the contention of the second defendant that the property is his self-acquisition in which the first defendant has no interest, on the petitioner paying the costs up to date of the plaintiff excepting the institution fee, which I assess at Rs. 450. If this is paid into Court within six weeks from the date of the receipt of this order, the Subordinate Judge will frame the issue asked for and if it is not paid within that time, he need not raise the issue and the order passed by him will stand. No order as to costs of this petition. If the issue asked for is framed, he may frame any consequential issue which may arise.

V. N. V.

A. N. A.

Order set aside.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 557 OF 1926.
September 21, 1927.

Present:—Mr. Justice Wallace.

THE FIRM OF R. B. PODDAR AND CO., BY ITS
AUTHORIZED AGENT HARKCHAND
DAMANIA PODDAR—PETITIONER

versus

D. D. TATACHARIAR AND OTHERS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13
—Ex parte decree—Pleader reporting no instructions
—Application to set aside decree, maintainability of.

Where a Pleader reported that he had no instruc-

(1) 96 Ind. Cas. 26; 23 L. W. 664; A. I. R. 1926 Mad. 744; (1926) M. W. N. 938.

tions and an *ex parte* decree was passed, and the Pleader subsequently applied with a fresh *vakalat* to set aside the *ex parte* decree:

Held, that the decree, though one on the merits, was nevertheless under the circumstances an *ex parte* decree and was liable to be set aside under O. IX, r. 13, Civil Procedure Code.

Prativadi Bhayankaram Pichamma v. Kamiseti Sreeramulu (1) and *Manickam Pillai v. Mahudum Bathummal* (2), followed.

Pazhaniandi v. Naku (3), dissented from.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order, dated the 29th June, 1926, of the Court of the District Munsif, Madura, in I. A. No. 351 of 1926, in O. S. No. 505 of 1925.

Mr. K. S. Narayana Aiyangar, for the Petitioner.

Mr. T. E. Ramabhadrachariar, for the Respondents.

ORDER.—There are two points which require elucidation before this civil revision petition can be settled:—

1. Whether the application to set aside the *ex parte* decree is not out of time having been presented more than 30 days from the date of *ex parte* decree.

2. Whether the Pleader who reported no instructions in the suit filed a fresh *vakalat* before he appeared to put in the application to set aside the *ex parte* decree.

The lower Court will submit findings on these points. Evidence may be taken on the first point, if parties desire, as the point seems to have been overlooked until now.

Time for submission of findings is two weeks after re-opening of this Court after vacation, and for objections ten days.

In compliance with the above order the District Munsif of Madura submitted the following

FINDINGS. The High Court has called for findings on the following two points:—

* * * * *

2. The plaintiff's Pleader was present and adduced no evidence. Defendants Nos. 2 to 5 (respondents in O. R. P. No. 557 of 1926) and their Pleader were absent.

3. The decree was passed on 25th February, 1926. The petition to set aside the *ex parte* decree has been presented into Court on 22nd March, 1926, less than 30 days from the date of the decree. This petition was presented originally on 22nd March, 1926, but it was returned thrice for certain defects to be remedied. The last of the returns was made on 15th April, 1926, with a direction to give the full description of the parties in a separate sheet attached thereto

if there was no space in the petition itself. And in obedience to this direction, a fresh sheet with the full description of the parties was attached on 20th April, 1926. But the Vakil attached the additional sheet in the form of a petition and dating it on 20th April, 1926, has represented the same along with the original petition; the original petition alone having been stamped. The original petition has evidently not been printed in the High Court printed papers. I find on the first point that the petition to set aside the *ex parte* decree was presented within 30 days from the date and that it is in time.

4. A fresh *vakalat* has been filed along with the petition to set aside the *ex parte* decree by the Pleader who presented the same. The *vakalat* also is herewith submitted.

JUDGMENT.—The findings are that the application to set aside the *ex parte* decree was in time and that a fresh *vakalat* was put in with the application to set aside the *ex parte* decree. I accept them.

The finding on the 2nd point shows that the Pleader did not continue to act on his original *vakalat* after he reported no instructions in the suit.

On the facts, therefore, I must hold following the Full Bench cases in *Prativadi Bhayankaram Pichamma v. Kamiseti Sreeramulu* (1) and *Manickam Pillai v. Mahudum Bathummal* (2), that the party was absent and, therefore, the decree though on the merits was nevertheless an *ex parte* decree. A ruling of a Single Judge of this Court in *Pazhaniandi v. Naku* (3), subsequent to *Manickam Pillai v. Mahudum Bathummal* (2), seems to me, if I may say so with respect, contrary to the Full Bench rulings.

There is, therefore, no error of law in the proceedings of the lower Court and I dismiss the petition. Costs here to be costs in the cause.

V. N. V.

Petition dismissed.

A. N. A.

(1) 43 Ind. Cas. 566; (1918) M. W. N. 92; 41 M. 286; 23 M. L. T. 1; 34 M. L. J. 24 (F. B.).

(2) 82 Ind. Cas. 102; 47 M. 819; 20 L. W. 427; 47 M. L. J. 398; (1924) M. W. N. 689; A. I. R. 1925 Mad. 21 (F. B.).

(3) 99 Ind. Cas. 32; 51 M. L. J. 684; A. I. R. 1927 Mad. 109.

PATNA HIGH COURT.CRIMINAL REVISIONS NOS. 751 AND 780.
OF 1927.

December 2, 1927.

Present:—Justice Sir Jwala Prasad, Kt.,
and Mr. Justice Ross.

CRIMINAL REVISION No. 751 OF 1927.

RAMGULAM TELI AND OTHERS—

ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

CRIMINAL REVISION No. 780 OF 1927.

PARMESWAR MUNDER AND OTHERS—

ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898, as amended by Act XVIII of 1923), s. 162—Accused's right to copies of statement recorded by Police—Time for making application—Called; meaning of—Accused, whether bound to wait till opening of cross-examination.

Under the provisions of s. 162 of the Criminal Procedure Code, when a witness for the prosecution is produced in Court the accused is entitled to apply for a copy of his statement recorded by Police, and if he makes an application at that stage, the Court is bound to refer to the writing and to direct that the accused be furnished with a copy thereof, subject to the proviso that if the Court is of opinion that any part of such statement is not relevant to the subject-matter of the enquiry or trial, or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, then the Court shall record such opinion and exclude such part from the copy furnished to the accused. [p. 817, col. 2.]

The Court has no power to refuse the granting of the copy until the cross-examination has been opened and the accused has by his questions laid a foundation for holding that there is contradiction between the statements made in Court and those made before the Police. [p. 818, col. 2.]

Dadan Gazi v. Emperor (4) and *Chedi Prasad Singh v. Emperor* (5), followed.

Madari Sikdar v. Emperor (1) and *In re Peramasami Ragudu* (2), dissented from.

Per Jwala Prasad, J.—The words "the Court shall refer to such writing" in s. 162 of the Criminal Procedure Code are obviously for the purpose of enabling the Court to exercise discretion under the second proviso, and not for the purpose of restricting the right of the accused to obtain a copy, the discretion wherein was expressly taken away by the Legislature. [*ibid.*]

CR. REV. No. 751 OF 1927.

Criminal revision from an order of the Special Magistrate, Bettiah, dated the 26th of October, 1927.

CR. REV. No. 780 OF 1927.

Criminal revision from an order of the Sessions Judge, Bhagalpur, dated the 31st of October, 1927.

Messrs. S. P. Varma, S. N. Sahay, K. N. Lal and Gopal Prasad, for the Petitioners.

The Government Advocate, for the Crown.
JUDGMENT.

CRIMINAL REVISION No. 751 OF 1927.

Ross, J.—This is an application to quash the commitment of the petitioners to the Court of Sessions on the ground that the Magistrate has not complied with the provisions of s. 162 of the Criminal Procedure Code.

It appears that the petitioners applied for copies of the statements of the witnesses before the Police. The order-sheet is not clear as to the precise stage at which the application was made, but it was at all events before the cross-examination opened. The learned Magistrate following the decision in *Madari Sikdar v. Emperor* (1) held that before copy could be given some foundation must be laid in cross-examination for the suggestion that evidence given in Court is contradicted by the previous statement recorded under s. 161, Criminal Procedure Code, and refused the application.

The meaning of s. 162 seems plain: The witness has to be called for the prosecution, that is to say, he must be produced in Court; and if then the accused applies for a copy of his statement before the Police recorded in writing the Court is bound to refer to the writing and to direct that the accused be furnished with a copy thereof, subject to the proviso that if the Court is of opinion that any part of such statement is not relevant to the subject-matter of the enquiry or trial, or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, then the Court shall record such opinion and exclude such part from the copy furnished to the accused. When this copy has been given, any part of the statement, if duly proved, can be used in the manners provided, by s. 145 of the Evidence Act to contradict the witness by the writing, i. e., his attention must be called to those parts of it which are to be used for the purpose of contradicting him before the writing can be proved. So far as the decisions in *Madari Sikdar v. Emperor* (1) and *In re Peramasami Ragudu* (2) go beyond this interpretation of the section I respectfully dissent from them. There is nothing in the section which requires that the cross examination shall have been

(1) 102 Ind. Cas. 550; 54 C. 307; A. I. R. 1927 Cal. 514; 28 Cr. L. J. 532; 8 A. I. Cr. R. 112.

(2) 91 Ind. Cas. 532; 27 Cr. L. J. 100; 22 L. W. 784; A. I. R. 1926 Mad. 183.

opened; nor do I see how the defence can be in a position to contradict the witness by his previous statement or to lay any foundation for the suggestion that there is a contradiction before it has seen the statement. Nor indeed is the Magistrate in a position to say whether there may not be a material contradiction between the two statements. All that the section requires is that the witness should be produced in Court, and the right conferred upon the accused by the section arises. The Magistrate was, therefore, in error in the procedure that he followed in this matter.

The further question remains as to what the consequence of the Magistrate's having failed to grant the copy applied for should be. The commitment has already taken place, and the learned Government Advocate states that the learned Sessions Judge has ordered that copy of all the statements of the witnesses should be granted to the accused. In these circumstances I think that no useful purpose would be served by quashing the commitment. I would, therefore, discharge the Rule.

CRIMINAL REVISION No. 780 OF 1927.

For the reasons given in deciding Criminal Revision No. 751 of 1927 (*Ramgulam Teli and others v. The King-Emperor*), I hold that the accused are entitled to copy of the statements of the witnesses who have been called at the stage which the trial has now reached, subject to the operation of the second proviso to s. 162, Criminal Procedure Code, and I would order accordingly.

Jwala Prasad, J.—I fully agree.

The question is at what stage an accused is entitled to a copy of the statement of a witness recorded by the Police during investigation. In other words, what is the true interpretation and scope of the proviso to cl. (1) of s. 162 of the Code of Criminal Procedure. In the old Code the proviso stood as follows: "provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then, if the Court thinks it expedient in the interest of justice, direct that the accused be furnished with a copy thereof." The words italicised in the aforesaid passage have been changed into "*the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, etc.*" The discretion which vested in the Court formerly of

granting such copies has now been taken away, and it has now become imperative upon the Court to grant copies to the accused at his request. The aforesaid words "if the Court thinks it expedient in the interests of justice" in the old section have been substituted by the second proviso to the new section under which the Court has a discretion to exclude from the copy any part of such statement which in the opinion of the Court "is not relevant to the subject-matter of the inquiry or trial, or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests"; otherwise the accused's right to obtain copy is absolute for the limited purpose of using the statement contained therein to contradict the witness in the manner provided by s. 145 of the Indian Evidence Act. The Court at the request of the accused is bound to "refer to such writing and direct that the accused be furnished with a copy thereof." If these words are read along with the second proviso referred to above, the meaning becomes clear that at the request of the accused the Court shall refer to the writing and direct copies to be furnished provided that under the second proviso to s. 162 the Court may exclude any part of the statement if it is of opinion that the statement asked for is not essential in the interests of justice, or is not relevant to the subject-matter of the enquiry or trial, or that it is inexpedient in the public interests. Therefore, the words "the Court shall refer to such writing" are obviously for the purpose of enabling the Court to exercise discretion under the second proviso, and not for the purpose of restricting the right of the accused to obtain a copy the discretion wherein was expressly taken away by the Legislature, and hence the Court cannot refuse the granting of a copy till the accused has by his cross-examination showed that there is contradiction between the statement in Court and the statement referred to before the Police, which would assume that the accused has already got an insight into the Police record without having got a copy. It is impossible for the accused, without having got a copy of the statement and without knowing the contents thereof, to lay the foundation in cross-examination for showing that there is contradiction, and it will open a wide door for obtaining surreptitious copies. The words "refer to such writing,"

do not in any way restrict the right of the accused to obtain the copy, nor is the writing to be referred to for the purpose of seeing whether there is any contradiction or not between the statement made in Court and the statement recorded by the Police Officer. Again, the trial Court is not the sole tribunal for determining whether in substance and in fact there is a contradiction or not. It might be a contentious matter, and the accused has a right to have the opinion of a higher tribunal in the matter. There is nothing in the section to show that the accused should by his questions lay the foundation in cross examination for the granting of a copy as was held in *Madari Sikdar v. Emperor* (1), and *In re Peramasami Ragudu* (2) and by one of the Judges of a Division Bench of the Patna High Court in *Saadat Mian v. Emperor* (3). This is not to be found in the section itself, and I do not think we can add those words to it in order to restrict the right of the accused to obtain copy. The section has expressly provided the time when the accused would be entitled to apply for and obtain copy and that is "When any witness is called for the prosecution in such inquiry or trial." The learned Government Advocate submitted that the word "when" should be read as "after" and the word "called" as "examined-in-chief." Even if this interpretation is accepted, it would simply mean that after the witness has been examined-in-chief; but it would not go further than that, namely, that the accused should have laid the foundation in cross-examination for showing that there was contradiction in the statement made in Court and that before the Police Officer in order to entitle him to apply for and obtain copy. The word "when" may mean "after" but that does not matter much. The sole question is what is the meaning of "called for the prosecution." The word "called" is not a word of art and is, therefore, used in its ordinary sense. It has various meanings to shout or cry out, to commend or request to come or be present to summon, cite; in law the expression "to call for the plaintiff" means to cry aloud his name in open Court, on his failure to answer to which the trial is at an end and he becomes non-suited: (*vide* The Imperial Dictionary, Webster's International Law Dictionary and Bouvier's Law Dictionary).

(3) 103 Ind. Cas. 597; 6 Pat. 329; A. I. R. 1927 Pat. 243; 28 Cr. L. J. 709; 8 A. I. Cr. R. 383; 8 P. L. T. 780.

The words "called for the prosecution" in the present section are the same as in the old s. 162. In *Dadan Gazi v. Emperor* (4) a Division Bench of the Calcutta High Court construed the aforesaid words to mean the time when the witness appears before the Court. As to the procedure for granting copy, their Lordships say: "The proper procedure is for the accused, at the time the witness, whose statement is so recorded, appears before the Court, to ask the Court to refer to such writing, and if necessary, furnish the accused with copies." That appears to be the plain meaning of the word "called", and we have no right to add to the word so as to restrict its meaning by holding that the witness for the prosecution should not only have been produced in Court, but that his examination-in-chief should have been finished and the accused should have commenced his cross-examination and by his questions laid the foundation for holding that the statements made by the witnesses are contradictory to those recorded by the Police.

I, therefore, respectfully dissent from the contrary view taken in the cases referred to above, and agree with the view expressed by Sen, J., in *Chedi Prasad Singh v. Emperor* (5).

I also agree with the order passed by my learned brother in all these cases.

H. K. P.

Order accordingly.

- (4) 33 C. 1023; 10 C. W. N. 890; 4 Cr. L. J. 79.
 (5) 102 Ind. Cas. 773; 8 P. L. T. 613; 28 Cr. L. J. 597;
 A. I. R. 1927 Pat. 325; 8 A. I. Cr. R. 271.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 796
 OF 1925.

December 6, 1927.

Present:—Sir Dawson Miller, Kt.,
 Chief Justice, and Justice Sir B.K. Mullick.
 HIRDAY NARAIN SINGH AND OTHERS—
 DEFENDANTS—APPELLANTS

versus

KALI CHARAN SINGH AND OTHERS—
 PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 101, 111
 (d)—Lessor and lessee—Acquisition by lessor of lessee's
 interest—Merger—Intention to keep lessee's interest
 alive, whether material.

Where the interests of the lessor and the lessee in
 the property leased become vested in the same
 person in the same right, the lease determines.

absolutely irrespective of any question of intention, express or implied, on the part of the acquirer to keep the subordinate interest alive. [p. 821, col. 1.]

Appeal from a decision of the District Judge, Monghyr, dated the 20th March, 1923, confirming that of the Munsif, Begusarai, dated the 15th September, 1922.

Mr. Shiveshwar Dayal, for the Appellants.

Messrs A. B. Mukherji and D. N. Sarkar, for the Respondents.

JUDGMENT.

Miller, C. J.—The plaintiffs in this case sued for a declaration of their title to, and for possession of, two plots of land including a dwelling house and an orchard measuring together between 6 and 7 *kathas* of land. Their case was that they purchased the property from Babu Sri Narain, the defendant No. 1 in the suit, with whom his sons have also been impleaded as defendants, being members of a joint family. It appears that in the year 1915 Sri Narain was the proprietor of a four-annas share in *Mauza* Chak Sikandra Sayedpur otherwise known as Mian Chak, *Touzi* No. 3803 in the Collector's roll. Within that share was the land in question. The plaintiffs, after their purchase in 1915, took possession of the four-annas share as proprietors but they did not get actual possession of these two plots which are the subject of the present suit. Within 12 years, however, they have sued for possession and for a declaration of their title relying upon the sale of 1915.

Although various defences were raised in the suit all of which were decided against the defendants in both the lower Courts, the only question with which we are concerned in this second appeal is one of merger. It was contended by the defendants that the property in suit was subject to a leasehold interest held by them and that the right to direct possession had not passed to the plaintiffs in 1915 by the transfer of the proprietary interest. Their case was that the leasehold interest never became merged in the proprietary interest and remained with the vendor. The plaintiffs, on the other hand, contended that although there had been originally a leasehold interest of this particular property, it had in fact become merged in the proprietary interest in the time of Sri Narain's father, Gopi Lal. This question is one which had to be considered both

in the trial Court and in the lower Appellate Court and in both those Courts it was found that the leasehold interest of this house and orchard had become merged in the proprietary interest of Gopi Lal before the defendant Sri Narain acquired by partition his four-annas share in the estate. It appears that Gopi Lal during his lifetime, being the sixteen annas proprietor of the *mauza* in question, purchased from the then tenant his leasehold interest in the two plots in suit and subsequently upon Gopi's death these two plots fell to the share of Sri Narain upon partition between him and his brothers.

The point raised in the lower Courts was that Gopi Lal at the time of his purchase of the house and orchard from the tenant was not in fact the sixteen annas proprietor but had a share only, amounting to fourteen annas, and, therefore, if he acquired an interest as a co-sharer proprietor, then under s. 22, sub-s. (2) of the Bengal Tenancy Act the interest did not become entirely merged in the larger proprietary interest but continued alive, the proprietor having the use and occupation and paying rent to his co-sharers according to their proportion, and that after his death when his son acquired the four-annas share in his interest including these two plots the same state of affairs continued and, therefore, the transfer of the proprietary interest did not transfer the leasehold interest. That was the only point which was raised in the lower Courts with regard to this part of the case. Both the lower Courts found that in fact Gopi Lal was the sixteen annas proprietor when he purchased the interest in the orchard and the house, and, therefore, the case fell within sub-s. (1) and not sub-s. (2) of s. 22 of the Bengal Tenancy Act and hence the leasehold interest became merged in the proprietary interest.

On second appeal to this Court a new point has been raised which was not taken in either of the lower Courts. It is contended to-day for the first time that this orchard and house were not in fact agricultural land and were not governed by the Bengal Tenancy Act but by the Transfer of Property Act and, therefore, in considering the question of merger it is contended that we must apply the general doctrine of merger as it prevails according to the English Law as administered in this country and we must see whether at the

time of the transaction whereby Gopi Lal acquired this interest, there was any intention on the part of the purchaser to keep alive the subordinate interest. In support of that proposition we have been referred to the decision of the Privy Council in the case of *Dulhin Lachhanbati Kumri v. Bodnath Tiwari* (1). That case was one which dealt with the general law of merger in the *mofussil* before the Transfer of Property Act came into force in 1882 and has nothing whatever to do with the law as it now exists under that Act. The law that we have to apply if the case is not governed by the Bengal Tenancy Act is the law laid down in s. 111 of the Transfer of Property Act. It is interesting to notice that under that Act there are two sections which deal with matters of this sort. The first is s. 101 which provides for the case where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property and the section provides that the charge or incumbrance shall be extinguished unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit. When we come, however, to the acquisition of a leasehold interest by the lessor s. 111 applies and it will be noticed that in that section there is no reference whatever to any declaration either express or by implication, or to the case where the continuance of the interest would be for the benefit of the person acquiring. By s. 111, cl. (d) it is provided that a lease of immoveable property determines in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right. Now that to my mind is a very clear exposition of the law on the subject and applies absolutely to the present case where the proprietor purchases the inferior right of his lessee. In such a case the transaction comes directly within the four corners of s. 111, cl. (d). Therefore it does not make any difference whether the property is governed by s. 22, sub-s. (1) of the Bengal Tenancy Act or by s. 111 (d) of the Transfer of Property Act. In either case it is clearly provided that the inferior

interest shall merge in that of the superior interest.

In my opinion, therefore, this appeal must be dismissed with costs.

Mullick, J.—I agree.

A. N. A.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 572

OF 1924.

December 19, 1927.

Present:—Mr. Justice Das and

Mr. Justice Kulwant Sahay.

KULDIP NARAIN TEWARI AND OTHERS—

DEFENDANTS 2ND PARTY—APPELLANTS

versus

RAM LAL MANDAL AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 148-A, 163, 167—Rent decree—Attachment and sale proclamation not issued simultaneously—Sale, effect of—Notice annulling incumbrances, validity of—Burden of proving that notice was not in accordance with law—Second appeal—Question of fact, determination of.

Where a rent-decree is obtained in a suit framed as a rent suit under the provisions of s. 148-A of the Bengal Tenancy Act and the decree-holder takes every step necessary to be taken under the Act to execute the decree as a rent-decree, the mere fact that the orders for attachment and sale were not issued simultaneously as required by s. 163 of the Bengal Tenancy Act is not a ground for holding that the sale held under the decree is not a rent sale. [p. 823, col. 1.]

Dhannun Singh v. Lachmi Lal (1), followed.

Under s. 167 of the Bengal Tenancy Act once the Collector has issued notice of annulment, the incumbrance must be deemed to have been annulled. Though this does not mean that the validity of the notice and the consequent annulment of the incumbrance cannot afterwards be called in question, the section casts the burden of proof upon the person questioning the validity of the notice to establish that the notice under s. 167 was not served in accordance with law. [p. 824, col. 1.]

Nand Kishore Chaudhuri v. Rameshwar Singh (3), followed.

A High Court has power to determine a question of fact in second appeal in order to save a remand. [ibid.]

Appeal from a decision of the District Judge, Bhagalpur, dated the 6th March, 1924, affirming that of the Subordinate Judge, Bhagalpur, dated the 10th September, 1919.

Sir Sultan Ahmed, Kt., and Messrs. Jaggarnath Prasad and S. Deyal, for the Appellants.

Messrs. S. M. Mullick and S. N. Dutt, for the Respondents.

JUDGMENT.

Das, J.—This appeal arises out of a

(1) 66 Ind. Cas. 551; 26 O. W. N. 565; (1922) M. W. N. 58; 15 L. W. 343; 30 M. L. T. 216; 3 P. L. T. 383; 4 U. P. L. R. (P. C.) 42; A. I. R. 1922 P. C. 94; 48 I. A. 485 (P. C.).

suit instituted by the respondents for recovery of possession of certain lands specified in the plaint. The suit was resisted by the defendants second party who are the appellants in this Court on the ground that they as landlords have purchased the disputed lands in execution of a rent decree obtained by them as against the tenants, the defendants first party, and that the plaintiffs as usufructuary mortgagees have no title to put forward as against them.

It appears that two rent suits properly framed as such under the provisions of s. 148-A were instituted by the landlords in respect of two holdings as against the defendants first party some time prior to the 11th December, 1915. While these rent suits were actually pending, the defendants first party, on the 11th December, 1915, gave a usufructuary mortgage of the holdings in question which were the subject-matter of the rent suits to the plaintiffs. On the 6th January, 1916, the landlords recovered rent decrees as against the defendants first party. They proceeded to execute their decrees and on the 26th March, 1917, and on the 27th March, 1917, they purchased these holdings in question. They actually recovered possession of the holdings on the 15th December, 1917. As I have said the plaintiffs were in possession of the holdings under the usufructuary mortgage of the 11th December, 1915. They were, however, dispossessed by the landlords and they then instituted the suit out of which the present appeal arises for recovery of possession of those lands. One other fact has to be noticed. On the 14th June, 1918, the landlords applied to the Collector under the provisions of s. 167 of the Bengal Tenancy Act for service of notice upon the plaintiffs to annul their incumbrances and the defendants contend that having regard to all these circumstances the plaintiffs have no title to put forward as against them in this action. They also claim that there was an abandonment of the holdings in question by the tenants as a result of the execution of the usufructuary mortgage in favour of the plaintiffs.

The trial Court held that there was no abandonment as contended by the defendants second party and that the decree obtained by them as against the defendants first party was not executed as a rent decree and that the sale held in pursuance of the decree was not a rent sale. In that

view the trial Court gave the plaintiffs a decree substantially as claimed by them. The lower Appellate Court found that the sale was a rent sale, but that Court did not go into the other question, namely, whether the incumbrance had been annulled by the defendants second party in accordance with law. That Court also found that there was abandonment as insisted on by the defendants second party. The plaintiffs appealed to this Court. This Court decided the issue as to abandonment in favour of the plaintiffs and then proceeded to say as follows:

"The learned District Judge having decided the case in favour of the defendants upon the point which I have just mentioned", namely, the point as to abandonment, "did not proceed to consider the question of fact raised by issue No. 12, namely, whether the incumbrance had been duly annulled. It was the defendants' case that the provisions of s. 167 of the Act had been complied with. Whether they had or had not depended upon questions of fact. These facts were not considered by the learned District Judge. It will be necessary, therefore, before this case can be finally disposed of that a finding should be arrived at upon that question. The result will be that the decree of the learned District Judge dismissing the suit will be set aside and the case will be remanded to him to try that part of issue No. 12, upon the facts, which relates to the question of whether the incumbrance had been duly annulled or not. There may have been other issues which were material to the decision of the case which were not considered by the learned District Judge but they have not been brought to our attention. If there are any such issues then the parties will be entitled to raise them before the learned District Judge on remand".

It will be seen then that the question as to whether the sale was a rent sale was not raised before this Court by the plaintiffs. They accepted the decision of the lower Appellate Court on this question and in remanding the case this Court asked the Court below specifically to try that part of issue No. 12, upon the facts, which relates to the question of whether the incumbrance had been duly annulled or not. In my opinion, therefore, the question as to whether the sale was a rent sale or not was finally determined by

the lower Appellate Court in the decision from which there was an appeal to this Court which appeal was finally disposed of on the 15th August, 1923.

When the case went back to the learned District Judge on appeal that learned Judge went into the question as to whether the sale was a rent sale or not. Having considered that question he came to the conclusion that it was not a rent sale. He proceeded to consider the other question which he was specifically asked to try and he found in favour of the plaintiffs. Having regard to those findings that learned Judge dismissed the appeal which had the effect of confirming the decision of the trial Court which was in favour of the plaintiffs. From the decision of the learned District Judge, dated the 6th March, 1924, the present appeal has been presented to this Court.

The first question is whether we ought to go into the question whether the sale was a rent sale or not. I have no doubt that the learned District Judge, having regard to the scope of the remand order, had no power to consider the question. But I do not desire to rest my decision on a point so technical as this; for I am satisfied that the decision of the learned District Judge on this point is erroneous. As I have stated, the suits were framed as rent suits under the provisions of s. 148-A of the Bengal Tenancy Act. It is not disputed before us that the decrees obtained by the landlords were rent decrees. Now, what reason is there for holding that the sales were not rent sales within the meaning of that term as used in the Bengal Tenancy Act? The learned District Judge gives two reasons:—first he says that the orders for attachment and sale of the holding were not issued simultaneously as required by s. 163 of the Bengal Tenancy Act. There is nothing to show that the decree-holder did not apply for simultaneous issue of the order for attachment and sale of the holdings in question and I am satisfied that this is not a ground for holding that the sale was not a rent sale. I may refer to a decision of this Court in *Dhunmun Singh v. Lachmi Lal* (1). It was held in that case that provided the holder of a rent decree takes every step necessary to be taken under the Bengal Tenancy Act to execute the decree

as a rent decree, the mere fact that the Court failed to issue simultaneously the order for attachment and the proclamation cannot make the decree anytheless a decree for rent. The second ground taken by the learned District Judge is equally untenable. He says that in the sale proclamation although the *khata* number of the holdings has been correctly given, various plot numbers are omitted from the holding and that the area is almost one acre less than the area of the holding. But the *khata* number of the holding having been given it would follow, in my opinion, that the decree-holder wanted to sell all the holdings comprised within that *khata* number; and it is worthy of note that the plaintiffs in this case did not dispute that the entire holdings were sold in this case. In any case, therefore, the decision of the learned District Judge on this point cannot be supported. I hold that the sales were rent sales and that the holdings in question passed to the landlord-purchasers and not merely the right title and interest of the judgment-debtors.

I now come to the second point. Sir Sultan Ahmed appearing on behalf of the defendants second party, the appellants in this Court, contends that the question whether the incumbrances were annulled by the landlords under s. 167 of the Bengal Tenancy Act is irrelevant, for in any case the holdings being non-transferable holdings, the plaintiffs cannot succeed in a suit for possession as against the landlords who have purchased the holdings in question in execution of their rent decrees. He refers us to a recent decision of this Court in *Badlu Pathak v. Sibram Singh* (2) decided by this Court on the 14th November last. It is however, not necessary for us to decide this point, as we are satisfied that the plaintiffs' suit must fail, since they have not established in this case that the incumbrances were not annulled in accordance with law. Now, in dealing with this point the learned District Judge has proceeded as if the onus were on the landlords to establish that the incumbrances were annulled by them in accordance with law. It is conceded that the application for annulment of the incumbrances in question was not made within one year of the date of sale; but it appears on reference to the petition filed before the Collector under

(1) 57 Ind. Cas. 492.

(2) 107 Ind. Cas. 310.

s. 167, Bengal Tenancy Act, that it was the case of the landlords that they had no information about the incumbrances in question until a period within one year of the date of the application. But the notice was in fact served upon the plaintiffs and to quote the language of s. 167 of the Act "the incumbrance shall be deemed to be annulled from the date on which it was so served." The question now arises whether in this suit it is for the landlords to establish that they had no information about the incumbrance until a period within one year of the date of the application or whether it is for the plaintiffs to establish that the landlords had the information of the incumbrance beyond one year of the date of their application. On this question the decisions of this Court are perfectly clear. It was held by this Court in *Nand Kishore Chaudhuri v. Rameshwar Singh* (3) that the onus is upon the person questioning the validity of the notice to establish that the notice under s. 167 was not served in accordance with law. It is sufficient for my purpose to quote the headnote of the case. It runs as follows:—

"Under s. 167 of the Bengal Tenancy Act once the Collector has issued notice of annulment, the incumbrance must be deemed to have been annulled. This does not, however, mean that the validity of the notice and the consequent annulment of the incumbrance cannot afterwards be called in question. The effect of the section is to cast the burden of proof upon the person questioning the validity of the notice."

I entirely agree with this decision and I hold that it was for the plaintiffs to establish that the notice was not served upon them within the period of limitation. The learned Judge did not decide this case on this footing and the question arises whether we should remand the case again to the District Judge to decide this point upon the evidence on the record, or whether we should decide it in this Court. We have power under the present Code to determine a question of fact of this nature in order to save a remand and we have gone into the evidence in order to find out

whether the plaintiffs have established their case upon this point.

[His Lordship referred to the evidence and concluded as follows:—]

It follows from this that there is no evidence on the side of the plaintiffs to establish that the notice under s. 167 was served upon them beyond the period of limitation. The learned District Judge, however, says that there is no evidence on the side of the defendants. Sir Sultan Ahmed has referred us to the evidence of Kartick Chaudhuri, defendants' witness No. 5, who says definitely in his evidence that his *malik* came to know of the incumbrance when the notice was received in the cases for setting aside the sale. I do not, however, consider that this evidence is sufficient for the evidence would be at best hearsay and the *malik* should have been called to give evidence on this point. The result is that there is no evidence on either side on this point and this being so, it is impossible to say that the plaintiffs have discharged the onus which is upon them so far this point is concerned.

I would allow this appeal, set aside the judgments and decrees passed by the Courts below and dismiss the plaintiffs' suit with costs in all the Courts.

Kulwant Sahay, J.—I agree.

B. K. P.

Appeal allowed.

[PATNA HIGH COURT.]

APPEAL FROM ORIGINAL DECREE No. 162
OF 1925.

December 15, 1927.

[Present :—Mr. Justice Das and
Mr. Justice Kulwant Sahay.]

Pandit MAHABIR PRASAD DUBEY

—APPLICANT—APPELLANT

versus

SHEODAYAL PATHAK AND OTHERS

—OPPOSITE PARTY—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XVII, rr. 2, 3, applicability of—Failure to appear on adjourned date—Hearing not commenced—Procedure—Rule 3 not applicable.

It is settled law that O. XVII, r. 3 of the Civil Procedure Code applies only where the hearing of a suit has commenced and an application for an adjournment is then made by one of the parties. When before the hearing of a suit is commenced the plaintiff fails to appear on an adjourned date, the Court has to proceed under r. 2 and not r. 3.

(3) 78 Ind. Cas. 476; 2 Pat. L. R. 19; A. I. R. 1924 Pat. 515.

Appeal from a decision of the District Judge, Gaya, dated the 6th August, 1925.

Messrs. S. N. Roy and Satyadev Sahay, for the Appellant.

Messrs. S. M. Mullick and Jalgobind Prasad Sinha, for the Respondents.

JUDGMENT.

Das, J.—This appeal is directed against the order of the learned District Judge of Gaya, dated the 6th August, 1925, by which he dismissed an application for grant of Probate under the provision of O. XVII, r. 3 with costs. Now, the order itself shows that the hearing of the suit had not commenced. It appears that the petitioner took time to produce his evidence from time to time. Ultimately the Court refused to grant him further time and dismissed the application; but it is to be observed that the hearing of the suit had not commenced before the learned District Judge. That being so, O. XVII, r. 3 does not apply. It is well established that O. XVII, r. 3 only applies where the hearing of a suit has commenced and an application for an adjournment is then made by one of the parties. It is also established that when, before the hearing of a suit is commenced, the plaintiff fails to appear on an adjourned date, the Court has to proceed under r. 2 and not 3; that is to say, it has power to dismiss the suit under O. IX, r. 8 so as to give the plaintiff an opportunity of having the dismissal set aside under O. IX, r. 9. As the matter stands, the plaintiff had no opportunity to have the order of dismissal set aside. This being so, the order of the learned District Judge must be set aside.

The result of this is that the Probate case must be taken to be pending, and the learned District Judge will fix a date and then proceed with the hearing of the suit. If the plaintiff refuses or fails to appear on that date, then it will be open to him to dismiss the suit under O. IX, r. 8 of the Code. The appellant is entitled to the costs of this appeal: hearing-fee three gold mohurs.

Kulwant Sahay, J.—I agree.

B. K. P.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 40 of 1927.

January 12, 1928.

Present:—Mr. Justice Ross and

Mr. Justice Wort.

SASIBUSHAN MAZUMDAR—APPELLANT

versus

MANIK LAL CHANDRA AND OTHERS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151—Court-fee—Levy of excess Court-fee—Appellate Court's power to order refund—Inherent powers.

An Appellate Court has inherent power to order refund of Court-fee illegally levied by the lower Court.

Chaudra Hari Singh v. Tipan Prosad Singh (1), In re Grant (2) and Hari Har Guru v. Ananda Mahanty (3), followed.

Messrs. R. C. Bhaduri and S. C. Roy, for the Petitioner.

Mr. U. N. Bannerji, for the Respondents.

ORDER.—The petitioner stamped his plaint with a Court-fee of Rs. 15 as in a declaratory suit, but he was ordered by the Subordinate Judge to pay an *ad valorem* Court-fee and thereupon he paid a Court-fee Rs. 877-8-0. On appeal to this Court the Court-fee on the memorandum of appeal was Rs. 15 and that was accepted as correct. We have referred to the pleadings in the suit and it seems clear that the suit was a declaratory suit and that the proper Court-fee was Rs. 15 only. The learned Advocate for the petitioner applies for a refund of the excess Court-fee paid under the orders of the Subordinate Judge. He refers to s. 13 of the Court Fees Act and contends that that section substantially applies, because, if he had not paid the *ad valorem* Court-fee as ordered by the Court, his plaint would have been rejected. Whether the section applies or not, the case is one in which the Court has jurisdiction to act under s. 151, as was held in this Court in *Chaudra Hari Singh v. Tipan Prosad Singh (1)*. See also *In re Grant (2)* and *Hari Har Guru v. Ananda Mahanty (3)*. On the authority of these decisions we direct that the Taxing Officer do issue the necessary certificate to enable the petitioner to apply to the Deputy Commissioner of Ranchi to obtain a refund of the excess Court-fee of Rs. 877-8-0.

A. N. A.

Certificate issued.

(1) 46 Ind. Cas. 271; 3 P. L. J. 452; (1918) Pat. 273.

(2) 14 W. R. 47.

(3) 20 Ind. Cas. 498; 40 C. 365.

PATNA HIGH COURT.

CRIMINAL REVISION No. 776 OF 1927.

December 12, 1927.

Present:—Sir Dawson Miller, Kt.,

Chief Justice, and Justice

Sir B. K. Mullick, Kt.

JAMUNA PRASAD—ACCUSED—PETITIONER
*versus***EMPEROR—OPPOSITE-PARTY.***Criminal Procedure Code (Act V of 1898), s. 234—*
Offences of same kind, within one year—Joint trial,
whether regular.

An accused can be tried for three offences in one trial if the offences are of the same kind within the meaning of s. 234 of the Criminal Procedure Code and if they were committed within the space of one year.

Asghar Ali Biswas v. Emperor (1), dissented from.

Farzand Ali v. Emperor (2), referred to.

Criminal revision against an order of the Sessions Judge, Gaya, dated the 5th November, 1927, confirming that of the Magistrate, First Class, Gaya, dated the 12th September, 1927.

Messrs. *Kailaspati and Sarju Prasad*, for the Petitioner.

Mr. *Manohar Lal*, for the Assistant Government Advocate, for the Opposite Party.

JUDGMENT.

Mullick, J.—The petitioner Jamuna Prasad was a peon at the Post Office at Gaya and was charged before the Deputy Magistrate of Gaya with having between the 8th December, 1926, and the 28th December, 1926, embezzled in the course of his employment three sums of Rs. 12, Rs. 22 and Rs. 25 respectively which should have been paid out on account of three money orders issued from Calcutta to certain payees at Gaya. He was also charged in respect of the same sums with having falsified his registers and he was convicted under s. 409 of the Indian Penal Code for criminal breach of trust as a public servant and sentenced to a consolidated term of rigorous imprisonment for nine months. In respect of the charges under s. 477-A of falsification of accounts he was also found guilty but no separate sentence was passed for these offences.

There was then an appeal to the Sessions Judge who affirmed the conviction and sentence and the present application is made to us in revision.

It is urged at the outset though somewhat faintly that there has been an error of law in regard to the charges. It is said that the trial Court was wrong in entering

under one heading all the three items in respect of which the accused has been charged, and that there should have been, a separate heading in respect of each item. The complaint, therefore, amounts to this that instead of stating the substance of the charges against the accused in three separate sentences the Court set out the details in one comprehensive sentence. In my opinion there is no substance in this complaint and the accused had full notice of each particular item and of the offence with which he was charged in respect of it.

It is then suggested that s. 233 of the Code of Criminal Procedure forbids the trial of the three offences in one trial and reliance is placed on *Asghar Ali Biswas v. Emperor* (1). It is quite clear, however, that the trial was perfectly legal. The three offences were offences of the same kind within the meaning of s. 234 of the Code and as the offences were committed within the space of one year the Magistrate was competent to hold only one trial. With regard to the authority quoted, it is clear that s. 234 of the Code was not brought to the notice of the learned Judges in that case which has been dissented from in this Court in *Farzand Ali v. Emperor* (2).

The same point is taken with respect to the charges under s. 477-A of the Indian Penal Code.

In my opinion there is no substance in either complaint.

The learned Sessions Judge appears to have thought that the framing of one charge containing the details of all three offences was irregular and he observes that the Magistrate would have been better advised to have put each charge under a separate heading. In my opinion there was no irregularity or illegality which required the aid of s. 531 of the Code of Criminal Procedure.

[His Lordship then considered the merits of the case and concluded as follows:—]

A consolidated sentence of nine months has been passed in respect of the three offences under s. 409 of the Indian Penal Code and there was no irregularity in this. The result is that the conviction and sen-

(1) 20 Ind. Cas. 609; 40 C. 846; 17 C. W. N. 827; 14 Cr. L. J. 449.

(2) 96 Ind. Cas. 221; (1926) Pat. 207; A. I. R. 1926 Pat. 347; 27 Cr. L. J. 909.

tence must be affirmed and the application must be dismissed.

Miller, C. J.—I agree.

B. K. P.

A. N. A.

Appeal dismissed.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 132

OF 1927.

December 21, 1927.

Present :—Justice Sir Jwala Prasad, Kt.

GULAI JHA AND OTHERS—ACCUSED—

PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Practice—Court hours—Sitting after Court hours without consent of parties, legality of—Party's right to adjournment—Evidence—Court witness—Apprehension that witness will be hostile—Party, whether entitled to compel Court to cite him.

The hours prescribed by the rules of the High Courts for sitting are intended not only to suit the convenience of the Courts but also of the parties, and a Court has no right to take up any case after the prescribed Court hours without the consent of the parties. [p. 828, col. 1.]

"The Courts in the *Mofussil*, no doubt, take it as their right and privilege to sit at any time they like regardless of the convenience of the parties concerned. The parties being suitors before them do not boldly object to the prolonging of Court hours or taking up of cases late in the day for fear of incurring the displeasure of the Presiding Officers of the Courts. The Courts should not take advantage of this weakness of the parties". [*ibid.*]

A Court cannot be forced to call a witness as a Court witness merely because the party who wishes to examine him apprehends that the witness will be hostile. [*ibid.*]

Criminal revision from an order of the District Magistrate, Darbhanga, dated the 24th November, 1927.

Messrs. S. Hasan Imam, S. Saran, R. K. Jha, R. Chaudhri and Murari Prasad, for the Petitioners.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This is an application (1) for transfer of the case from the file of the Magistrate, (2) for giving an opportunity to the petitioner to cross-examine the Court witness named Ramnihora Singh and (3) for giving the petitioner permission to rebut the new evidence called by the Court.

No sufficient ground for transfer for the case has been made out, and hence this part of the prayer must be rejected.

It seems, however, that sufficient oppor-

tunity was not given to the petitioner to cross-examine the said witness. After the evidence on both sides and the arguments closed, the case was adjourned to 12th October, 1927, for judgment. It was again adjourned to 17th October, and then to 19th October. On the 19th October, the Magistrate passed an order for summoning three persons as Court witnesses for the next date, the 20th October, Ramnihora Singh being one of them. On the 20th October, the examination of this witness began at 4 P.M. and continued up to 6-30 P.M. when the petitioner was asked to cross-examine the witness. He wanted time as his Pleader was not then present. This was refused and the petitioner was called upon to cross-examine the witness himself. He tried to do so, but after putting some questions to the witness he could not continue his cross-examination being a layman and began to quarrel with the witness and put questions to him which naturally incensed the Magistrate who threatened to punish him for contempt of Court. The result was that the witness was not properly and fully cross-examined by the petitioner.

Now, the Magistrate after several adjournments suddenly made up his mind on the 19th of October that the evidence of three witnesses was necessary, inasmuch as he says that he found certain omissions on material points in the evidence already adduced in the case and parties who were waiting for judgment from the 12th of October were suddenly told by the Magistrate that he would examine these fresh witnesses the next day. The petitioner objected to the case being taken up on the 20th October, because his lawyers were not available. Not only that, he commenced the examination of the witness at the *fall*-end of the day, namely, at 4 P.M. and called upon the petitioner to cross examine the witness in question at 6.30 P.M. long after the Court hours prescribed by rules 1 and 2, Vol. I, Criminal, of the High Court's General Rules and Circular Orders. Rule 1 says: "The Court hours shall ordinarily be from 10-30 A.M. to 4-30 P.M. standard time," and r. 2 says "Every Sessions Judge and Magistrate shall sit daily and punctually at the hour appointed for the opening of his Court unless prevented by circumstances which are to be recorded in the Court's diary." The Magistrate says in his explanation that he took up the case so late in the day, because it was the custom

of that Court to sit till late. The hours prescribed for the sitting of Courts are not only to suit the convenience of the Courts but also of the parties, and the Court in question had no right to take up any case after 4-30 P. M. without the consent of the parties. The Courts in the *mofussil*, no doubt, take it as their right and privilege to sit at any time they like regardless of the convenience of the parties concerned. The parties being suitors before them do not boldly object to the prolonging of Court hours or taking up of cases late in the day for fear of incurring the displeasure of the Presiding Officers of the Courts. The Courts should not take advantage of this weakness of the parties. I think the petitioner, when he was called at 6 30 P. M. by the Magistrate to cross-examine the witness in question, was within his right to have the case adjourned, and the Magistrate would have been well-advised if he had acceded to the prayer of the petitioner to enable him to fully and properly cross-examine the witness in question.

I, therefore, direct that full opportunity be given to the petitioner to further cross-examine the witness in question and he should also be given an opportunity to adduce evidence in rebuttal as already prayed for.

Learned Counsel on behalf of the petitioner further says that Ramanand Jha, nephew of the complainant, should be called as a Court witness. I do not think that the Court below can be forced to call that witness on behalf of the Court. If that witness is material, he may be called in rebuttal by the petitioner himself. Then learned Counsel says that the said witness being the nephew of the complainant will be hostile and he would, therefore, like to cross-examine him and hence he should be called as a Court witness. This is not a valid reason for forcing the Court to call him as a Court witness. The petitioner might lay foundation for cross-examining the witness if he proves to be hostile.

A. N. A.

Order accordingly.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 39 OF 1927.

January 5, 1928.

Present:—Sir Dawson Miller, Kt.,
Chief Justice, and Justice Sir B. K.
Mullick, Kt.

Babu SHAMA KANT LAL AND OTHERS
—APPELLANTS

versus

Mahanth RAMDHAN PURI—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 110—
Appeal to Privy Council—Valuation of suit—
Future mesne profits, whether can be taken into
account.

In arriving at the value of a suit for the purposes of s. 110 of the Code of Civil Procedure the Court is entitled to take into account not merely the mesne profits claimed up to the date of the suit but also the future mesne profits, and, in any case, up to the date of the decree of the trial Court. [p. 829, col. 2.]

Imamuddin Khan v. Kishundeo Narain Mahatha (1), *Mahabir Prasad Singh v. Anup Narain Singh* (2) and *Basanta Kumar Roy v. Secretary of State* (3), followed.

Messrs S. M. Mullick and Kailaspati, for
the Appellants

Messrs P. C. Manuk, N. K. Prasad II and
Sarju Prasad, for the Respondent.

JUDGMENT.

Miller, C. J.—On the whole, although I think this case is not altogether free from doubt, I consider that it falls within the provisions of s. 110 of the Code of Civil Procedure.

The plaintiff as proprietor sued to recover from the defendants a 4-annas share in *Mauza Baghore*. The defendants raised various defences and amongst other things contended that they had a *mukarrari* interest of the 4-annas share of which the plaintiff claimed possession. They further raised questions of limitation.

The trial Court appears to have found, as far as I can follow the judgment, that the defendants were not *mukarraridars* and that the suit was not barred by limitation. Upon the latter point, however, the findings of the trial Court are somewhat obscure. After saying that the suit was not barred by limitation, the learned Judge says: "The plaintiff is not anxious to evict the defendants and has conceded the long possession of the defendants and is quite willing to treat them as tenants. He has not shown that he is within time for the purpose of evicting the defendants as for that purpose he must bring himself within the special provisions of the law." Then again he says: "The plaintiff does

not want *sir* possession and has not shown himself to be within time for that purpose, but he wants that a *mukarrari jama* be fixed permanently and claims that his suit is under s. 157 of the Bengal Tenancy Act." In the result the Subordinate Judge assessed a rent of Rs. 583 as the fair *mukarrari* permanent rent for the 4 annas share in suit payable since 1326 *Fasli*.

When the case came on appeal to the High Court, the High Court also decided that the defendants had not proved their *mukarrari* interest and, in the circumstances, they set aside that part of the decisions which had assessed a fair rent to be paid by the defendants and awarded *khas* possession to the plaintiff.

From that decision the defendants now seek to appeal to His Majesty in Council.

It is said, in the first place, that the decision is not one of reversal but a decision of affirmance. It is quite true that in some respects the decision of the High Court affirmed the decision of the trial Court. Both judgments find that the defendants were not *mukarraridars*, and it is further contended on behalf of the respondents that both judgments find that the suit is not barred by limitation and, therefore, that the only question which can remain for further discussion over and above the points determined by the concurrent findings of fact, is the question whether any amount is to be paid, by the defendants. I do not, however, regard the matter in this light. From the somewhat obscure judgment of the trial Court it would appear that the learned Judge arrived at the conclusion that the claim of the plaintiff to get *khas* possession of the property was barred by some law of limitation and that could only be on the ground that the defendants, although not *mukarraridars*, had been in possession of the land for a number of years, over 12 years, before the institution of the suit and, indeed, that appears to me to be the ground of his judgment. If, on the other hand, there is no question about the matter and it was to be held that the suit was not barred by limitation, then clearly the plaintiff would be entitled to possession and the assessment of rent would be a matter outside the province of the trial Court. Therefore, the defendants in this case are entitled to say that the decision is in the result one reversing that of the trial Court. The defendants are

entitled to seek the opinion of the higher tribunal without showing that there is any substantial question of law involved in the appeal.

Then comes the question of the value of the suit. The actual value of the land was assessed by the plaintiff in his plaint at the sum of Rs. 5,500. He also claimed mesne profits for three years prior to the institution of the suit amounting to Rs. 1,955. He further asked in cl. (1) of para. 15 of his plaint that he should be awarded in addition future mesne profits up to the date of recovery of possession from the defendants. This Court in the case of *Imamuddin Khan v. Kishindeo Narain Mahatha* (1), as well as in an earlier case [*Mahabir Prasad Singh v. Anup Narayan Singh* (2)], has held following the decision of the Calcutta High Court in *Basanta Kumar Roy v. Secretary of State* (3) that in arriving at the value of the suit for the purposes of s. 110 of the Code of Civil Procedure the Court is entitled to take into account not merely the mesne profits claimed up to the date of the suit but also the future mesne profits and in any case up to the date of the decree of the trial Court. Now, following that principle it would appear that the future mesne profits amount to something approaching Rs. 4,000 up to the time of the appeal Court's decree and, in these circumstances, the total value of the subject-matter of the suit comes to over Rs. 10,000. It was argued that the value of the subject-matter in appeal to his Majesty in Council was not that amount but only that amount which could be assessed upon the difference between the rent which the trial Court had assessed and the right to *khas* possession. How this value is to be arrived at I am not very sure; but in any case I do not think that this is the proper method of calculation, for if the defendants are entitled to appeal at all they are entitled to appeal on the ground that the trial Court found that the plaintiff could not get *khas* possession whereas the High Court has held that he can. The value, therefore, seems to me to be the value of the property which is the subject-matter of the dispute *plus* mesne profits claimed.

(1) 63 Ind. Cas. 402; 6 P. L. J. 246; 2 P. L. T. 675.

(2) 46 Ind. Cas. 137; 3 P. L. J. 377; (1918) Pat. 246; 5 P. L. W. 327.

(3) 6 Ind. Cas. 792; 14 C. W. N. 872.

The plaintiff is entitled to his costs.
Hearing fee five gold mohurs.

Mullick, J.—I agree.

B K. P.

Leave granted.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 295
OF 1926.

December 14, 1927.

Present:—Justice Sir Jwala Prasad, Kt.,
Mr. Justice Adami and Mr. Justice
Macpherson.

GOPAL RAM—PETITIONER—APPELLANT
versus

MAGNI RAM AND OTHERS—OBJECTORS
—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 27 (2), 43, 75—Order of adjudication—Duty of Court to fix time for applying for discharge—Power of Court to extend time even after expiry of period fixed—Expiry of time, whether ipso facto annuls adjudication—Notice to show cause against annulment, whether necessary—Order annulling adjudication for failure to apply for discharge—Appeal—Leave to appeal, whether necessary—Power of Appellate Court to grant leave—Admission by Division Bench, effect of—Inherent power of Courts to extend time.

An order of adjudication in insolvency is not ipso facto annulled by the expiry of the period fixed for applying for discharge, but has to be determined by an order of annulment, and until the adjudication is so annulled, the Court has seisin of the case and has power to extend the time for making an application for discharge under s. 27 (2) of the Provincial Insolvency Act regardless of the expiry of the period originally fixed. [p. 832, col. 1.]

Abraham v. Sookias (2), Arunagiri Mudaliar v. Kandaswami Mudaliar (3) and Lakhi v. Molar (4), followed.

In re Ram Krishna Misra (1), dissented from. Bhugwandas Bagla v. Haji Abu Ahmed (5) and other cases, referred to.

Section 27 of the Provincial Insolvency Act is imperative and a Court should, on making an order of adjudication, specify the time within which the debtor should make an application for discharge. [p. 831, col. 1.]

There is no provision of law for issuing a fresh notice upon an insolvent who has failed to apply for discharge within the prescribed period, to show cause why the adjudication should not be annulled. [p. 831, col. 2.]

An order annulling an adjudication on account of the failure of the debtor to apply for discharge within the time fixed by the Court falls within the purview of s. 43 of the Provincial Insolvency Act and cannot, therefore, be appealed from except with the leave of the Court.

The admission of an appeal from such an order by a Division Bench of the High Court may, under proper circumstances, amount virtually to the granting of leave to appeal.

It is open to the Appellate Court to grant such leave even after hearing the case.

Per *Jwala Prasad, J.*—A Court has inherent power to extend the period fixed by it for the doing of any act even though the period originally fixed by it may have expired.

Appeal from an order of the District Judge, Saran, dated the 25th September, 1926.

Mr. B. C. De, for the Appellant.

Mr. Shambhu Saran, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This is an appeal against the order of the District Judge of Saran, dated the 25th of September, 1926, passed in an insolvency proceeding. The order runs as follows: "The application for discharge has been made after the date fixed by the Court. The order of adjudication be cancelled and this be published in the *Bihar and Orissa Gazette*."

A preliminary objection has been taken by the respondents that the appeal to this Court is incompetent, and the ground urged is that the appeal comes under s. 75, cl. (3) of the Act under which it was essential for the appellant to obtain leave of this Court to appeal. This would be so if the order of the Court came under s. 43 of the Act, which relates to an annulment of an order of adjudication. Mr. De on behalf of the appellant says that the order of the Court below virtually came under s. 41 of the Act, which relates to the discharge of an insolvent, and that consequently under Sch. I of the Act no leave of the Court was necessary for an appeal. This contention is based upon the fact that the insolvent's application, dated the 25th September, 1925, related to his discharge. The order of the Court, dated the 21st November, 1926, dealing with this application is a mixed order disallowing discharge of the appellant and cancelling the order of adjudication. True, the petition of appeal and the grounds set forth therein deal practically with the application for discharge and prays that the Court ought to have extended the time for an application to discharge by the insolvent and should have discharged him; but the order of adjudication cannot be ignored and this being the case, the appeal would come under s. 43 of the Act and hence the leave of the Court would be necessary. In that case Mr. De relies upon the order of this Court, dated the 8th December, 1926, and says that when the Bench presided over by Mullick, A. O. J. and Sen, J., admitted the appeal and

directed notice to issue, the leave requisite was virtually granted for O. XLI, r. 11, had no application to the case. There is a good deal of force in this contention. The appeal so far has been treated as if leave was granted. I think in the circumstances of this case we should construe the order of this Court referred to above under O. XLI, r. 11 as granting leave. Even if that be not sufficient, I would, after having heard the entire case, consider that sufficient case has been made out by the appellant for obtaining leave to appeal and hereby grant the leave.

I would now come to the merits of the appeal. On the 6th of January, 1923, the Court passed an order adjudicating the appellant an insolvent. That order did not specify the time within which the insolvent was to apply for his discharge as is required by s. 27, cl. (1) of the Act. Such an order, however, was passed on the 21st of August, 1925, more than two years and a half from the date of the order of adjudication. By this order the Court fixed the 31st October, 1925, as the date before which the application for discharge should be made by the insolvent. From 31st October to 2nd November, 1925, were holidays, and the case was taken up on the 3rd November, 1925, when the Court passed the following order: "31st October to 2nd November, 1925, were holidays; taken up to day. Petition for discharge not yet filed. Issue notice for the 21st November, 1925, to show cause why the adjudication should not be annulled." On 21st November, 1925, the appellant filed a petition stating: "The petitioner begs to submit that he has been served with a notice requiring him to show cause why the insolvency proceedings should not be cancelled. He begs to submit that as he fell ill he could not file a petition for 'discharge' before. He, therefore, files this petition and prays that he may be 'discharged' under s. 74 (b)." Section 74 (b) mentioned in this application is obviously a mistake, and we fail to find out what section was really meant. It has already been observed that in the order of the 6th of January, 1923, the Court did not specify the time within which the debtor should have made an application for his discharge. Section 27 is imperative. The period within which the debtor should apply for his discharge must have been mentioned along with the order of adjudication. Under cl. (2) of that section the Court is empowered to

extend the period fixed under cl. (1) of s. 27 within which the debtor *shall* apply for his discharge. The order of the 21st August, 1925, specifying for the first time the period within which the debtor was to apply for his discharge, was not passed along with, but more than two years after, the order of adjudication under cl. (1) of s. 27, and thus the Court contravened the provisions of law contained in that clause. On the 3rd of November, 1925, when this period expired the Court directed notice to issue upon the insolvent, fixing the 21st November, 1925, to show cause why the adjudication should not be annulled. There is no provision for issuing a fresh notice upon the insolvent calling upon him to show cause why the adjudication should not be annulled, and hence here again the order of the Court of the 3rd of November, 1925, has no sanction in the Act. Be that as it may, the Court did not, as a matter of fact, annul the adjudication under s. 43 read with s. 37 of the Act upon the expiry of the period fixed by it for the insolvent to make an application for his discharge, no application having been made for it. On the other hand, it virtually extended the time for the annulment till the 21st November, 1925, and gave an opportunity for the insolvent to obtain further extension of time under cl. (2) of s. 27 to apply for his discharge upon sufficient cause being shown in that behalf. I could not think of any other interpretation of the order of the Court calling upon the insolvent to show cause why the adjudication should not be annulled. The insolvent availed himself of the opportunity offered to him and showed cause by his application of the 21st November, 1925, stating in effect that not only that the order of adjudication should not be annulled but that he should be discharged, giving an explanation for not having made an application earlier. The Court treated it as an application for discharge and issued the usual notice upon such an application under s. 41 (1) for hearing the application and any objection thereto. On the 25th September, 1926, when the application for discharge was heard, the Court cancelled the order of adjudication, upon the ground that the application for discharge was made after the date fixed by the Court. It did not enter into the merits of the insolvent's application. Mr. De contends that the Court was bound to dispose of his application and, if it had found that the

petitioner was prevented from making an application earlier for his discharge or extension of time on account of his illness the Court should have extended the time originally fixed by it for that purpose.

Mr. Shambhu Saran on behalf of the respondents repels this contention and urges that no application for extension of time having been made before the 3rd of November, 1925, fixed by the Court for making such an application for discharge, the application of the insolvent was incompetent and not fit to be entertained, inasmuch as the Court had no power to entertain such an application made after the period fixed by it had expired. This contention is based upon s. 43 of the Act, which says that the order of adjudication "shall be annulled" upon the failure of the insolvent to make an application for an order of discharge within the period specified by the Court. The contention would be perfectly sound if the Court had passed an order of annulment after the expiry of the period specified by the Court for an application to be made by the insolvent for his discharge. In other words, the application of the insolvent of the 21st of November, 1925, would not have been maintainable if before that date the Court had passed the order of annulment under s. 43. The Court, however, had not till then passed any order of annulment. The matter was, therefore, pending and the question of the annulment of the order of adjudication was not disposed of. The Court had seisin of the case and it had, to my mind, power to extend the time originally fixed by it for the insolvent to make an application for discharge in spite of the fact that the time originally fixed by the Court had expired and no application for discharge was made by that time.

Sub-section (2) of s. 27 gives to the Court power upon sufficient cause being shown "to extend the period within which the debtor shall apply for his discharge." It does not by any express words restrict the power of the Court to grant time for such an application to be made by reason of the fact that the period originally fixed had expired. The discretion to enlarge the time is large and unfettered, and we cannot read into the clause words restricting the power of the Court. That power can only be curtailed, or, as a matter of fact, withdrawn, when the Court's power to deal with the question of adjudication has come to an end

by reason of its having passed the final order annulling the order of adjudication, and so long as that order is not passed by the Court it has the power vested in it by cl. (2) of s. 27 to extend the period originally fixed from time to time regardless of whether the extension is given after the time originally fixed had expired or not. The interpretation sought to be placed upon s. 43 of the Act by Mr. Shambhu Saran could only be accepted if the Court was not required to pass an order of annulment after the failure of the insolvent to make an application within the period specified by the Court. The annulment of adjudication would not *ipso facto* come into operation without an express order of the Court to that effect under s. 43 of the Act. This is clear from the section itself and it gains support from cl. (2) of s. 37 which says "Notice of every order annulling an adjudication shall be published in the Local Official Gazette and in such other manner as may be prescribed," so that an order annulling an adjudication has to be passed by the Court and so long as that order is not passed the question, as observed above, remains pending before the Court in spite of the expiry of the period fixed by the Court for the insolvent to make an application for his discharge. No doubt, the decision in *In re Ram Krishna Misra* (1) seems to support the contention of Mr. Shambhu Saran, but in that case cl. (2) of s. 27 does not seem to have been considered nor the other provisions of the Act such as contained in ss. 37 (2), 5(1) and 10 (2). The decision is based merely upon a consideration of s. 27 read with s. 47 of the Act. In this case the Court had not specified the time within which the insolvent was to make an application for his discharge in the order of adjudication, as is expressly required by cl. (1) of s. 27; so the right of the insolvent to make an application for his discharge is not barred by reason of his not complying with the order made by the Court under that clause, and the penalty prescribed by s. 43 of the Act of annulling the adjudication does not come into operation, for that section obviously refers to the expiry of the time fixed under cl. (1) of s. 27. Assuming that s. 43 did apply, it is to be read along with cl. (2) of s. 27 under which the Court has power to extend the period of limitation

(1) 88 Ind. Cas. 70; 4 Pat. 51; A. I. R. 1925 Pat. 355; 8 P. L. T. 770.

originally fixed by it. Though s. 43 says: "The order of adjudication shall be annulled upon the failure of the debtor to apply for his discharge within the time fixed by the Court", s. 27 (2) gives to the Court power to extend the time originally fixed. The power of the Court is not in any way hampered in extending the time by reason of the time originally fixed having expired. Such was the interpretation put upon it by the Calcutta High Court in *Abraham v. Sookias* (2) by Mr. Justice Krishnan of the Madras High Court in *Arunagiri Mudaliar v. Kandaswami Mudaliar* (3) and the Lahore High Court in *Lakhi v. Molar* (4). Mr. Justice Waller took a contrary view in the aforesaid Madras case. These decisions and particularly the decision of Mr. Justice Krishnan proceed upon the principle enunciated by their Lordships of the Judicial Committee in *Bhugwandas Bagla v. Haji Abu Ahmed* (5), *Badri Narain v. Sheo Koer* (6), *Raja Har Narain Singh v. Chaudarain Bhagwant Kuar* (7) and *Rajab Ali v. Amir Hossein* (8). In *Raja Har Narain Singh v. Chaudarain Bhagwant Kuar* (7) their Lordships observed that an extension of time might be granted even after the period originally fixed had expired provided only that such extension was asked for and granted before the award was in fact made, and in *Badri Narain v. Sheo Koer* (6) as well as in *Rajab Ali v. Amir Hossein* (8) their Lordships re-affirmed the principle even where the word "shall" was used in ss. 54 and 41 of the then Code of Civil Procedure. By analogy reference may be made to s. 3 of the Second Schedule to the Code of Civil Procedure which says that the Court shall fix a time as it thinks reasonable for the making of an award and "shall specify such time in the order." The Court, undoubtedly, has power to extend the period originally fixed in the order of reference before the award is actually made even if an application for the exten-

sion of the time is made after the expiry of the time originally fixed. This is illustrated and made clear by an extreme case *Nilmoni Dora v. Methi Sahu* (M. A. No. 19 of 1925, decided by this Court on the 5th July, 1926, unreported). In that case the order of adjudication prescribed one year within which to apply for discharge. There was an appeal preferred to the High Court against the order of adjudication by a creditor of the insolvent which was ultimately dismissed. The respondent applied to the District Judge for his final discharge stating that he could not apply earlier as the appeal to the High Court by the creditor was pending. The creditor then applied under s. 43 of the Provincial Insolvency Act for annulment of the order of adjudication on the ground that the insolvent had not applied for his discharge within the time prescribed by the Court. Two days later the insolvent made another application asking for extension of time under s. 27 (2) of the Act for making his application for discharge. The Court granted the prayer for extension holding that sufficient cause had been shown inasmuch as the insolvent had to wait for the result of the appeal preferred by the creditor against the order of adjudication. Against that order the creditor appealed to this Court urging that after the period prescribed for the application for discharge had expired the Court had no power to grant an extension of time. This Court upheld the order granting an extension of time. The insolvent in that case did not apply for his discharge within the time fixed by the Court, because the creditor had preferred an appeal against the order of adjudication of his insolvency. The adjudication was ultimately upheld by this Court and the appeal of the creditor was dismissed. If upon the interpretation sought to be put upon s. 27 the application for discharge, or for an extension of the period originally fixed for such an application, was incompetent and s. 43 *ipso facto* came into operation, the order of adjudication against the insolvent would necessarily have been annulled, although it was already affirmed in appeal by this Court. This would be an absurdity. If the appeal preferred against the order of adjudication was a sufficient cause for entitling the insolvent to obtain an extension of time after it had expired, there is no reason why any other cause, such as, illness, etc., should not entitle him

(2) 81 Ind. Cas. 584; 51 C. 337; A. I. R. 1924 Cal. 777.

(3) 83 Ind. Cas. 955; 19 L. W. 413; 34 M. L. T. 170; (1924) M. W. N. 331; A. I. R. 1924 Mad. 635.

(4) 86 Ind. Cas. 115; 26 P. L. R. 126; A. I. R. 1925 Lah. 416.

(5) 16 B. 263; 8 Ind. Dec. (N. s.) 654.

(6) 17 C. 512; 17 I. A. 1; 5 Sar. P. C. J. 493; 8 Ind. Dec. (N. s.) 881 (P. C.).

(7) 13 A. 300; 18 I. A. 55; 6 Sar. P. C. J. 14; 15 Ind. Jur. 283; 7 Ind. Dec. (N. s.) 189 (P. C.).

(8) 17 C. 1; 5 Sar. P. C. J. 389; 8 Ind. Dec. (N. s.) 539 (P. C.).

to get such an extension. No doubt, it was argued in that case that the appeal against the order of adjudication re-opened the time fixed for an application for discharge. That would, of course, be a good ground for extending the period fixed and would rather show that the Court can grant an extension of time even after the expiry of the period originally fixed. In that case I went upon the larger question and that was that the Court's power to extend the time did not cease with the expiry of the time originally fixed until the final order cancelling the adjudication was passed. I would also refer to the inherent power of the Court to extend the period fixed even after its expiry, which always existed and was recognized by judicial decisions the effect of which was to give a statutory sanction to it in s. 148 of the Code of Civil Procedure which says "where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, *even though the period originally fixed or granted may have expired.*" Again, although the words in s. 43 are "the order of adjudication shall be annulled," it adds "and the provisions of s. 37 shall apply accordingly." Therefore, as already observed, the order of adjudication does not *ipso facto* come into operation by the expiry of the period fixed but has to be determined, and until it is so determined the Court has the seisin of the case and has power to extend the time under s. 27 regardless of the expiry of the period originally fixed. With great respect to the learned Judges who decided the case of *In re Ram Krishna Misra* (1) I am afraid the aforesaid points were not brought to the notice of their Lordships.

I am, therefore, of opinion that the Court's power to entertain an application for the extension of time originally fixed by it and for discharging the appellant had not spent itself by reason of the original time fixed having expired and no application having been made for extension thereof before its expiry. Upon a true construction of the application of the insolvent, dated the 21st November, 1925, he was entitled to a determination by the Court of his explanation as to why he did not make an application before either for extension of the period or for his discharge. That application could not mean anything else but an application for his discharge upon extending the period

originally fixed by the Court for his making an application. The Court cancelled the order of adjudication simply because it thought that the time fixed had expired and no application for discharge was made before the expiry thereof. I have already shown that the view as to its power to extend the period for making an application for discharge is wrong, as it is not supported by the provisions in the Act or by the authorities on the subject.

The order of the learned District Judge of the 25th September, 1926, must, therefore, be set aside, and the case remanded to the Court below to dispose of the application of the insolvent, dated the 21st November, 1925, on merits. If the Court comes to the conclusion that the appellant has failed to substantiate the application made by him the Court would dismiss his application and would refuse to grant further time to make an application for his discharge. If, on the other hand, the Court thinks that there was sufficient reason for the petitioner not to have made an application before the 25th November, 1925, the Court would in its discretion fix another time within which the insolvent should make an application, failing which the Court will dispose of the case in accordance with the provisions of the Act.

Adami, J.—I agree. I would only like to observe that the difficulty which has been put before us in this case would never have arisen had the Court below exercised more care and paid due attention to the provisions of the Provincial Insolvency Act. In the first place, it omitted to specify in the order of adjudication the date or the period within which discharge was to be applied for by the debtor as required under s. 27, so that really the order of adjudication was altogether defective; and secondly, when on the 3rd of November, 1925, the Court found that no application for discharge had been made, according to the plain provisions of the law the Court was bound to annul the adjudication. The steps taken by the Court in calling upon the judgment-debtor to show cause were altogether unwarranted by the Act.

Macpherson, J.—I also agree. I add a few observations on the main point for determination.

That point is whether after the expiry of the period prescribed in s. 27 (1) of the Provincial Insolvency Act the Insolvency Court

may still exercise the power conferred by s. 27 (2) of extending the period.

I was hitherto inclined to hold that the case in *In re Ram Krishna Misra* (1) had been rightly decided and that annulment under s. 43, which provision was clearly enacted to meet the special situation, was automatic, just as abatement is under the provisions of O. XXII, rr. 3 and 4 of the Code of Civil Procedure. But no order of the Court directing that the suit or appeal shall abate, is necessary, whereas s. 37 (2) of the Provincial Insolvency Act speaks of an order annulling the adjudication. If under s. 43 annulment of the adjudication followed automatically on the expiry of the period prescribed under s. 27 (1), the Legislature would not have employed in s. 37 (2) the expression "the order annulling the adjudication." In my judgment, therefore, an order of the Court is required under s. 43, annulling an adjudication.

Now, ordinarily the Court will after the expiry of the period prescribed pass, as it is entitled to do, forthwith and without any notice, an order of annulment though sometimes it is prudently directed when passing the order of adjudication that if the debtor does not apply in time, the case be put up, for order under s. 43 immediately after the period prescribed has expired. After an order of annulment, the debtor's only recourse, apart from an appeal under s. 75 (3), is to apply to the Court for leave under s. 10 (2) to file another insolvency petition. In such a case, therefore, the time cannot be extended under s. 27 (2). But it has occasionally occurred (generally owing to in-conversance with the new Act) that the order annulling the adjudication is delayed. In such circumstances, since there is no annulment till an order of annulment is passed, the order of adjudication stands and the proceeding remains pending on the file of the Insolvency Court with the result that s. 27 (2) is still applicable and enables the Court to enlarge the period within which the debtor may apply for his discharge.

A. N. A.

Case remanded.

PATNA HIGH COURT.

GOVERNMENT APPEAL No. 3 OF 1927.

May 19, 1927.

Present:—Sir B. K. Mullick, Kt., Acting Chief Justice, and Mr. Justice Wort.

EMPEROR—APPELLANT

versus

GHULAM NABI AND OTHERS—ACCUSED—

RESPONDENTS.

Arms Act (XI of 1878), ss. 19, 29—Institution of proceedings, meaning of—Sanction obtained after submission of charge sheet but before Magistrate takes it up for consideration—Legality of prosecution—Criminal trial—Appeal from acquittal—Presumptions in favour of accused—Magistrate having knowledge of case during investigation—Trial, propriety of—Evidence—Appreciation of evidence—Probabilities—Charge for substantive offence—Conviction for abetment—Legality of conviction.

In an appeal by Government against an acquittal the accused starts with a double presumption in his favour. Firstly, there is the rule that it is for the prosecution to make out their case and that until they do so beyond all reasonable doubt the accused must be presumed to be innocent and, secondly, that the accused having succeeded in securing an acquittal from a Court, a Superior Court will not interfere until the Crown show conclusively that the inference of guilt is irresistible. [p. 839, col. 1.]

A Magistrate who has some knowledge of the case while it is under investigation should not try the case. But a conviction cannot be set aside or retrial ordered on this ground where the accused is not shown to have been prejudiced. [p. 840, col. 1.]

Inferences drawn from probabilities must give way to sworn testimony unless the inferences are irresistible and show that the sworn testimony must be false. [p. 840, col. 2.]

A proceeding is instituted within the meaning of ss. 29 and 30 of the Arms Act where for the first time the adjudication of a Court of competent jurisdiction is sought [p. 842, col. 1.]

'Proceedings' in s. 29 of the Arms Act mean legal proceedings in Court and not searches or arrests or investigations made by the Police in the exercise of the powers conferred upon them by the Criminal Procedure Code or any other law. [*ibid.*]

A complaint was made against A and B on the 30th of June, 1925. The Police continued to investigate and on the 13th of August the Police submitted a charge sheet against A, B and C. This application was considered by the Magistrate on the 17th August. Formal sanction for prosecuting C was obtained on the 17th of August and produced before the Magistrate on that date:

Held, that the prosecution of C was not bad for want of previous sanction inasmuch as no proceeding within the meaning of s. 29 of the Arms Act had been instituted against C till the 17th of August. [*ibid.*]

An accused can be convicted for abetment on a charge for the substantive offence. [p. 842, col. 2.]

Appeal against a decision of the Sessions Judge, Patna, dated the 5th October, 1926, overruling that of the City Magistrate, Patna, dated the 20th August, 1926.

The Assistant Government Advocate, for the Appellant.

Messrs. *Fazal Ali, Akbari and S. A. Khan*, for the Respondents.

JUDGMENT.

Mullik, A. C. J.—This is an appeal by the Local Government against the acquittal of Ghulam Husain, Ghulam Nabi and Muhammad Husain who were convicted by the City Magistrate of Patna for offences under ss. 19 (a) and 19 (f) of the Indian Arms Act but were acquitted in appeal by the Sessions Judge of Patna.

The history of the case is this :—In or about 1924, it was suspected at Patna that an illicit traffic in contraband arms was being carried on on an extensive scale and a number of officers of the Criminal Investigation Department were placed on duty to investigate. Sub-Inspector Brij Behari Lal a native of Meerut in the United Provinces joined the Criminal Investigation Department at Patna on the 24th March, 1924, and was deputed to take over the investigation on the 29th March of that year. Sub-Inspector Muhammad Taki also a native of the United Provinces joined the Department in April, 1924, and he says that he first made the acquaintance of the accused Ghulam Husain in or about that month and of Ghulam Nabi 10 or 12 days later and of the accused Muhammad Husain several months afterwards. Sub-Inspector Mathura Prasad also a native of the United Provinces did not take any part in the investigation till about February, 1925. It is the case of the prosecution that these three Police Officers soon obtained the confidence of the accused and of one Ghulam Rasul, the father of the accused Ghulam Nabi, and had some dealings in opium and cocaine with them. Brij Behari says that about June, 1924, he showed Ghulam Nabi a cake of opium obtained from the Criminal Investigation Department. He also says that between April, 1924, and June, 1925, he at various times sold both opium and cocaine to the accused. Evidence as to these transactions has been given to show the manner in which the Police Officers got into touch with the accused and put themselves on sufficiently confidential terms with them to induce them to sell to them the revolver which is the subject of the present charge on the 28th June, 1925. The first time Brij Behari Lal saw a revolver in the possession of the accused was on the 29th March, 1924.

He next saw another revolver (Ex. 1) which is the subject of the present case on the 21st May, 1924. In April, 1924, he took an advance from the Criminal Investigation Department of a sum of Rs. 180 and with this money on the 13th June, he purchased in the presence of Sub-Inspector Muhammad Taki a revolver from four persons, namely, Moghul, Ghulam Rasul, Ghulam Husain and a man called Wazir. It appears to have been the practice of the Police Officers to make a declaration before the City Magistrate every time they obtained an advance in notes from their Department. The object of this was to keep some record in the Office of the City Magistrate of the number of the notes so that they might be identified if subsequently passed to the vendors of an unlicensed weapon. In the case of the above advance of Rs. 180 no declaration was made but it appears that about a year later on the 25th June, 1925, a complaint was made by the Police Officers for the prosecution of the persons who had sold the revolver. The result of that case has not been disclosed.

Next it is alleged that in or about October, 1924, Brij Behari Lal went to the Punjab to carry on his investigations about the export of arms from there and there is evidence that he was assisted by Ghulam Husain and Ghulam Nabi for several months and that he obtained letters from Ghulam Husain introducing him to three persons in Calcutta who he says were interested in the sale of firearms. It is suggested by Brij Behari Lal that these letters were given in order to assist him in buying unlicensed revolvers but the letters themselves may equally well support the inference that they were given in order to assist him in carrying on an illicit trade in opium and cocaine. At this time Brij Behari was going under the name of Rambarat and Muhammad Taki was going under the name of Ghulam Murtaza. As will be seen later Mathura Prasad when he joined the inquiry took the name of Kesho Babu a rich banker of Benares. The letter Ex. (1) is dated the 12th August, 1924, and purports to have been addressed by Ghulam Husain to a lady. It begins "Dear Madam" and proceeds to state that the writer "is sending herewith Rambarat and requests the lady to kindly attend to him and do the needful for him without the least possible shrinking." The letter then proceeds as follows :— "As regards the price he will

pay you in cash. My signatures that is with you are the same as in the present one. You can tally if you please. This letter I am giving him very gladly. Kindly see that the charges are reasonable." The next letter (Ex. 2) is addressed to a man called Zahur a tailor in Calcutta. In it the writer asks Zahur to introduce Rambarat to Nankhu a betel seller. The third letter (Ex. 3) is addressed to Nankhu and informs him that Rambarat is going to make purchases and that he should accept whatever Rambarat may give him as reward. The writer further asks that Nankhu is not to fail in introducing him to "Madam."

The learned City Magistrate has taken these letters to mean that Rambarat was to be assisted to carry on a trade in illicit arms but upon the letters as they stand it does not follow that this conclusion is the only one that can be drawn. It is equally possible that Rambarat was engaged in some other kind of illicit trade in which Ghulam Husain was trying to assist him. But what the letters do show beyond all question is that Brij Behari had within the space of something like six months completely gained the confidence of Ghulam Husain and that Ghulam Husain had no suspicion that Rambarat was not his real name or that he was a member of the Criminal Investigation Department.

Proceeding now to the next transaction in Patna we find that Brij Behari Lal returned from the Punjab sometime about February, 1925, for he says that on the 18th February of that year a second firearm was purchased by him in the presence of both the other Sub-Inspectors. This time the firearm was a pistol and the vendors were three men called Fazlu Rahman, Azizul Rahman and Jadu Sao and the price paid was Rs. 130. Brij Behari deposes that on that very day he took an advance of Rs. 130 from the Criminal Investigation Department and made a declaration in the City Magistrate's Office in which the numbers of the notes which comprised this amount were recited.

The next step taken by Brij Behari Lal was on the 21st February, 1925, when he took an advance of Rs. 500 from his Department. The evidence is that this money was never used and was refunded to the Department because the firearms which were intended to be purchased were not available.

The next proceeding is a most important

one for the purposes of this case. It is alleged that on the night of the 24th March, Brij Behari went to the shop of Ghulam Nabi at Patna and entered into negotiations with Ghulam Rasul, the father of Ghulam Nabi, and with the accused Ghulam Husain for the purchase of a revolver. The evidence is that Ghulam Husain and Ghulam Rasul were both present at the shop. The learned City Magistrate has recorded Brij Behari's deposition in somewhat involved language where he speaks of the persons from whose possession the revolver was actually obtained on that day. He says that the revolver was obtained from Ghulam Rasul through Ghulam Husain. He probably means that it was delivered to Brij Behari by Ghulam Rasul with the consent of or in the presence of Ghulam Husain. The point does not, however, matter very much because it is established that Brij Behari did get possession of the revolver on that day. He says that he and Sub-Inspector Mathura Prasad who was then passing off under the assumed name of Kesho Babu were both present in the shop and that he (Brij Behari) said that the revolver must be shown to Ghulam Murtaza in order that his opinion might be taken on the condition of the weapon. After some demur the weapon was handed over to Brij Behari and he went away with it leaving as hostage Kesho Babu. There can be no doubt that the revolver was then taken to Mr. Bruce who was Brij Behari's superior officer.

Mr. Bruce handed the revolver to a photographer about 11 o'clock on the 25th and caused several photographs to be taken of it which are now before us. Brij Behari in the meantime came back and although it appears that Ghulam Rasul and Ghulam Husain were somewhat alarmed at the disappearance of the revolver he was able to calm their fears and to obtain permission for Kesho Babu to go away. He himself remained with these two accused till Inspector Muhammad Taki passing off as we have already seen as Ghulam Murtaza came with the revolver about 1 o'clock and returned it to Ghulam Rasul. That ended the transaction on that day.

Apparently no immediate step was taken to purchase it but it is said that Ghulam Husain assured Brij Behari that he could get delivery at any time he pleased.

Brij Behari says that he then had other business and went away to Calcutta and

returned sometime in June to Patna. He went to Ghulam Nabi and asked for the revolver and Ghulam Nabi said that nothing could be done until Ghulam Husain had fixed the price and that he had already written to him to come to Patna. The City Magistrate has found as a fact that Ghulam Husain came to Patna somewhere between the 19th and the 23rd June, 1925. He has arrived at this finding, firstly, on the evidence of Brij Behari himself, and, secondly, upon the evidence of certain ticket collectors who proved the issue of a third class ticket on or about the 19th from Gidhour for Patna and the issue of a similar ticket on or about the 23rd from Patna to Gidhour.

The price of the revolver having been settled at Rs. 130 Brij Behari's next step was to take an advance of this sum from his Department and he says that on the 27th June he got 13 ten rupee notes and made a declaration in the Office of the City Magistrate of the numbers of these notes. He then arranged with the District Police to be in waiting at Khajekullan Police Station which is about 720 feet from the shop of Ghulam Nabi and with the other two Sub-Inspectors he proceeded that night to Ghulam Nabi's shop to take delivery. It is said that a constable named Abdul Razak belonging to the District Police also went with him but as it was raining Ghulam Nabi would not give delivery that day. Why rain should have prevented the delivery of the revolver on that day is explained by Brij Behari who says that it is the habit of those who deal in unlicensed firearms never to keep their engagements so that the chance of detection may be lessened. Brij Behari states that finding he could not get delivery that day he and his two companions returned home and the District Police were called off.

On the next night he repeated the visit by arrangement and Abdul Razak was again made to accompany him. Brij Behari says that when he and the other two Sub-Inspectors entered Ghulam Nabi's shop Ghulam Nabi and Muhammad Husain were present and the revolver and a packet containing 15 cartridges were shown to him. Ghulam Nabi, however, said that it would not be safe to deliver the weapon till the light in the Standard Medical Hall which is a druggist's shop on the other side of the road about 15 feet from Ghulam Nabi's

shop was put out and the three Sub-Inspectors retired with a promise that they would come back later. About 11 o'clock the Sub-Inspectors returned and on entering the shop Ghulam Nabi brought from an inner room the revolver (Ex. 1) and the packet of cartridges and then Brij Behari Lal handed over to Ghulam Nabi the 13 ten rupee notes which he had received from his Department. Ghulam Nabi handed the notes to Muhammad Husain who put them in his pocket. The party then came out and sat on a *charpai* outside the verandah of the shop and Mathura Prasad slipped away saying that he was going to fetch an *ekka*. He took the opportunity to make a signal to Abdul Razak who was waiting at the corner of a road which is described as the *ghat* road about 100 feet off. Abdul Razak at once gave information to the District Police who were waiting at the *thana* and a force consisting of Sub-Inspector Muhammad Ishak, Sub-Inspector Jamuna Prasad and several constables appeared on the scene and found Brij Behari and Muhammad Taki seated with Ghulam Nabi on the *charpai* with Muhammad Husain standing up close by and on the *charpai* were lying the revolver (Ex. 1) and the cartridges. The persons of both Muhammad Husain and Ghulam Nabi were at once searched and in Muhammad Husain's pocket were found the 13 notes and on Ghulam Nabi's person were found two packets of a substance which looked like opium, a knife and some other things. On the *charpai* there were also two packets of cocaine (not two phials as has been stated by the learned Sessions Judge). Ghulam Nabi's explanation was that the two Sub-Inspectors had come to buy a shawl from him but Muhammad Ishak took Ghulam Nabi and Muhammad Husain into custody and also (apparently for the sake of appearances) the two Sub-Inspectors Brij Behari and Muhammad Taki. Mathura Prasad who was with the Inspector's party was not arrested.

The accused were then lodged in Jail and on the 30th June a formal complaint was made by Brij Behari for the prosecution of Ghulam Nabi and Muhammad Husain for offences under the Arms Act.

No mention was made in this complaint of Ghulam Husain's complicity but the Police proceeded to carry on an investigation and on the 13th August in submitting a final charge sheet against Ghulam Nabi

and Muhammad Husain they also reported that there was a case against Ghulam Husain and applied for the District Magistrate's sanction which is necessary under s. 29 of the Indian Arms Act, for the prosecution of this man. That sanction was not given till the 17th August but the records of the City Magistrate's Court show that no evidence was recorded in the case against any of the accused until after that date.

The trial was protracted for many months and ended in the conviction of the three accused under ss. 19 (a) and 19 (f) of the Indian Arms Act, a consolidated sentence of two years' rigorous imprisonment and a fine of Rs. 1,000 being passed on Ghulam Nabi, two years' rigorous imprisonment and a fine of Rs. 1,000 on Ghulam Husain and six months' rigorous imprisonment and a fine of Rs. 100 on Muhammad Husain.

The accused then appealed with the result that the learned Sessions Judge of Patna by his judgment dated the 25th October, 1926, acquitted the accused and expressed himself somewhat strongly regarding the behaviour of the three Police Officers. He found that there had been grave irregularities in the admission and exclusion of evidence in the trial Court and also that the evidence of the Police Officers was so contrary to all experience of human conduct that it could not be believed.

The question now is whether the learned Sessions Judge's findings are so clearly wrong that our interference is necessary in appeal.

In an appeal by Government from an acquittal the accused starts with a double presumption in his favour. Firstly, there is the rule that it is for the prosecution to make out their case and that until they do so beyond all reasonable doubt the accused must be presumed to be innocent and, secondly, that the accused having succeeded in securing an acquittal from a Court a Superior Court will not interfere until the Crown show conclusively that the inference of guilt is irresistible.

We have been taken at great length through the evidence in this case and we think that having regard to the position which the Police Officers held at that time and their standing in the service and the punishment and disgrace which was bound to follow in the event of detection it is impossible to hold that they deliberately palmed off a revolver on two innocent men,

The trial Court appears to have been greatly influenced by the statements made by Brij Behari Lal of his successes in the Punjab and in Calcutta and the learned Magistrate appears to have assumed that Brij Behari with the assistance of Ghulam Nabi and Ghulam Husain actually bought other unlicensed firearms there but the evidence shows no such thing and is extremely vague and flimsy upon this point. The learned Magistrate thought that the evidence, such as it is, was admissible under ss. 14 and 15 of the Indian Evidence Act. We agree with the learned Sessions Judge that the learned Magistrate was under a total misconception of the law of evidence. There was no question here whether the firearm (Ex. 1) was found on the *charpai* of Ghulam Nabi by accident. There might have been a question whether Ghulam Nabi knew that the firearm was smuggled and whether he intentionally sold a smuggled firearm but that issue was not clearly raised. Therefore, to admit evidence of similar transactions if indeed there had been such evidence was altogether irregular and illegal. As a matter of fact there was no evidence at all of similar transactions and the question of admissibility does not really arise.

Then the learned Sessions Judge appears to have been strongly influenced by another obvious irregularity. The learned Magistrate allowed the officers of the Criminal Investigation Department to plead privilege in the matter of the alleged transactions in opium and cocaine between them on the one hand and the accused on the other from April 1924 up to March 1925. It is quite clear that as it was the intention of the prosecution to prove that the Police Officers had gained the confidence of the accused the defence were entitled to know what were the particular circumstances under which that relationship was established and if necessary to obtain details of the various alleged transactions in illicit cocaine and opium. There was a statement in the examination-in-chief of Brij Behari that the accused had purchased opium and cocaine from him but when the defence attempted to explore this allegation the Court immediately stopped further cross-examination on the ground of privilege. It is quite clear that there was no privilege at all, and the evidence was wrongly excluded. But fortunately in this case the exclusion has not made any appreciable difference. The purpose of the cross-examination was to show that the

Police Officers were not on confidential terms with the accused but to pursue that line became useless as soon as it was proved that the letters Exs. 1, 2 and 3 were obtained by Brij Behari from Ghulam Husain in the winter of 1924.

It is also to be noticed that at no period was it the defence of the accused that the money which was found on Muhammad Husain's person was paid by the detectives as the price for a quantity of illicit cocaine. The learned Judge appears to have made a case in this respect which was not the case of the accused. The cross-examination with regard to previous sales would have been material if that had been the defence but in the circumstances the exclusion of the evidence did not prejudice the accused.

Finally the learned Sessions Judge has also been much influenced by the fact that the City Magistrate after having taken the declaration of the 27th June, 1925, regarding the notes proceeded to try the case himself. It does appear from the copy of the order sheet which has been produced before us that the City Magistrate had some knowledge of the case while it was under investigation and perhaps it would have been better if he had declined to try the case. But we do not think that there has been such prejudice to the accused that we must either acquit them or order a re-trial. It is obvious that the writing containing the numbers of the notes was not admissible by itself. The document cannot prove itself. But in this case evidence has been given by Brij Behari Lal that the notes which were found in Muhammad Hussain's pocket were the notes which he received from the Criminal Investigation Department and which he shewed to the City Magistrate on the 27th June and the numbers of which were taken down by the City Magistrate in the declaration which has been objected to. This evidence is quite sufficient if believed to prove that the notes found in Muhammad Husain's pocket at the arrest of the 28th June were the notes which the Sub-Inspector had obtained from the Department on the 27th.

The most important question, however, in this case is whether the incident of the 24th March has been established. If that evidence is believed there can be no doubt that Ghulam Husain and Ghulam Rasul the father of Ghulam Nabi were arranging to sell the revolver Ex. 1 to Brij Behari on that day.

[His Lordship referred to the evidence and proceeded :-]

With regard to the circumstances under which the revolver was found on the *charpai* it has been strenuously contended by the learned Counsel for the respondents that no sane man would deliver a revolver, especially an unlicensed revolver, in the manner alleged or allow it to remain on the *charpai* so that it might be discovered by any one who came. The object of the detectives being to catch Ghulam Nabi in possession of the revolver it is easy to see why they did not touch the revolver until the arrival of the raiding party. After all inferences drawn from probabilities must give way to sworn testimony unless the inferences are irresistible and show that the sworn testimony must be false and I certainly cannot agree with the learned Sessions Judge that upon the probabilities arising out of the acts of the Sub-Inspectors on the night of the 28th June it would be fair to brand them as liars and perjurers of the most dangerous type. Inferences from conduct require to be extremely strong to support adverse conclusions of this kind.

This practically concludes the case of possession and sale so far as Ghulam Nabi and Muhammad Husain are concerned.

It is clear that upon this evidence if believed the conviction of Ghulam Nabi for the possession of an unlicensed revolver and its sale is fully justified.

With regard to Muhammad Husain the question arises whether he was merely a servant. He appears to be only 14 years of age and to have been living in the house of Ghulam Nabi as a dependent member of the family. It is true that he took the notes and put them in his pocket and that he was standing close by when the Police arrested Ghulam Nabi but having regard to his age and the fact that he did not take part in any of the previous negotiations I think he should be given the benefit of the doubt and that he should be acquitted.

With regard to Ghulam Nabi there is one more fact which requires notice. Immediately on arrest he said that the two men, pointing to the detectives, had come to him to purchase a shawl. If it had been proved at the trial that there was some substance in this defence and that the two Sub-Inspectors either had had previous dealings in shawls with the accused or had arranged to buy a shawl on that night the possession of the 13 ten

rupee notes by Muhammad Husain would have been explained. But unfortunately the accused have given no satisfactory evidence of any contract of this kind. They say that they are shawl merchants on a big scale in Patna. The learned trial Court says that they only sell shawls on commission but in any event they have account books and a certain number of account books were actually seized by the Police. A sum of Rs. 3,000 was also found in their cash box so that it is clear that they are men of business habits and that the sale of a shawl for Rs. 130 is not likely to escape entry in their account books. No such entry has been shown nor has any attempt been made to tender the account books. Instead of this a witness (defence witness No. 5) has been called to show that he was present on the 26th June, when two men whom he did not know arranged to buy a shawl from Ghulam Nabi and promised to come the next day. Another witness (No. 6) Muhammad Husain has been called to show that about a year earlier which would be sometime in May or June, 1925, he saw two men come and buy a shawl for Rs. 130 out of which Rs. 5 had already been paid as earnest money and Rs. 125 was paid in the witness's presence. The learned City Magistrate has examined this evidence very carefully and I agree with the reasons given by him for distrusting it. There is the fact that the best evidence, namely, that of the account books has not been produced and in the absence of that evidence oral evidence of this kind is of very little value.

Some notice must here be taken of the evidence of the search witness Hazari. This man attested the search list drawn up on the night of the 28th June, and says in his deposition that there was a man with a shawl. This is quite incorrect. The search list which he signed does not mention any shawl and Sub-Inspector Ishak is positive that there was no fifth man in or near the *charpai* with or without a shawl. The learned trial Magistrate has discussed this point and I agree with him that Hazari has either made a mistake or is intentionally giving false evidence.

Then there is the evidence of a quarrel between Brij Behari and Ghulam Nabi with regard to a woman named Raj Kumari. Evidence has been given by Raj Kumari, Naurangi Lal and Muhammad

Husain on this point but I agree with the learned City Magistrate that it has not been proved that Brij Behari had any relations with the woman and that in any event the quarrel does not account for a false case.

Then Ghulam Nabi has also given evidence to show that his father was in Amritsar in March, 1925, and not in Patna as is alleged by Brij Behari. With regard to this the relevant evidence is that of two witnesses examined on commission at Amritsar on the 7th May, 1926. One is Ghulam Muhammad who says that about the 27th March, 1925, Ghulam Rasul purchased a large quantity of silk yarn from his shop but no books are produced and the witness's memory in the face of the evidence given for the prosecution cannot be relied upon. The other witness is a Muhammadan physician named Hakim Ali Muhammad who proves certain entries dated the 24th, 25th and 26th March, 1925, in his register and says that on those dates he treated Ghulam Rasul for cold and fever. The learned City Magistrate has shown that the books could easily have been written up to suit this case and that the witness admitted that two or three blank registers of this kind are always in his possession. It is also in evidence that although the register is supposed to be inspected by a certain Gazetted Officer no proof has been given of any such inspection in April, 1925.

In my opinion the story of the prosecution with regard to the presence of Ghulam Rasul in the shop in Patna on the 25th March, has not been shaken by the rebutting evidence given by the defence.

There remains the case of Ghulam Husain. The first objection taken with regard to it is that the sanction given by the District Magistrate on the 17th August, 1925, was bad. The facts are these:—The complaint of the 30th June, 1925, made by Brij Behari did not ask for any proceedings against Ghulam Husain. Ghulam Husain, however, was under arrest in connection with another case and the Police appear to have continued their investigations against him in the matter of the sale of the revolver (Ex. 1) along with the case against Ghulam Nabi and Muhammad Husain and on the 13th August they submitted a charge sheet in which they reported to the City Magistrate that the case was complete not only against Ghulam

Nabi, and Muhammad Husain but also against Ghulam Husain. They had no authority to prosecute Ghulam Husain without sanction but, in my opinion, no proceeding within the meaning of s. 29 of the Arms Act had been instituted against Ghulam Husain before the District Magistrate gave his sanction on the 17th August. On that date an application based upon the charge sheet of the 13th August was made by the Police to the District Magistrate and he accorded formal sanction for the prosecution of Ghulam Husain. Although Ghulam Husain had been in custody in connection with another case and although the Police had been investigating the case against him the first application by the Police for proceedings against him in Court was made on the 13th August and that application was not considered by the Magistrate until the 17th August on which date he assumed jurisdiction over Ghulam Husain and examined some evidence for the prosecution. In the meantime sanction had already been received from the District Magistrate, and I think that the provisions of s. 29 of the Indian Arms Act were complied with. No judicial or legal proceedings had been taken against Ghulam Husain before the 17th. It is true that the Police had been investigating the case against him but I think they were empowered to do this without the sanction of the District Magistrate. As in the case of a suit, a proceeding is instituted when for the first time the adjudication of a Court of competent jurisdiction is sought. "Proceedings" in s. 29 mean legal proceedings in Court and not searches or arrests or investigations made by the Police in exercise of the powers conferred upon them by the Criminal Procedure Code or any other law. In *Kutroo v. Emperor* (1) the opinion was expressed that "proceeding instituted" in ss. 29 and 30 of the Arms Act means legal proceedings taken in Court.

Then as regards the merits of the case against Ghulam Husain it is to be observed that he is charged with possession and sale on the 28th June. Having regard to the fact that it was he who was on the most intimate terms with Rambarat, that it was he who arranged for the delivery of the revolver on approval on the 25th March, and that it was he who settled the price

between the 19th and the 23rd June the inference is irresistible that he had control over the revolver and was in joint possession of it on the 28th June. It is also quite clear that upon the evidence on the record a conviction for abetment under s. 109 of the Indian Penal Code read with s. 19 of the Indian Arms Act would be justifiable if by any chance the substantive charges failed.

In my opinion the evidence is quite sufficient to show that both Ghulam Nabi and Ghulam Husain were in possession of the revolver in March and in June 1925 and that they sold the same to Brij Behari Lal.

Therefore, the conviction of Ghulam Husain by the City Magistrate under s. 19 of the Arms Act was, in my opinion, correct.

The result is that agreeing with the learned Sessions Judge we affirm the acquittal of Muhammad Husain but disagreeing with him we set aside the acquittal of Ghulam Husain and Ghulam Nabi and restore the convictions entered by the City Magistrate and affirm the sentences passed by him.

Wort, J.—I agree.

A. N. A.

Sentence affirmed.

PATNA HIGH COURT.

CIVIL APPEAL No. 33 of 1927.

November 8, 1927.

Present:—Mr. Justice Kulwant Sahay
and Mr. Justice Macpherson.

CHAUTHMAL BHAGIRATH—APPELLANT
versus

KHEM KARAN DAS AND OTHERS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, rr. 2, 8—Dismissal of application for insolvency for non-payment of process-fees—Fresh application, maintainability of—Dismissal under O. IX, r. 8, legality of.

The dismissal of an application for insolvency, under O. IX, r. 2 of the Civil Procedure Code does not prevent the applicant or another creditor from presenting a fresh application. [p. 843, col. 2.]

Abdul Aziz v. Habid Mistri (1), followed.

In order to bring a case under O. IX, r. 8, Civil Procedure Code, it has to be established that the defendant did appear on the date on which the application was dismissed. [*ibid.*]

Appeal from an original order of the District Judge, Manbhum, dated the 12th February, 1927.

(1) 88 Ind. Cas. 280; 47 A. 575; 23 A. L. J. 364; L. R. 6 A. 124 Cr.; A. I. R. 1925 All. 434; 26 Cr. L. J. 1112.

Mr. S. C. Majumdar, for the Appellant.

Messrs. A. K. Roy and A. B. Mukerji, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal on behalf of the creditor against the order of the District Judge of Manbhum rejecting his application for adjudication of one Gauridutt Singh, a debtor of the firm, as an insolvent. Some of the other creditors opposed the application and the learned District Judge has dismissed the application on the ground that it was barred by *res judicata*.

The facts are shortly these: The debtor Gauridutt applied for insolvency on the 5th October, 1925. His application was dismissed for default on the 12th December, 1925. On the same date one Tejmal, another creditor, made an application for adjudicating the debtor an insolvent. This application was ultimately dismissed on the 20th February, 1926, on the ground that the applicant had failed to file process-fees as required by the Court. Before the application of Tejmal was dismissed on the 20th February, 1926, Chauthmal Bhagirath, the present appellant, had made an application on the 1st February, 1926, praying for permission to be joined hand as an applicant in the case and permission was granted on that date. But the application of Tejmal was dismissed on the 20th February on the ground of his failure to file certain process-fees which he was directed to file. The present appellant Chauthmal Bhagirath thereupon filed the present application on the 24th February, 1926, and the ground upon which he made this application was that (the debtor had with intent to defeat and delay his creditors departed from his dwelling-house and usual place of business and was deliberately absenting himself so as to deprive his creditors of the means of communication with him and that this was an act of insolvency within the meaning of s. 6 (d); Provincial Insolvency Act). Upon this application two of the creditors, namely, Khem Karan Das Jokhram and Gauridutt Ganesh Lall appeared and opposed the adjudication of the debtor as an insolvent.

It appears from the order of the learned District Judge that the application of the present appellant was opposed on three grounds: firstly, that the applicant's alleged dues were bogus, secondly that the application was time-barred, and third-

ly, that it was barred by *res judicata*. The learned District Judge has found that the debt of the applicant was not a bogus debt and that the application was not time-barred, but he has dismissed the application on the ground of *res judicata*, because in the proceeding arising out of Tejmal's application the present appellant was also a party and that the application had been dismissed by the District Judge for default in payment of process-fees. In my opinion the dismissal of the application of Tejmal did not operate as *res judicata* in the present proceeding. It appears that the dismissal of Tejmal's application was under the provisions of O. IX, r. 2, Civil Procedure Code, and dismissal of an application for insolvency under O. IX, r. 2, of the Code does not prevent the applicant from presenting a fresh application. This was the view expressed by a Division Bench of the Calcutta High Court in *Abdul Aziz v Habid Mistri* (1) and, in my opinion, this is the correct view.

It is contended on behalf of the respondents who are some of the opposing creditors that the dismissal was not under O. IX, r. 2, but one under O. IX, r. 8, and that a fresh application is barred under O. IX, r. 9, but in order to bring the case under O. IX, r. 8, it has to be established that the defendants did appear on the date the application was dismissed. There is nothing on the record to show it. Mr. A. B. Mukerji refers to the postal receipts or acknowledgments showing service of notice upon the creditors, but the application of Tejmal was dismissed for non-payment of process-fees and although notices might have been served there is nothing to show that the creditors did appear on the date on which the application was dismissed. I am, therefore, of opinion that the dismissal was one under O. IX, r. 2, and the present application is not barred by *res judicata*.

It is further pointed out on behalf of the appellant that the previous application of Tejmal was based on an act of insolvency different from the one alleged in the present application of the appellant and that is another reason for holding that the present application cannot be barred by *res judicata*. It has been contended on behalf of the respondent that the debtor cannot be adjudicated an insolvent inasmuch as it has not been proved that he

departed from his dwelling-house or his usual place of business or otherwise absented himself with intent to defeat or delay his creditors as required by cl. (d), s. 6, Provincial Insolvency Act. In the first place this objection does not appear to have been taken before the learned District Judge. In the second place, I find that there is evidence of the fact that the insolvent had ceased to live in his usual dwelling-house and was absent for thirteen or fourteen months on the date the evidence was given, namely, the 14th February, 1927, and that his whereabouts were unknown.

It is contended that the evidence as required by law was evidence of the intention of the debtor and that positive evidence had to be given that he absented himself with intent to defeat or delay the creditors. It is impossible for any witness to come and swear as regards the intention of the debtor. The intention can be gathered only from the circumstances of the case and having regard to the fact that the debtor in the present case left his place of residence without paying his debts and that his whereabouts were unknown the Court could reasonably infer that he absented himself with the intention of defeating or delaying his creditors. I am, therefore, of opinion that the ground upon which the application was dismissed cannot be maintained.

The result is that the debtor Gauridutt must be and is hereby adjudicated an insolvent and it is directed that he do apply for his discharge before the District Judge within six months from this date. The appellant is entitled to his costs from the opposing creditors. Hearing-fees three gold mohurs.

Macpherson, J.—I agree.

A. N. A.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 164
OF 1924.

January 11, 1928.

Present :—Mr. Justice Ross and
Mr. Justice Wort.

Musammam RAMESHWAR KUER

—DEFENDANT—APPELLANT

versus

LACHMAN PRASAD SAHI

AND ANOTHER—PLAINTIFFS—

—RESPONDENTS.

Landlord and tenant—Suit for bhaoli rent—Plaintiff's evidence unreliable—Court, whether bound to act on defendant's admission—Duty of Court to arrive at an estimate on available materials.

In a suit for bhaoli rent an estimate as to the amount of rent payable has to be arrived at from the materials at the disposal of the Court, and the Court is not bound, therefore, to rely upon the admission of the defendant alone even though it has discarded the evidence of the plaintiff in its entirety. [p. 845, col. 2.]

Appeal from a decision of the Subordinate Judge, Gaya, dated the 30th of April, 1924.

Sir *Sultan Ahmad*, Kt., Messrs. *Nawal Kishore Prasad II* and *Kedar Nath Verma*, for the Appellant.

Messrs. *Hasan Imam* and *Kailaspati*, for the Respondents.

JUDGMENT.

Wort, J.—This is an appeal against the decision of the learned Subordinate Judge of Gaya in a suit brought by the plaintiffs against the defendant for *nakdi* and *bhaoli* rents for the years 1326 to 1329. In this appeal no question arises regarding *nakdi* rent, nor is there any question with regard to the *bhaoli* rent for the year 1326. The learned Subordinate Judge decided that in any event the plaintiffs were not entitled to *bhaoli* rent for the year 1326, by reason of the fact that the plaintiffs had already recovered from the defendant's predecessors-in-title (the former tenants, that is to say) for that year. The short point of the case relates to the amount of *bhaoli* rents for the years 1327 to 1329 only.

The allegation contained in the plaint was that as regards a portion of the lands in suit, that is to say, some, twenty-nine *bighas*, they had been deliberately left *parti* or fallow by the defendant, but in the written statement the defendant denies this allegation and states that although crops were raised, they were of a very poor quality by reason of the difficulties relating to irrigation. In the result, I think

there is no real dispute as to the fact that crops were raised on the total area of land in relation to which *bhaoli* rent was to be paid, and there is no dispute as to that total area, being sixty *bighas* approximately.

The plaintiff in support of his case relied upon oral as well as documentary evidence and the learned Subordinate Judge in his judgment sets out that evidence under five heads. As regards the first head that was evidence or admissions in a former suit by one Sheosaran Singh, the learned Judge rejects it as also he rejects the evidence under the fourth head. The fourth item was the report of the Commissioner appointed to make a cutting experiment in this case in the year 1923. The learned Subordinate Judge also rejects the fifth item of evidence. Now there are two items, namely, the second and third, upon which the Court placed reliance. The first of these was a consent judgment against the tenants of the defendant in a suit for rent for the years 1320 to 1323. This suit was brought against some sixty-four tenants of which forty-two apparently appealed and in the Appeal Court, as regards these forty-two tenants, the decrees were modified on the basis that for the year 1320 the defendant (she being the plaintiff in that suit) was entitled at the rate of $4\frac{1}{2}$ maunds, for the year 1321, 10 maunds for the year 1322 $14\frac{1}{2}$ maunds and for the year 1323 at the rate $13\frac{1}{2}$ maunds of paddy.

The second item upon which the learned Subordinate Judge relies was a decision in a s. 69 proceeding in which it was found that forty-two *bighas* yielded some 607 maunds odd. But I do not think that he was right in so relying upon that decision for the reason that there is no distinct finding in this case that the land in relation to which s. 69 proceeding was brought was similar in any way to the land in suit. The respondents in this appeal rely upon the evidence of one of their own witnesses (P. W. No. 2) to show similarly in which he made a statement that these lands in respect of which s. 69 proceeding was taken, produced an outturn of 16-annas paddy in 1331 and 12-annas in 1326 the same was the outturn for the year 1327 as also for 1321, whereas in 1328 the outturn was 14-annas and in the year 1329, 15-annas. In my judgment that cannot be stated to be evidence of the similarity of the lands but rather, as it states

in fact, the relation of the output of the respective years there mentioned as compared with the year 1331. In my judgment, therefore, the learned Subordinate Judge in relying upon the s. 69 proceeding was clearly wrong.

It comes to this, therefore, that so far as the plaintiffs' evidence is concerned, the whole of it is rejected including the Commissioner's appraisal in this particular case. The only part of the evidence adduced by the plaintiffs upon which the learned Judge in the Court below relies is that of the decrees obtained by the defendant against her tenants for the years 1320 to 1323. I should have said that in the defendant's evidence there was an admission that in respect of the years in question there was an output of paddy from two to four maunds per *bigha* and respective *rabi* crops from two to two and a half maunds per *bigha*. Now the argument of Sir Sultan Ahmad appearing on behalf of the appellant is that in this state of affairs, the learned Subordinate Judge having rejected in its entirety the evidence of the plaintiffs, he has nothing to go upon but the admissions contained in the evidence of the defendant, and that the most that can be awarded to the plaintiffs in respect of the *bhaoli* rent is the amount or the quantity which is admitted by the defendant herself. In my judgment, it would be unsafe if not unjust in a case of this character, where it is clear that an estimate is to be arrived at from the materials at the disposal of the Court, to rely upon the admission of the defendant alone especially when we have some evidence in the case of what the land can produce although in earlier years. It is quite clear from this admission that it does not bear a strict relation to the actual facts of the case, that is to say, it is an under-estimate on the part of the defendant of what was actually produced on this land in the years in question. That being so it seems to me that this Court is thrown back upon the decision in the suit with regard to the years 1320 to 1323 to which I have just referred. I have already stated the quantity per *bigha* of produce for four years, and, working out an average of the four years, the crop is approximately ten maunds per *bigha*. In my opinion, this would be in the circumstances of the case a fair estimate of the crop on which basis the plaintiffs are entitled to recover in this case. As I under-

stand the learned Counsel for the appellant is agreeable to accepting what I may describe as flat rate for the land which has been alleged by the plaintiffs to be deliberately allowed to remain *parti* as also for the lands which it is admitted on all hands are being cultivated. In the result, therefore, the plaintiffs are entitled to recover *bhaoli* rent at the rate of ten maunds per *bigha* in regard to paddy and half that rate in regard to *rabi*. In other respects the judgment of the learned Subordinate Judges should be affirmed.

The appeal is, therefore, allowed to the extent indicated, but there will be no costs.

Ross, J.—I agree.

B. K. P.

Appeal allowed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 810 OF 1927.

January 13, 1928.

Present :—Justice Sir B. K. Mullick, Kt.

RAMESHWAR SAHU—ACCUSED—

PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 257—Re-calling of prosecution witnesses—Accused's right to cross-examine them—Applicability of s. 257 to summons cases.

The only object of re-calling a prosecution witness as a defence witness under s. 257, Criminal Procedure Code, is to secure an opportunity to the accused for further cross-examination. [p. 847, col. 2.]

Once a summons has been issued to a prosecution witness under s. 257 of the Criminal Procedure Code and the witness is before the Court, there is no jurisdiction in the Court to dictate to the accused the terms upon which the examination of the witness shall be conducted. If the accused wishes to put questions in cross-examination the Magistrate is bound to allow it. [*ibid.*]

The principle of s. 257 applies to summons cases also. [*ibid.*]

Criminal revision against an order of the Officiating Judicial Commissioner, Chota Nagpur, upholding that of the Deputy Commissioner, Ranchi, dated the 19th September, 1927, which in return upheld an order of the Sub-Deputy Magistrate, Gumla, dated the 1st September, 1927.

Messrs. S. P. Varma, Anand Prasad and B. P. Varma, for the Petitioner.

JUDGMENT.—The petitioner was ac-

cused before the Sub-Deputy Magistrate of Ranchi of an offence under s. 447 of the Indian Penal Code. The relevant date for our purposes is the 4th July, 1927. On that date the complainant was examined and cross-examined and at 2.30 P. M. the trial Court stopped the case in order to take up some other cases which were urgent. At 5 o'clock he resumed the trial of the petitioner's case and the cross-examination of the complainant went on for about twenty minutes. Then the trial Court intimated to the Pleader for the petitioner that the cross-examination was getting irrelevant and should be curtailed. The petitioner's Pleader informed the Court that he intended to go on with the cross-examination for several hours more and finding the questions put by the Pleader after this to be irrelevant the trial Court stopped the cross-examination. He then called upon the petitioner to cross-examine the four remaining prosecution witnesses. The Pleader replied that unless he was allowed to cross-examine the complainant in his own way he would not cross-examine the other four witnesses. The trial Court thereupon discharged these four witnesses and examined the accused and adjourned the case until the 16th July for hearing the defence witnesses.

In the meantime the Deputy Commissioner was moved by the petitioner to transfer the case to some other Court but on the 19th July, after hearing the explanation of the trial Court the Deputy Commissioner declined to allow a transfer but suggested that the four prosecution witnesses who had not been cross-examined should be re-summoned if the petitioner so chose as defence witnesses and that such questions should be put to them as were admissible in examination-in-chief.

On the 29th August, the witnesses cited by the petitioner for his defence as well as the four prosecution witnesses who had not been cross-examined appeared in Court in answer to the Court's summons. The petitioner then asked permission to cross-examine these four witnesses but the trial Court refused the request and took the examination and cross-examination of five of the defence witnesses and adjourned the case to the 31st August. It appears that the petitioner declined to examine the prosecution witnesses as his defence witnesses and, therefore, they were discharged.

On the 31st August the case was adjourned till the 1st September when the petitioner was convicted under s. 447 of the Indian Penal Code and sentenced to rigorous imprisonment for two weeks and a fine of Rs. 25.

An appeal was filed against this order to the Deputy Commissioner but was dismissed after a full hearing.

Thereupon an application was made in revision to the Sessions Judge. The learned Sessions Judge was of opinion that although if this had been a warrant case the provisions of s. 257 of the Code of Criminal Procedure would have compelled the trial Court to allow the cross-examination of the four prosecution witnesses the case being a summons case the procedure of s. 257 did not apply and that the trial Court had full liberty to cut down the cross-examination provided the general scheme for the trial of summons cases was not violated. The petitioner now comes before me in revision.

I think it is clear that the petitioner's Pleader adopted a wholly unjustifiable attitude on the 4th July. It is not now suggested before me that the time given for the cross-examination of the complainant was inadequate and instead of agreeing to cross-examine the four prosecution witnesses when called upon to do so he adopted a somewhat disrespectful attitude and declined to go on with the case if he was not allowed to cross-examine the complainant according to his own ideas and for as long as he liked. This was an altogether unjustifiable position and the trial Court was fully competent to discharge the witnesses when the petitioner's Pleader declined to cross-examine them. Therefore, when an application was made to the trial Court to re-summon these prosecution witnesses for cross-examination on the analogy of the provisions contained in s. 257 of the Code of Criminal Procedure it would have been open to that Court to refuse to summon them on the ground that an opportunity for cross-examination had already been given. The same ground could also have been taken by the learned Deputy Commissioner when he dealt with the transfer matter. But, in my opinion, the learned Deputy Commissioner while allowing the prosecution witnesses to be re-called was wrong in limiting the scope of the examination. Obviously it was not to the interest of the

petitioner to recall the prosecution witnesses and put to them such questions as would be only permissible in examination-in-chief. Such a course would have only made the case against him worse and the only object of re-calling prosecution witnesses as defence witnesses was to secure an opportunity for further cross-examination. Such an opportunity is not usually given but the provisions of s. 257 are exceptional and in exceptional cases the accused after a witness has been called for the prosecution and discharged is allowed a further opportunity of supplementing the cross-examination of that witness by again cross-examining him. Once a summons has been issued and the witness is before the Court it does not seem to me that there is any jurisdiction in the Court to dictate to the accused the terms upon which the examination of the witness shall be conducted. If the accused wishes to put questions in cross-examination the Magistrate is bound to allow it. I think, therefore, that the accused should have been allowed to cross-examine the prosecution witnesses who were present on the 29th August. Though it was a summons case I think the principle of s. 257 applies.

It seems, therefore, to me that the proper course now is to set aside the order of the learned Deputy Commissioner and to direct that the cross-examination of Bania Oraon, Madho Oraon, Jakhua Oraon and Kaila Oraon be taken either by the learned Deputy Commissioner himself or by any other officer to whom the case may be remanded by him for that purpose and that after the evidence has been so taken the appeal be re-heard by the learned Deputy Commissioner according to law.

B. K. P.

Case remanded.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 257
OF 1926.

January 13, 1928.

Present:—Mr. Justice Adami and
Mr. Justice Macpherson.

Bibi JAMILA KHATOON AND OTHERS—
APPELLANTS

versus
DAYANAND THAKUR AND OTHERS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—Death of defendant before decree—Objection to validity of decree in execution, whether maintainable—Prayers under s. 47 and O. XXI, r. 90, whether can be joined together.

In execution proceedings the objection that the decree was a nullity since one of the judgment-debtors had died before the decree was passed, can be put forward.

A prayer under s. 47, Civil Procedure Code, can be joined with a prayer under O. XXI, r. 90 in one application. It is only reasonable that the Executing Court should deal with every objection which the judgment-debtors put forward to an execution sale in one and the same proceeding.

Per *Macpherson, J.*—Even if it is necessary for the objectors to make an election in the first Court, that Court should put them to their election and should not itself choose at a late stage which of the two objections it should consider and which it should not consider.

Appeal from a decision of the District Judge, Purnea, dated the 26th June, 1926, confirming that of the Munsif, Araria, dated the 6th June, 1925.

Mr. *Hasan Jan*, for the Appellants.

Mr. *D. L. Nandkeolyar*, for the Respondents.

JUDGMENT.

Adami, J.—A decree having been passed against the father of the appellants together with other judgment-debtors and the property of the appellants having been put up for sale in execution of the decree and sold to a third person, the appellants came forward with an application under s. 47 and under O. XXI, r. 90 of the Code of Civil Procedure seeking to have the sale set aside. The objections put forward to the sale were firstly, that there had been irregularities in connection with the proclamation and the process leading to the sale, and, secondly, that the decree in execution of which the property was sold was in fact a nullity inasmuch as the father of the appellants had died before the decree in the suit was passed.

The Courts below have rejected the application of the appellants finding in the first place, that there was no such irregular-

ity as would warrant setting aside the sale and, secondly, that the two grounds put forward in the petition could not form the subject of one and the same application. The Courts below have held that a prayer under s. 47 of the Code could not be joined in one application with a prayer under O. XXI, r. 90 and, therefore, they rejected the application to set aside the sale on the ground of the decree being a nullity.

It has been decided by a Bench of this Court that in execution proceedings the objection can be put forward that the decree was a nullity since one of the judgment-debtors had died before the decree was passed. Neither the Courts below nor the Advocate in this Court have put forward any decision to the effect that a prayer under s. 47 cannot be joined with a prayer under O. XXI, r. 90 in one application, and there seems to be no good reason for disallowing the joinder of the two applications. The application of the appellants was to have the sale set aside, and it would be unreasonable that, because there were two reasons for setting aside the sale, there must be two applications. It is only reasonable that the Executing Court should deal with every objection which the judgment-debtors put forward in one and the same proceeding.

The result is that the appeal must be allowed and the Executing Court, having disposed of the objection under O. XXI, r. 90, should now enquire into the objection under s. 47. Costs in the Courts below will follow the result.

Macpherson, J.—I agree. It is admitted that neither on principle nor on authority can the orders of the Courts below be supported. It may further be indicated that had it, in fact, been necessary for the objectors to make an election in the first Court, that Court ought to have put them to their election and not have itself chosen at a late stage which of the two objections it should consider and which it should not consider.

B. K. P.

Appeal allowed.

RANGOON HIGH COURT.

CIVIL REGULAR SUIT No. 565 of 1926.

April 29, 1927.

Present:—Mr. Justice Chari.

SURATEE BARA BAZAAR Co. LTD.—**PLAINTIFFS***versus***MUNICIPAL CORPORATION OF****RANGOON—DEFENDANTS.**

City of Rangoon Municipal Act (VI of 1922), ss. 25, 26, 113, 192, 203—Erection of urinals—Private person when entitled to injunction—Principles—Torts—Acts authorised by Legislature—Nuisance to private person—Remedies—Local bodies, duties of—Provision for compensation, whether bars suit for injunction—Likelihood of misuse by public, whether gives cause of action.

If the Legislature authorises a specific act to be done, and if the performance of that act and of every other subsidiary act necessary for, and incidental to, the performance of the main act, creates nuisance or causes damage, the local body authorised to perform the act cannot be restrained by injunction nor made liable for damage except on the ground of negligence, and not even on that ground, if the mode of performance is also prescribed and the act is performed in the prescribed manner. [p. 853, col. 1.]

If the act can be performed without creating a nuisance and without causing injury or damage then the local body performing the act would be liable if the act is performed in such a manner as to create nuisance or cause damage. [*ibid.*]

Where the Legislature in general terms gives powers to a local body to perform certain acts then it is a matter of construction of the Act, whether the Legislature intended (a) merely to confer permissive right on the local body, or (b) to enjoin the performance of an obligatory duty. The local body, when exercising powers in the performance of a permissive act is in no higher position than a private person and must perform the prescribed acts without creating a nuisance or infringing private rights. Different considerations arise in the performance of obligatory duties and it then becomes necessary to see whether the Legislature intended the act to be performed even if it does create nuisance. Where the Legislature is silent on this point, then the nature of the duty imposed must be considered to ascertain whether the inevitable consequence of the performance of the act is to create a nuisance or otherwise affect the rights of private persons. If it is, it may be presumed that the Legislature contemplated the creation of a nuisance or the causing of a certain amount of damage and injury to private persons, as a consequence of the performance of the duty imposed. [p. 853, cols. 1 & 2.]

Where, in the performance of an act, an option is given to the local body, e. g., in the selection of a site or in the deciding of the necessity for the performance of the act at a particular time, then the choice of the local body of either place or time cannot be questioned unless the choice has not been made *bona fide*. [p. 853, col. 2.]

[Case-law discussed.]

Under the City of Rangoon Municipal Act a duty is imposed on the Corporation to erect urinals and water closets for public convenience on Municipal lands and the choice of the place where they are to

be erected and the time when they become necessary are left to the Corporation. [p. 854, col. 2.]

The erection of structures is not merely a permissive act, and the principles applicable are those which apply to the carrying out of imperative duties imposed on a local body. [p. 855, col. 1.]

If the erection of a latrine does not necessarily give rise to a cause of action, the mere fact that the latrines may give rise to a nuisance on account of misuse by the public will not entitle a plaintiff to a cause of action in anticipation. The remedy of the plaintiff in such a case is to wait till the latrine is actually misused and has become a nuisance when he can ask the Court to grant relief. [*ibid.*]

Obiter.—Section 192 of the City of Rangoon Municipal Act does not deprive a private person of his Common Law right to an injunction and leave him merely a right to compensation. [p. 855, col. 2.]

It is a cardinal principle of the construction of Statutes that no legislative enactment should be so construed as to take away the Common Law rights of private persons. [*ibid.*]

Mr. Leach, for the Plaintiffs.

Mr. N. M. Cowasjee, for the Defendants.

JUDGMENT.—This is a suit filed by the Soratee Bara Bazaar Company, Limited, against the Municipal Corporation of the City of Rangoon for an injunction to restrain the defendant Corporation from erecting or causing to be erected a latrine in Dalhousie Street on the site selected by it, which is the north-east corner of Dalhousie Street and the 24th Street. The allegations in the plaint are that the site chosen by the Corporation is not a proper or convenient site and that in the selection of this site the Corporation has not observed the provisions of the Act which enjoin it to cause the least practicable nuisance. The plaintiff Company claims that the Corporation acted negligently in erecting a latrine in a main thoroughfare particularly of the type proposed to be erected and in erecting it close to the shops owned by the plaintiff Company, thereby causing more nuisance than is necessary. The plaintiff also alleges that the latrine proposed to be erected will constitute a nuisance in that it will obscure the view from the street of the goods and stock-in-trade of the tenants of the plaintiff who occupy the shops opposite to the latrine, that it will obstruct the access of air and light to such shops, that as a large number of the customers of these shops are Burmese ladies they will not resort to the shops on account of the presence of the latrine, that the latrine itself will create an offensive smell and that the persons using the latrine will obstruct the foot-path in front of the shops. The plaintiff also complains that

the rental value of the premises will be depreciated on account of the above facts. Three issues were raised and later an additional one as follows:—

(1) Is the erection of the latrine in question a nuisance and if so does it give rise to an actionable claim against the Corporation?

(2) Is the defendant-Corporation protected from liability by the provisions of the City of Rangoon Municipal Act and if so what is the extent and result of that exemption from liability?

(3) To what relief if any is the plaintiff entitled? Additional issue:—

Is the plaintiff entitled to the injunction claimed on the ground that the erection of the latrine interferes with the enjoyment of the plaintiffs' property by the tenants to whom it had been let?

Before dealing with the relevant provisions of the Rangoon Municipal Act and discussing the evidence I shall briefly state the principles deducible from the rulings on the subject. These are weighty rulings and there is no difficulty in arriving at the general principles applicable to this class of cases though the application of those principles to any particular case is a matter of some difficulty. The first case I shall refer to is the case of *Hammersmith and City Ry. v. Brand* (1). It is unnecessary to deal with this case at length as it merely reiterated a settled principle. According to Lord Blackburn in *Metropolitan Asylum District v. Hill* (2), which will be considered later, *Hammersmith Railway case* (1) settled beyond controversy the principle that, where the Legislature directs that a thing shall at all events be done the doing of which if not authorised by the Legislature will entitle anyone to action, that right of action is taken away. Therefore, where the doing of an act is expressly authorised by the Legislature, then no liability of any kind attaches to the person performing that act, with the result that all the rights of the injured party, including the right of compensation, unless it is expressly reserved, are taken away. The next case to be considered is *Vernon v. St. James West Minster Vestry* (3). This was

(1) (1869) 4 H. L. 171; 38 L. J. Q. B. 265; 21 L. T. 238; 18 W. R. 12.

(2) (1881) 6 A. C. 193; 50 L. J. Q. B. 353; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664.

(3) (1881) 16 Ch. D. 449; 50 L. J. Ch. 81; 44 L. T. 229; 29 W. R. 222.

a case under s. 88 of the Metropolitan Local Management Act the wording of which is that "it shall be lawful for every Vestry and District Board to provide and maintain urinals . . . in situations where they deem such accommodation to be required." The Vestry purporting to act under the power given by this section erected a urinal in a mews which was a *cul de sac*. The result would have been that a large number of people would go into the mews who would not otherwise have done so. Vice-Chancellor Mellins granted the injunction asked for and I shall refer to one or two passages in his judgment which have a bearing on the present case. At page 458* the learned Vice-Chancellor says:—"Now if the question between the parties was merely whether one situation or another was the more fit, I should be clearly of opinion that it was a question to be decided by the Vestry, they being authorised by the Act to place urinals in situations where they deemed them necessary." The matter was taken up to the Court of Appeal and the following propositions can be deduced from the judgment of Lord Justice Cotton:—(1) Nobody is authorised to commit a nuisance or is to be held so authorised under an Act of Parliament unless it appears from express words or by necessary implication that the act was to be done or might be done notwithstanding its tending to the creation of a nuisance. (2) That there is no presumption that no water-closet or urinal can possibly be erected without being a nuisance and, therefore, the mere authorisation by Parliament of the erection of a urinal does not, by itself or by necessary implication, empower the local body to erect it if it is a nuisance. Lush, L. J., explains the wording of the section and draws attention to the fact that a Vestry had no power to obstruct any part of a public street way and the words "it shall be lawful" with which the section begins was intended to legalise such an erection on the part of the Vestry. If this be so, it follows that the provision of the Statute does not enjoin a statutory duty on the Vestry but was merely intended to legalise an act which would otherwise have been illegal. *Sellers v. Matlock Bath Local Board* (4) also related to the erection of a urinal which it was contended was authorised by s. 39 of the English Public Healths Act,

(4) (1885) 14 Q. B. D. 928; 52 L. T. 762.

*Page of (1881) 16 Ch. D.—[Ed.]

1875. That section enacts that any urban authority may, if they think fit, provide and maintain in proper and convenient situations urinals . . . and other similar conveniences for public accommodation. In that case, it was found as a fact that the Local Board had erected the urinal on a portion of private ground. Mr. Justice Denman held on the evidence before him that the urinal was a nuisance and that the authority to erect a urinal did not authorise the creation of a nuisance and that s. 308 which empowered the Local Board to give compensation to any person who sustains damage under the Act did not take away the right by injunction since the Board had no power to erect urinals on private grounds.

It is assumed by Mr. Justice Denman that if there had been such a power the effect of that section, *viz.*, 308 would be to relegate the party to the recovery of compensation. A similar argument had been adduced in the case before me and I draw attention to this particular passage for that reason. In the case of *Biddulph v. St. George's Vestry* (5) a urinal was erected by the Vestry of St. George purporting to act under powers conferred on them by s. 88 of the Act for the better local management of the Metropolis, the terms of which I have already given. In the trial Court, Stewart, Vice-Chancellor, granted an injunction. He was of opinion that a urinal could be constructed in such a manner and at such a spot as not to be a nuisance and as there were no compulsory powers in the Act and as, in his opinion, the construction of the urinal would have been an arbitrary exercise of power he granted the injunction. On appeal the injunction was dissolved; Lord Justice Knight-Bruce basing his decision on the ground that the evidence did not show that it would be certain or probable that the proposed urinal would be a nuisance. In answer to the argument that the powers given by the Act of Parliament were being exercised unnecessarily and injuriously to private property, the learned Lord Justice stated that the Courts will interfere in cases where there is not a *bona fide* exercise of the power given by Parliament, but if the power is

being exercised *bona fide*, the Courts will not interfere in such exercise of the power. I shall now deal with the important case of *Metropolitan Asylum District v. Hill* (2). In that case the Managers of the Metropolitan Asylum who were incorporated under the Metropolitan Poor Act for the purpose of providing hospitals for the sick poor of the Metropolis, proposed to erect a small-pox hospital in Hampstead. An injunction had been granted against them and on appeal to the House of Lords that body ordered the appeal to be dismissed. Lord Selborne was of opinion that there was nothing in the Act which could be construed as authorising the creation of a nuisance and that the powers under the Act, which were optional, were not intended by the Legislature to be exercised at the expense of or so as to interfere with any man's private right. Lord Blackburn expressed the opinion that the burden was on the Metropolitan Asylum to establish that the Legislature intended to take away the rights of individuals and that they had failed to show that, by express words or necessary implication, the Legislature intended to do so. Lord Watson after referring to the case of *Hammersmith and City Ry. v. Brand* (1) as laying down the proposition that where a specific act in a specific place and in a specific manner is directed to be done, the public body doing that act cannot be restrained by injunction from doing it though such act may be a nuisance, except in cases where the act is being done negligently, stated that if it is proved that the direction of the Act cannot be complied with at all without creating a nuisance, then no injunction could issue, but the justification in such cases depended on the imperative nature of the command imposed by the Legislature and the impossibility of obeying that command without infringing private rights. If, however, the order of the Legislature can be carried out without nuisance then the protection of the Statute cannot be claimed. In the case of acts which are permissive as distinguished from imperative duties, the performance of the act being left to the discretion of the local body empowered to do the act, it is a reasonable inference that the Legislature intended the discretion to be exercised in strict conformity with private rights and that the Legislature did not intend to confer a license to commit nuisance in any place selected by the local body. In the case of

(5) (1863) 33 L. J. Ch. 411; 3 De G. J. & S. 493; 9 Jur. (N. s.) 953; 8 L. T. 558; 11 W. R. 739; 46 E. R. 726; 142 R. R. 139.

L. B. & S. C. Ry. v. Truman (6) the Railway Company which was authorised to carry cattle was also empowered to purchase lands "in such places as should be deemed eligible for the purpose of making and providing additional stations ... warehouses and other buildings and conveniences for receiving, depositing, loading or keeping any cattle, or any goods....." The Railway Company erected some cattle pens and a yard and used them for the purpose of landing and unloading daily and nightly the cattle which they were carrying. The adjoining occupiers sought to restrain the Company by injunction. In the course of his judgment Lord Halsbury laid down as undoubted law the proposition that a Railway Company created for the purpose of carrying goods, or passengers or cattle is protected in the use of the functions with which Parliament has entrusted it, if such use necessarily involves the creation of what would otherwise be a nuisance. He was also of opinion that it was not necessary to enquire whether the sites were selected with due regard to public convenience because in his view as the Company was acting under its statutory authority the absolute discretion of selecting the site was in the Company. Lord Selborne in his judgment after laying down the general principle that if the use made by the Company of the land is authorised by the Act, there is no cause of action against it not even for negligence if the particular mode of performing the Act is authorised, dealt with the argument that the Company having option as to place was bound to exercise that option so that no adjoining land owner should suffer detriment from the subsequent use of the land for the authorised purpose. His Lordship showed the unsoundness of this argument, since no matter what site is selected the adjacent land owner was bound to be affected and even if a site without any building on the adjoining lands were selected the owner may afterwards think fit to build a house on his property, which will place the Company in the same difficulty. Lord Blackburn laid down the principle as follows:—"If on the true construction of a Statute it appears to be the intention of the Legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighbouring

land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of these powers, effect must be given to the intention of the Legislature." Whether the Legislature had or had not such an intention is a matter of construction of the Statute. Later referring to the words "in such places as shall be deemed eligible," Lord Blackburn was of opinion that on a true construction of the Act the Legislature intended the Railway Company to be the judges of this and also that the Company did on very sufficient grounds *bona fide* judge it requisite that there should be further conveniences for carrying cattle and did *bona fide* think the spot eligible. Dealing with the *Metropolitan Asylum District v. Hill* (2) his Lordship pointed out that in that case in the words of Lord Justice Bowen there was no element of compulsion nor any indication of an intention to interfere with private rights. The next case cited before me is that of *West v. Bristol Tramways Co.* (7). In that case the Company which was under an obligation to pave certain portions of the road with wood paving used wood blocks coated with creosote which caused damage. Lord Alverstone pointed out that if the doing of a particular thing was authorised no action will lie in the absence of negligence and Sir Gorrell Barnes showed how on the true construction of the Statute the use of creosote wood was not authorised expressly or by necessary implication, i. e., either in express terms or by authorising work necessarily involving its use. In all such cases if the doing of an act is authorised and it can be done without causing injury, but is done so as to cause injury, the person doing that act will be liable. In the case of *Prices Patent Candle Co. Ltd. v. London County Council* (8) the Act specifically provided that the power conferred must be carried out without creating a nuisance. The exact decision, therefore, has no bearing upon the present case but Cozens Hardy, M. R., laid down certain general principles. (1) The presumption is that a public body is not authorised to create a nuisance or otherwise affect private rights unless compensation is provided, but (2) where the

(7) (1908) 2 K. B. 14; 77 L. J. K. B. 684; 99 L. T. 264; 72 J. P. 243; 6 L. G. R. 609; 24 T. L. R. 478.

(8) (1908) 2 Ch. 526; 78 L. J. Ch. 1; 99 L. T. 571; 72 J. P. 429; 24 T. L. R. 823.

(6) (1886) 11 A. C. 45; 55 L. J. Ch. 354; 54 L. T. 250; 34 W. R. 657; 50 J. P. 388.

language is clear it overrides this presumption and a nuisance can be created even without compensation, (3) if the Statute when conferring a power provides that no nuisance must be created it affords no defence to say that the work cannot be done without creating a nuisance. I do not propose to deal with the Indian and Burma cases that have been cited before me. They lay down no new principle and are merely applications of the principles deducible from the authorities I have cited, to the particular facts of the cases with which the Courts were dealing. These principles so far as they are material for the consideration of the present case are :—

(1) If the Legislature authorises a specific act to be done, and if the performance of that act and of every other subsidiary act necessary for and incidental to the performance of the main act, creates nuisance or causes damage, the local body authorised to perform the act cannot be restrained by injunction nor made liable for damage except on the ground of negligence, and not even on that ground, if the mode of performance is also prescribed and the act is performed in the prescribed manner. This last is merely an application of the general principle involved in the first part of the rule. From this it follows—

(2) that if the act can be performed without creating a nuisance and without causing injury or damage then the local body performing the act would be liable if the act is performed in such a manner as to create nuisance or cause damage. The class of cases in which these principles were applied was mainly Railway cases but the principles themselves are of general application. The words "specific act" used by me must not be construed as meaning a single act. It not only includes such an act but also applies to the repeated performance of a series of acts of the same kind at different times or at different places. In such cases the Legislature contemplates a recurrent performance of the act.

(3) Where the Legislature in general terms gives powers to a local body to perform certain acts then it is a matter of construction of the Act, whether the Legislature intended (a) merely to confer permissive right on the local body or (b) to enjoin the performance of an obligatory duty. The examples of the first class of cases are where a private person or a local body is

allowed to perform acts for profit. In such cases the presumption is that the performance of the act is not primarily intended for the public benefit and is, therefore, entirely optional. Even in cases of acts which are for the benefit of the public, the performance may be optional. The local body, when exercising powers in the performance of a permissive act is in no higher position than a private person and must perform the prescribed acts without creating a nuisance or infringing private rights. Different considerations arise in the performance of obligatory duties. It then becomes necessary to see whether the Legislature intended the act to be performed even if it does create nuisance. No difficulty, of course, can arise if the Legislature expressly says that the act must be performed without creating a nuisance but where the Legislature is silent on this point, then the nature of the duty imposed must be considered to ascertain whether the inevitable consequence of the performance of the act is to create a nuisance or otherwise affect the rights of private persons. If it is, it may be presumed that the Legislature contemplated the creation of a nuisance or the causing of a certain amount of damage and injury to private persons, as a consequence of the performance of the duty imposed.

(4) Where in the performance of an act an option is given to the local body, e. g., in the selection of a site or in the deciding of the necessity for the performance of the act at a particular time, then the choice of the local body of either place or time cannot be questioned unless the choice has not been made *bona fide*. These are all the principles which it is necessary to bear in mind in deciding the present case in the light of the evidence adduced.

The Act which confers powers and imposes duties on the Corporation of Rangoon is the Rangoon Municipal Act (Burma Act VI of 1922). Chapter III deals with the duties and powers of the Corporation of Rangoon; s. 25 of that Chapter provides that "the Corporation shall make adequate provisions by any means or measures which it is lawfully competent for it to use, for each of the following matters, namely:— (i)....., (ii) the erection in proper and convenient situations on Municipal land of water-closets, closet accommodation, urinals and other conveniences for the public, and the maintenance and cleansing of the same,....." It is instructive to refer-

to the wording of the succeeding section which runs as follows:—"The Corporation may in its discretion provide either wholly or in part for all or any of the following matters, viz, ..." so that without reference to the other parts of the Act the scheme of this Chapter seems to be to lay down in s. 25 of the list of obligatory duties and in s. 26 a list of acts, the performance of which is permissive or optional. The next relevant section is s. 113 which runs as follows:—"In carrying out the duties imposed on the Corporation by cls. (i), (ii) and (iii) of s. 25 or exercising the powers conferred thereon by ss. 94, 95, 96, 97, 109, 111 and 112, the Corporation is responsible that the least practicable nuisance is created." I have already given above cl. (ii) of s. 25 in full. Clause (i) of s. 25 relates to the construction or laying out of drains and the maintenance, flushing and cleansing of the same, and cl. (iii) refers to the collections, removal, treatment and disposal of sewage, offensive matter and rubbish. The word "nuisance" is defined in s. 3, cl. (xxix) as follows:—" 'Nuisance' includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smell or hearing, or which is or may be dangerous to life or injurious to health or property." Section 192 runs as follows:—"In any case not otherwise expressly provided for in this Act, the Corporation may pay compensation to any person who sustains damage by reason of the exercise of any of the powers vested in the Corporation, or vested in or delegated to the Commissioner, or to any other Municipal Officer or servant under this Act." Section 203 enacts—"that no suit shall be maintainable against the Corporation.....in respect of anything in good faith and with due care and attention done or intended to be done under this Act." The first point for consideration is as to the intention of the Legislature so far as that intention can be gathered from the scheme and wording of the Act itself. Did the Legislature intend to enjoin an obligatory duty on the Corporation to erect water-closets and urinals or is such erection a permissive act, which it is open to the Municipality to perform or not to perform, the object of the Legislature being merely to authorise the performance of an act which without such provision would be *ultra vires* of the Corporation? I have

already drawn attention to the difference in the wording between ss. 25 and 26 of the Act and it is noteworthy that in s. 113, in referring to the performance of the acts contained in cls. (i), (ii) and (iii) of s. 25, the Legislature uses the words "in carrying out the duties imposed on the Corporation", and the wording of this section (s. 113) and the difference in the wording of s. 25 and s. 26 give a clear indication of what the Legislature intended to be acts the performance of which was compulsory and acts the performance of which was optional. In the performance of the former s. 113 provides that the Corporation is responsible that the least practicable nuisance is created. It is argued by the learned Counsel for the defendant that this section shows that the Legislature contemplated the inevitable creation of a certain amount of nuisance in the performance of these obligatory duties and that the Corporation is responsible only to the extent of seeing that the least practicable nuisance is created. On the other hand, it is argued by the learned Counsel for the plaintiff that the plain meaning of that section is that if an act could be performed without creating any nuisance it should be so performed and that if it cannot be performed without inevitably creating a nuisance, but there are more than one mode of performance some of which create a larger amount of nuisance than the others, then the Municipality is bound to choose that mode which creates the least nuisance. It seems to me that the contention of the Advocate for the plaintiff is correct. The Legislature obviously intended that if the acts could be performed without creating a nuisance they should be so performed, but if some nuisance is inevitable, then the least practicable amount of nuisance must be created. The words of s. 113 of the Act do not, in my opinion, show that the Legislature contemplated, in the erection for public use of water-closets and urinals on Municipal lands, the inevitability of the creation of a nuisance. On a construction of the relevant provisions of the Rangoon Municipal Act I hold (a) that a duty is imposed on the Corporation to erect urinals and water-closets for public convenience on Municipal lands, (b) that the choice of the place where it is to be erected and the time when such water-closets and urinals at any particular place became necessary are left to the Corporation. In

view of this finding, since the erection of such structures is not merely a permissive act which it is open to the Corporation to perform or not to perform, the principles applicable are those which apply to the carrying out of imperative duties imposed upon a local body.

[His Lordship was of opinion on the evidence that the proposed latrine would be a nuisance only if there was bad supervision or insufficient cleansing, and that as the Corporation had chosen the site *bona fide* mere amenities of property or depreciation of value owing to loss of amenities could not support a claim for an injunction.]

Having disposed of these points, I now turn to the main question of the tendency of these latrines to become a nuisance on account of the misuse to which they are likely to be put by the public. A threatened nuisance will undoubtedly give rise to a cause of action but in that case the act which is threatened must in itself be the nuisance. The fact that a latrine need not, as such, necessarily be a nuisance, puts the plaintiff at once out of Court. If the erection of the latrine does not give rise to a cause of action, then the obvious remedy of the plaintiff-Company is to wait till the latrine is actually misused and has become a nuisance when it can ask the Court to grant a relief on its behalf. There is no presumption that the latrine will be misused by the public at all times, and though this is probable, it cannot give rise to a cause of action by anticipation, nor is there any presumption that the employees of the Corporation will to the end of time remain inefficient. They may surprise the Rangoon public by their efficiency in keeping the latrine clean and free of smell so as not to give the plaintiff or the public any cause of complaint. I hold, therefore, that there is no certainty or even a high degree of probability that the latrine will be a nuisance later. If, however, on account of the misuse to which the latrine is put it becomes a nuisance then it is always open to the plaintiff to move the Court to restrain the defendant by injunction from allowing the public to use the latrine or to compel the Corporation to take such steps as may be necessary to abate the nuisance. The Court will then undoubtedly, if satisfied that the nuisance does exist take such action as may be necessary to give adequate relief to the plaintiff.

I have thus dealt with all the objections raised on behalf of the plaintiff and I have come to the conclusion that the plaintiff-Company has at present no cause of action against the Corporation. The plaintiff is not, therefore, entitled to an injunction. I, therefore, answer the first issue in the negative.

In the view I have taken above it is unnecessary to give any finding on the two other arguments raised by the learned Advocate for the defendant. I shall, however, briefly indicate my opinion on these points. The first point is that the effect of s. 192 of the Rangoon Municipal Act is to deprive the party injured of his right to an injunction and leave him merely with the right to claim and obtain compensation. There is a dictum in one of the cases cited above which lends support to this argument but a careful perusal of the preceding sections of the Act itself shows that it was not the intention of the Legislature to deprive a private person of his Common Law rights, leaving him solely the right to obtain compensation. Section 189 of the Act provides for the payment of compensation to an owner whose immovable property has deteriorated in value on account of the exercise by the Corporation of the powers conferred by certain sections of the Act. Section 190 enables the injured party to move the Local Government and prescribes the procedure to be followed by the Local Government. Section 191 saves the right of the injured party to recover damages, i. e., his right to have recourse to a Court of Law remains unaffected. Then follows s. 192 which provides generally that in cases not otherwise expressly provided for the Corporation may pay compensation to any person who sustains damage by reason of the exercise of any of the powers vested in the Corporation. The use of the words "exercise of any of the powers" makes it doubtful whether the section was intended to apply to cases where the Corporation is carrying out its statutory duties, but even if construed as including such cases, the section does not support the contention of the learned Advocate for the defendant. It is a cardinal principle of the construction of Statutes that no legislative enactments should be so construed as to take away the Common Law rights of private persons and the intention of the Legislature to do so must be expressly stated or necessarily implied. The primary object of ss. 189 and 192 of the Act

is to authorise certain payments which but for such authorisation will be *ultra vires* of the Corporation. It was clearly not the intention of the Legislature to deprive private persons of their ordinary rights or remedies. There is high authority for the proposition that the absence of a provision for compensation "affords reason though not a conclusive reason, for thinking that the intention of the Legislature was not that the thing should be done at all events, but that it should be done, if it could be done without injury to others," [per Lord Cairns in *Hammersmith and City Ry. v. Brand* (1)] and if the converse position is also true, then the presence of such a provision may be a reason though not a conclusive one for thinking that the Legislature intended that the thing should be done at all events. However that may be, such a provision by itself does not afford a reason for thinking that the Legislature intended to deprive the private citizen of all his other remedies. The second argument is that s. 203 of the Act bars a suit in respect of anything "in good faith and with due care and attention done or intended to be done under this Act." Similar words in a Madras Act were considered by Mr. Justice O'Farrel in the case of *Haji Ismail Sait v. Trustees of the Harbour, Madras* (9). It is unnecessary to dispose of this argument on the ground relied upon by that learned Judge because s. 203 requires that the thing should be done "with due care and attention." If the Legislature did not authorise the creation of a nuisance and if the Corporation knowingly creates it, the thing cannot be said to be done with due care and attention. I am, therefore, of opinion that neither s. 192 nor s. 203 of the Act is a bar to the plaintiffs' suit.

The plaintiffs' suit is dismissed with costs. I grant special costs. Advocate's fee after the first day Rs. 340 per day.

A. N. A.

Suit dismissed.

(9) 23 M. 389; 9 M. L. J. 270; 8 Ind. Dec. (N. S.) 673.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 89
OF 1927.

July 5, 1927.

Present:—Mr. Justice Maung Ba.
MA SHWE MRA PRU AND ANOTHER
—APPELLANTS

—versus

MAUNG BA ON—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58—Decree against legal representative—Attachment of property—Claim by judgment-debtor on his own account, whether falls within s. 47—Appeal.

An objection by a judgment-debtor against whom a decree has been passed as the legal representative of another, to an attachment of the property of the deceased on the ground that the property was not liable to attachment inasmuch as it belonged to him by virtue of a gift made to him by the deceased prior to the suit or decree, falls within the purview of s. 47 of the Civil Procedure Code and not within O. XXI, r. 58 of the Code. [p. 857, col. 2.]

Punchamun Bundopadhya v. Rabia Bibi (1), referred to.

A wide and liberal construction has always been placed on s. 47 in order that all questions which can possibly be determined in execution proceedings should be so determined. [p. 857, cols. 1 & 2.]

Mr. Sein Tun Aung, for the Appellants.

Mr. R. M. Sen, for the Respondent.

JUDGMENT.—This second appeal arises out of an execution case involving an important point of law whether the objection raised to an attachment of the deceased's property by the judgment-debtor, against whom a decree was passed as a legal representative, alleging that the property is not liable to be attached as it belongs to him by virtue of a gift made to him by the deceased prior to the suit or decree, is a matter which falls within the scope of s. 47 or within the purview of r. 58 of O. XXI, Civil Procedure Code.

The Sub-Divisional Judge of Kyauktaw treated the objection as an ordinary application for removal of attachment under O. XXI, r. 58. If that procedure were correct, no appeal would lie from an order passed by the Sub-Divisional Judge. The learned District Judge of Akyab was of opinion that the objection was a matter falling within the scope of s. 47, and that, therefore, an appeal lay.

It is now urged that that view of the learned District Judge is incorrect, and that s. 47 is not applicable. Maung Ba On was one of the defendants sued as legal representatives of the deceased U Kyaw Khine in the original suit. In execution of the decree passed against

him, and the other legal representatives, certain property was attached as forming part of the deceased's estate. Maung Ba On preferred a claim to one-half of that property, alleging that the same had been gifted to him by a gift made about four years previously. The question to be decided, therefore, is whether that portion of the property has descended to him as the representative of the deceased and is liable to be attached in execution of the decree against him as such representative or whether it belongs to himself and not in such representative character. Surely this is a question arising between the parties to the suit in which the decree was passed relating to the execution of the decree. That being so, the question is one falling within the scope and purview of s. 47.

The learned Advocate wishes to draw a very fine line between a case where a legal representative bases his claim upon a title acquired before the decree and that based upon a title acquired after the decree. He urged that s. 47 would be applicable only in the case of a claim based upon title acquired after the decree. I do not see any reason for drawing such a distinction. Ba On is, no doubt, a party to the suit, and the question whether the property attached is attachable as being part of the estate or not attachable as being his own property is a question relating to the execution of the decree passed against him as a legal representative. If he were to bring a regular suit to decide that dispute, it would have to be decided in that suit whether the property in dispute was liable to be attached as part of the deceased's estate or that it was not liable to be attached as it belonged to Ba On. The matter to be decided in the regular suit under O. XXI, r. 63, is, therefore, practically the same as that to be determined under s. 47. Since it is a matter that may as well be determined by the Court executing the decree, the Legislature has laid down that in such circumstances that matter should be determined by the Court executing the decree and not by a separate suit. The Judicial Committee has pointed out that it is of the utmost importance that all objections to executions should be disposed of as cheaply and as quickly as possible. Consequently in order to attain that object a wide and liberal construction has always been placed on s. 47 in

order that all questions which can possibly be determined in execution proceedings should be so determined. A Full Bench of the Calcutta High Court in the case of *Punchann Bundopadhyaya v. Rabia Babi* (1) has put the same construction upon s. 244 of the old Code (now s. 47 of the new Code). The Full Bench held that an objection taken by a person who has become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property, and not held by him as such representative, is a matter cognizable only under s. 244 of the Code of Civil Procedure, and not the proper subject matter of a separate suit.

The learned District Judge in allowing the appeal has not expressly declared that the claim is to be allowed only in respect of half of the property.

The appeal is accordingly dismissed with costs, but I note that in the decree it should be clearly stated that the attachment is to be released only from half of the property.

A. N. A.

Appeal dismissed.

(1) 17 C. 711; 8 Ind. Dec. (N. S.) 1016 (F. B.).

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 153

OF 1925.

May 14, 1926.

Present.—Sir Guy Rutledge, Kt.,
Chief Justice, and Mr. Justice Carr.

SOORATEE BARA BAZAR

Co., Ltd.—APPELLANTS

versus

MUNICIPAL CORPORATION OF

RANGOON—RESPONDENTS.

City of Rangoon Municipal Act (VI of 1922), s. 80
—*Assessment of bazaar property—Principles.*

In assessing the value of bazaar property under the City of Rangoon Municipal Act on the basis of what a hypothetical tenant would pay, it is proper to deduct from the gross rents, license-fees, directors' commission and lighting charges, the proportionate cost of establishment, interest on the capital required by the hypothetical tenant, his reasonable profit and occupiers' taxes amounting to 16½ per cent. of the rental but not the general tax, 7 per cent. payable by the landlord. [p. 858, cols. 1 & 2.]

Mr. Ormiston, for the Appellants.

Mr. N. M. Cowasjee, for the Respondents.

JUDGMENT.—This is an appeal from a judgment of the then Officiating Chief Judge of the Small Cause Court of Rangoon affirming the assessment made by the

Commissioner of the Corporation in respect of the Sooratee Bara Bazaar Blocks A, B, C, D and E.

The judgment appealed from affirms the order of the Commissioner for the reasons given by him; so we have to fall back upon that order to appreciate the several claims made by the appellants that the order is wrong.

On page 2 of his order the Commissioner sets out the principle on which he bases the assessment:—"The method of assessment adopted is to determine the amount of rent which would be paid by a 'hypothetical tenant', for the Sooratee Bara Bazaar Company's property. If we consider a 'hypothetical tenant' taking the bazaar on lease he would first of all, in making his offer for renting the property, calculate the total gross rent which he would receive. He would then make allowances for:—

(a) Stalls, which would become empty in the ordinary course of things and be vacant before being re-let, and also for bad debts and irrecoverable rents, such as constantly occur from time to time.

(b) He would then have to consider the necessary expenses which he would incur in the way of cleaning, protecting, etc., the bazaar, the cost of collecting rents and so on.

(c) He would then have to consider other necessary outgoings in the way of taxation.

(d) He would then have to consider how much actual profit he would expect to put into his own pockets to reward him for the trouble of managing the business and incurring the risk of loss, which is inseparable from all business transactions.

"The preceding paragraph is quoted *verbatim* from the judgment of the High Court in Civil Miscellaneous Appeal No. 44 of 1923. I assume, therefore, that this method of valuation for assessment purposes has the approval of the High Court. In practice the method comes to a calculation of the gross rents recoverable from this property and of the amount which must be deducted from the gross rents in order to arrive at the valuation of the property for assessment purposes. My task has been much simplified by the fact that the Bazaar Company has placed all its books and records at the disposal of the Assessor and the figures of gross rents, etc., have been agreed upon. The only thing, therefore, left for me is to consider the principles

involved and what deductions from the gross earnings should be allowed. I will first state those deductions which I am prepared to allow. These are:—

	Rs.
(1) License-fee paid to the Corporation	13,900 per annum
(2) Directors' commission	15,946 per annum
(3) Lighting	5,332 per annum."

In the argument of the case this part of the Commissioner's order was not attacked.

The first point on which the assessment is attacked is with regard to the allowance for the cost of establishment. The appellants claimed under this head a sum of Rs. 48,800. The Commissioner has found that the appellants are the largest individual owners of house property in Rangoon; that they paid about 1½ lakhs of rupees per annum Municipal taxes in respect of this house property as apart from the bazaar; that, of the appellants' staff, the Secretary, the Head Clerk, the Cashier, the Assistant Clerk, the Typist and two Accounts Clerks deal with the appellants' house property as well as the bazaar property, and that the Assessor's deduction of 25 per cent. from the gross cost of establishment on account of the house property was reasonable. He consequently allowed under the head of "Cost of Establishment" Rs. 45,350 instead of Rs. 48,800. Since admittedly the members of the staff mentioned by the Commissioner manage and deal with a very large estate of house property, some deduction from the cost of establishment is clearly indicated. The amount deducted has not been shown to be unreasonable; and, in any case, since a deduction ought to be made, the exact amount of that deduction is not a question of legal principle which this Court could go into in a second appeal.

The appellants claimed an allowance of Rs. 43,000, being interest at 10 per cent. on the paid up capital of the Company, viz., Rs. 4,30,000. The Commissioner held that this claim was inadmissible as, in making it, the Company confused its position as owner of the bazaar and the position of a 'hypothetical tenant'. We consider that he was correct in holding that an allowance was inadmissible on this basis. He goes on, however, to hold that the hypothetical tenant requires no capital. It is difficult to conceive of a person

offering to take a tenancy of a vast business like the Sooratee Bara Bazar without any capital whatever. We quite agree that cases of Railways, docks and gas companies, where a tenant has to incur large expenditure on necessary stock-in-trade, tools, machinery and plant, form no guide whatever in a case like the present. It is urged that the hypothetical tenant takes over the large building with raised concrete platforms, which are let out to daily tenants at a daily rent, that these sub tenants provide themselves with whatever furniture or apparatus may be necessary for the purposes of their trade; that the hypothetical tenant consequently does not require to expend anything in the way of fixtures, plant, or furniture, and that, as the rents come in daily, he will be able from the first day of his tenancy to meet any liabilities which he may incur. Even though the tenant may not have to incur any expenditure on furniture or stock-in-trade, we think that it is unreasonable to suppose that he could take on the tenancy of the Sooratee Bara Bazar without any capital. If a tenant had no capital, the landlord would obviously insist on his rent being payable in advance. A small sum, in our opinion, ought to have been allowed sufficient to cover one month's rent payable in advance, and any other expenditure, such as a deposit in respect of electric light, which the tenant might have to incur; and we think that there will have to be a remand to ascertain the amount under this head.

Intimately connected with the last point is the further objection which the appellants take, to the assessment, in that the Commissioner has taken the Directors' commission, viz., Rs. 15,946 as a sufficient allowance for the profit which would be sufficient to induce a hypothetical tenant to incur the responsibility of the tenancy of the bazaar. Admittedly a hypothetical tenant, not being a philanthropist, would require a substantial inducement to make him incur a heavy responsibility. It has been pointed out that the Directors' remuneration might be taken as an equivalent of the tenant's remuneration for his personal management, and that in the Commissioner's calculation nothing has been allowed to the hypothetical tenant for his management beyond the amount allowed for cost of establishment. We think that there will have to be a remand for a finding of what, in the condition prevailing in Rangoon, would

be a reasonable amount as tenant's profit to induce a hypothetical tenant to become tenant of the bazaar premises after taking into consideration reasonable remuneration for himself as manager.

The appellants claimed that an allowance of 10 per cent. should have been made on account of stalls which became empty and remained vacant for some time before being re-let, for bad debts, irrecoverable rents and such other contingencies. It is admitted that the Finance Committee, on the recommendation of the Commissioner, ordered that a deduction of 10 per cent. in regard to these contingencies shall be made on all property let in separate parts. The Commissioner has, in our opinion, quite rightly held that this order does not apply to the bazaar which is being valued on the principle of what rent would a hypothetical tenant be prepared to give for the bazaar as a going concern. The Commissioner had held that vacancies are very seldom to be found in the bazaar, and that the machinery for collecting rents works so well that the amount which has to be written off as "irrecoverable" is reduced to a minimum. It is objected on behalf of the appellants that exceptional good management should not be imputed to the hypothetical tenant, but only ordinarily reasonable management. There is no question of legal principle involved in this point. The Commissioner has made an allowance under this head; and nothing has been adduced before us to lead us to think that the amount allowed is unreasonably small.

Finally it is claimed that the deduction on account of Municipal taxation should be $23\frac{1}{2}$ per cent. instead of $16\frac{1}{2}$ per cent. and that the method of calculation is wrong and results in a deduction of only a little more than 14 per cent. instead of $16\frac{1}{2}$ per cent. Both of those questions were decided in *Suratee Bara Bazaar Co. v. Municipal Corporation of the City of Rangoon* (1) which was between the present parties. It is contended that those decisions were wrong.

We are of opinion that those decisions are correct, but think it desirable to attempt to make the reasons for them somewhat clearer.

The Commissioner's calculations up to this stage have determined the gross

(1) 84 Ind. Cas. 996; 3 Bur. L. J. 221; A. I. R. 1925 Rang. 115.

amount which a hypothetical tenant would be prepared to pay for the premises. In addition to the rent the tenant will be liable also for certain Municipal taxes. If we add taxes to the gross amount already calculated we shall *ex-hypothesi* arrive at a total greater than the tenant will pay. The rent must, therefore, be less than that gross amount by a sum equal to the amount of the Municipal taxes payable by the tenant. In this case the gross amount is Rs. 58,402. The taxes payable by the tenant amount to $16\frac{1}{2}$ per cent. of the rent. The problem before us, therefore, is—

What is the sum which with $16\frac{1}{2}$ per cent. of itself added will equal Rs. 58,402? In other words we have to solve the equation—

Rent plus $16\frac{1}{2}$ per cent. of rent	=	Rs. 58,402
That is rent plus $\frac{33}{200}$ of rent	=	" 58,402
Or $\frac{233}{200}$ of rent	=	" 58,402
Therefore rent	=	$58,402 \times 200 \div 233$
	=	" 50,130.

This result agrees with that obtained by the Commissioner using the formula given in the former case.

Verifying this by working backward we find that $16\frac{1}{2}$ per cent. of Rs. 50,130 is Rs. 8,271 and adding these two together we get Rs. 58,401. Fractions are, of course, neglected. On this it is clear that the method of calculation adopted is correct.

Coming now to the claim that the allowance should be $23\frac{1}{2}$ per cent. we find that this is made up of the $16\frac{1}{2}$ per cent. already dealt with and 7 per cent. which represents the general tax payable by the landlord. As this is not payable by the tenant there is no reason whatever why it should be taken into account in calculating the true rent from the gross amount that the hypothetical tenant would be able to pay.

In the result we remand the case with a direction that the Commissioner do proceed to determine the allowances which should be made on account of—

(i) interest on the capital required by a hypothetical tenant; and

(ii) reasonable profit of the hypothetical tenant.

The appeal thus succeeds only on two very minor points and fails on the more substantial questions. We direct, therefore, that the appellant do pay to the respondent ten gold *mohurs* as the costs of this appeal.

A. N. A.

Appeal allowed.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 185 of 1927

AND

CIVIL MISCELLANEOUS APPEALS

Nos. 112, 127, 128, 129 of 1927,

August 1, 1927.

Present:—Sir Guy Rutledge, Kt.,
Chief Justice, and Mr. Justice Carr.
M. E. MOOLLA AND M. E. MOOLLA
AND SONS, LTD.—APPELLANTS

versus

CHARTERED BANK OF INDIA,
AUSTRALIA AND CHINA—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 2, 46—Agreement before decree not to execute decree, validity of—Presidency Towns Insolvency Act (III of 1909), s. 12 (2)—Application by secured creditor—Estimate of security—Revision by Court—Prohibitory order addressed to Secretary—Acceptance by Managing Director—Validity of attachment—Application for adjudication—Withdrawal—Fraudulent preference—Prejudice to other creditors—Appointment of liquidator—Discretion of trial Court—Interference in appeal.

An agreement entered into by a party to a suit before the passing of the decree, that he will not take any steps to enforce the decree to be passed against the other party cannot be entertained by an executing Court. [p. 861, col. 2.]

Mulla Ramzan v. Maung Po Kaing (1), followed.

Where a secured creditor who applies for adjudication of his debtor as an insolvent gives an estimate of the value of his security, the Court will not enquire into its correctness if it is a genuine estimate. [p. 862, col. 1.]

A prohibitory order issued to a Company without a Secretary can be validly accepted by its Managing Director even though the order is wrongly addressed to the Secretary. [p. 862, col. 2.]

A Court should not allow a creditor who has applied to adjudicate his debtor as an insolvent, to withdraw his application where such withdrawal would result in a fraudulent preference of the petitioning creditor to the detriment of the other creditors. [p. 863, col. 1.]

The appointment of a liquidator is a matter purely in the discretion of the trial Court and the decision of the trial Court should not be interfered with except under very special circumstances. [p. 864, col. 2.]

Noble v. Bank of Burma (2), followed.

Messrs. N. M. Cowasji, Keith and Munshi, for the Appellants.

Messrs. Leach Clarke, for the Respondent.

Messrs. Dhar, Clifton and Campagnac, for the Creditors.

JUDGMENT.—These are a group of appeals from orders on the Original Side adjudicating Mr. Moolla an insolvent and winding-up M. E. Moolla and Sons, Ltd., a private Limited Company of which he is the Managing Director and in which he holds a vast majority of the shares. As the questions in each are intimately connected, we shall deal with them in the same judgment.

Mr. Moolla was possessed of a very large estate of immoveable property, and in about 1920 floated a Company called the Ally Moolla Industrial Corporation, to which he transferred *inter alia* 46 acres of land with a rice mill at Pazundaung, and in which he held a large number of shares both Preference and Ordinary.

Early in 1921 he promoted M. E. Moolla and Sons, Ltd., to which he transferred most of his immoveable property and in which he admittedly holds by far the greater number of shares.

The Ally Moolla Industrial Corporation by an order dated the 11th April, 1924, was compulsorily wound up and Mr. J. A. Robin, Chartered Accountant, appointed Official Liquidator. The winding-up has not yet been completed.

We shall now proceed to deal with the individual appeals.

First Civil Appeal No. 185 of 1927.—Respondent Bank advanced to the appellants a large sum of money and as security held a mortgage, dated the 19th January, 1923, over the premises known as No. 7, Merchant Street, Rangoon, and the western half of First Class Suburban Allotment No. 31, Rangoon. The Bank had a further security in that 9,900 Preference shares in the Ally Moolla Industrial Corporation were transferred to the names of the Agent and Sub-Agent of the Chartered Bank and the scrip lodged with the Bank. The Bank filed a mortgage suit being Civil Regular No. 360 of 1925 against the appellants and obtained a preliminary decree on the 24th August, 1925, for over Rs. 9,00,000. The Bank then applied for a personal decree against the appellants in respect of balance outstanding after the sale of the mortgage property. This was on 15th January, 1927. The appellants asked for time to file objections and time was given till 31st January, 1927. Objections were not filed by 31st January, 1927, but the appellants seem to have verbally pressed the objection that the Bank was not entitled to a personal decree until they had sold the 9,900 shares in the Ally Moolla Industrial Corporation. . . . Eventually, on the 3rd February, 1927, a personal decree for Rs. 3,22,862 9-4 with interest was passed with the consent of the defendants' attorney.

On the 24th February, 1927, the Bank filed an application for execution and on

the 9th March, 1927, a prohibitory order was passed attaching 15,348 Ordinary shares belonging to the 1st appellant in the 2nd appellant Company, which were in the custody of the Bank's Advocates, Messrs. Ormiston and Leach, in respect of another creditor of the appellants. Then, on 6th April, 1927, the Bank applied to adjudicate the 1st appellant an insolvent and not until 25th April, 1927, did the appellants make the application before us, which is one under O. XXI, r. 2, of the Code of Civil Procedure to record an alleged agreement between Mr. Ormiston, the Bank's Advocate, and Mr. Burjorjee, Advocate for the appellants. Mr. Burjorjee, in his affidavit in support, states that Mr. Ormiston promised that the Bank would never take any step to have M. E. Moolla adjudicated an insolvent, or to wind-up M. E. Moolla and Sons, Ltd., nor take any steps to enforce the personal decree unless for the purpose of obtaining the rateable share of the Bank of any assets realised by any Court belonging to either of the judgment debtors, and that on the strength of this promise the draft objections were not filed and that Keshavlal would attend before the Court and consent to the personal decree being passed.

[Their Lordships referred to the affidavits and continued:—]

We, therefore, agree with the learned Judge on the Original Side that the appellants have failed to prove any such agreement as that alleged and we are satisfied that the appellants' attorney, Keshavlal, was himself fully aware of what transpired on the 2nd February and was in no way induced to consent to the personal decree through thinking that Mr. Ormiston had made any such promise as Mr. Burjorjee alleges in his affidavit. The application was not, in our opinion, a *bona fide* one, but made with the object of gaining time. We have dealt with this matter on the facts because it was so dealt with by the learned Judge on the Original Side, and because the facts are of importance in relation to the other appeals on the question as to whether there was any *bona fide* dispute as to the fact of the debt being due to the Bank. But we are also of opinion that the application was not one that could be entertained under O. XXI r. 2, of the Civil Procedure Code or could be dealt with by the Executing Court under s. 47 of the Code,

The case set up is similar to that of *Mulla Ramzan v. Maung Po Kaing* (1) and we agree with the decision in that case and with the reasoning on which it is based.

The appeal must, therefore, be dismissed with costs, ten gold mohurs.

Civil Miscellaneous Appeal No. 112 of 1927.

—This is an appeal by Mr. Moolla against the order of 7th May, 1927, adjudicating him an insolvent, and a complaint is made that the learned Judge acted unreasonably in not granting time to the appellant and in not holding an enquiry to ascertain the value of the shares in the Ally Moolla Industrial Corporation, which the Bank held as security.

* * * *

An objection is urged that the Bank put a fictitious value, namely Re. 1, on the shares held by them as security. The law no doubt requires the decree-holder to value any security in his hands before applying to adjudicate. According to s. 12 (2) of the Presidency Towns Insolvency Act: "If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor." And Mr. Chamier (2nd Edition, page 30), states in his notes under this section: "Where, however, a creditor gives an estimate of his security, the Court will not enquire into its correctness if it is a genuine estimate." The Bank's Agent has, in fact, valued the shares at the nominal sum of Re. 1, stating that there is no market for the shares, and we are satisfied, for the reasons given, that the estimate was genuine. Mr. Rahman stated that the Official Assignee had lately sold 100 Ordinary shares for Re. 1 a share and 50 for Re. 1-1. In our opinion, these sales were not a genuine proof of the market value and were probably merely made in view of the present proceedings. The Court was entitled to accept the statement of the Bank's Agent without requiring any further proof and the accu-

racy of this valuation, as we have already seen in the previous case, is borne out by the Official Liquidator's evidence that the shares are worth nothing. He is corroborated in this by the affidavit of a partner in Messrs. Mahony & Co., a firm of Stock and Share Brokers of standing.

The main question argued in this case, however, was that there was no valid attachment on either Mr. Moolla or the Company. Service of notice was accepted by Mr. S. M. Rahman Chowdhury, referred to in the argument as "Rahman." The power-of-attorney is dated the 12th July, 1921, and is in favour of three persons, Keshavlal, Rahman and one Cassim Nacooda. It is not a full power, but, from a careful perusal, the intention was obviously to make it as full as possible with regard to suits, legal proceeding or any case of whatsoever nature in any Court or public office or tribunal "and generally to do all acts and things for the said Muhammad Ebrahim Moolla in relation to the premises aforesaid as the said M. E. Moolla could do if personally present." It was urged that although this power gave the three persons named power to take any action with regard to the institution, prosecution or defence of a suit, it did not empower them to accept notice for Mr. Moolla in an execution matter. In view of the words quoted, and the whole tenor of the instrument, we consider that this argument is unsound and we are of opinion that Mr. Rahman had full power to accept notice for Mr. Moolla. The question of his power to accept on behalf of the Company requires some further consideration. The attachment of the shares was by way of prohibitory order. According to O. XXI, r. 46, (1) "In the case of a share in the capital of a Corporation the attachment shall be made by written order prohibiting the person in whose name the share may be standing from transferring the same or receiving any dividend thereon (2) A copy of such order shall be affixed on some conspicuous part of the Court-house, and another copy shall be sent to the proper officer of the Corporation"

We may mention that Mr. Moolla as Managing Director gave the three persons above-named an almost identical power on behalf of Moolla and Sons, Ltd. The order was sent to the offices of the Company and was received by Mr. Rahman, the attorney

(1) 96 Ind. Cas. 773; 4 Rang. 118; 5 Bur. L. J. 41; A. I. R. 1928 Rang. 140.

of the appellant, who was Managing Director of the Company. A point is made that it was addressed to the Secretary of the Company. The Company, being a private one, had no Secretary. Obviously, in such circumstances, the Managing Director was the proper officer of the Company within the Rule, and, considering the powers entrusted to Mr. Rahman by his power-of-attorney, he was duly empowered to receive the notice on behalf of Mr. Moolla. If the notice had been sent by registered post to the offices of Company, the Rule would have been sufficiently complied with. We, therefore, agree with the learned trial Judge in holding that there had been an effective and valid attachment of the shares for twenty-one days and that the appellant had consequently committed an act of insolvency.

A further point has been urged that at the hearing on the Original Side, an offer was made to pay down Rs. 2,00,000 of the debt and give security with regard to the balance if the petition was withdrawn and the respondent Bank was willing to accept this offer if the Court approved. The offer has been renewed before us in a still more complete form, namely, to pay the whole amount, and the position taken up by the Bank is the same. The learned Judge declined to allow the petition to be withdrawn on these terms and his reasons, from his reference to another case, seem to be that to permit such a thing when there were other creditors might in fact result in the Court allowing a fraudulent preference in favour of one creditor to the serious detriment of other creditors. There is obviously great force in this argument. If there were no creditors other than the Bank we would have had no hesitation in adjourning the matter to give the appellant an opportunity of fulfilling his promise and then allowing the Bank to withdraw its petition. We are in the dark as to the extent of the appellant's indebtedness, for unfortunately, he has not chosen to file his schedule, but from the proceedings before us in this and the next appeal, we know that he has several other creditors for large amounts (whose consent had not been obtained).

We are consequently unable to accede now, as to do so would *prima facie* be to allow one creditor to be paid in full and so jeopardise the rights of the other creditors.

For these reasons the appeal must be dismissed with costs ten old mohurs.

Civil Miscellaneous Appeal No. 127 of 1927.—In disposing of this appeal, we shall at the same time dispose of Civil Miscellaneous Appeals Nos. 128 and 129 of 1927, as they are on behalf of creditors who oppose the winding-up of the Company.

In this case the respondent Bank has entered a petition for the winding-up of the appellant Company. The learned Judge on the Original Side ordered the Company to be wound-up and appointed Mr. Hormasji, the Administrator-General and Official Assignee, as Official Liquidator of the Company. Hence this appeal.

The petition of the Bank was that they had obtained a personal decree against the Company on 3rd February, 1927, in Civil Regular No. 160 of 1925 for Rs. 3,22,862-4-9 and interest thereon at 6 per cent. per annum from 3rd January 1927, to date of payment or realisation; that by a demand dated 3rd March, 1927, the petitioner required the Company to pay the said sum, that the demand was served on the Company at its registered office on 4th March, 1927, and that the sum had not been paid. Section 163 of the Indian Companies Act (1913), states:—

"A Company shall be deemed to be unable to pay its debts—(1) if a creditor, by assignment or otherwise, to whom the Company is indebted in a sum exceeding Rs. 500 then due, has served on the Company, by leaving the same at its registered office, a demand under his hand requiring the Company to pay the sum so due and the Company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor."

And s. 162 states:—

"A Company may be wound-up by the Court . . . (v) if the Company is unable to pay its debts."

It was urged that the learned Judge should have adjourned the matter under s. 170 (1) as there was an appeal pending in the matter of the adjustment of the personal decree, that is the matter which we have disposed of in the first of this series of appeals. The learned Judge had already decided this matter and held that there was no substance in it and in our judgment above we have upheld his decision. As there was no stay, he was under no obligation to question his own decision and

adjourn the matter. It is then further urged that he disregarded the wishes of the majority of the creditors and did not carry out the spirit of s. 174 of the Companies Act, which states that the Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributors as proved to it by any sufficient evidence; and it is urged that he should have given time to the various creditors to put forward their objections to the winding-up, and to show that the Company was solvent, a number of affidavits have been filed (most of them dated 18th June 1927) all stating the amount of the appellants' indebtedness to them and most of them asking for time to formulate their objections. As the application was recorded to be advertised on 9th April, 1927, it would seem that they had ample time to instruct their Advocates as to what their objections were and from the proceedings it seems clear that their Advocates did state those objections.

* * * * *

There is a great preponderance of creditors in favour of the winding-up. We may here say that, for the reasons already given, we are of opinion that there was no *bona fide* dispute as to the amount of appellant's debt. Various English cases have been cited to show that where there was an offer of payment of a debt, the Court granted time, but we do not think that these cases are of much assistance in deciding a case like the present, though, no doubt, they might be of great assistance were this a public commercial Company. But here we have a case of a man with large estates, who has transferred these estates to a private Limited Company in which he holds, according to the learned trial Judge, admittedly 90 per cent. of the shares, over which as Managing Director up till the winding-up order he had complete control. He admittedly has great liabilities, as has the Company, and he has been adjudicated an insolvent. We take judicial notice of the fact, which has not been mentioned in argument, that there is a decree of this Court against him for about Rs. 17,00,000. It is on appeal to His Majesty in Council and if not reversed will go to swell appreciably his liabilities. Taking all the circumstances of the case into consideration, we are of opinion that reading s. 163 (i) with s. 162 (v), the learned Judge was right in ordering the Company to be

wound-up and in consideration of the peculiar facts of this case and of Mr. Moolla's great liabilities and his predominant holding of shares in the Company, whose assets consist of Mr. Moolla's estates transferred to the Company, it is also under s. 162 (vi) just and equitable that the Company should be wound-up.

Messrs. Keith and Campagnac complain of the appointment of the Administrator-General and Official Assignee as liquidator and suggest that there may be a conflict of interest between Mr. Moolla's creditors and the creditors of the Company and that the learned Judge ignored the wishes of the creditors, as the respondent Bank suggested as liquidator a gentleman with intimate knowledge of the real property market, in Rangoon. On this point, Mr. Leach on behalf of the Bank, states that though he did suggest this gentleman as liquidator to the trial Court, he is satisfied with the appointment made and leaves the matter entirely to the Court. Mr. Dhar, on the other hand, for his clients and on behalf of Mr. Clifton, strongly supports the appointment of the Official Assignee and asks that the discretion of the learned trial Judge should not be interfered with, and relies on a decision of a Bench of the late Chief Court in *Noble v. Bank of Burma* [(2)] where Sir Charles Fox held that the appointment of a liquidator was a matter purely in the discretion of the trial Court and that that decision should not be interfered with, except under very special circumstances.

We are in full agreement with the trial Judge that in the peculiar circumstances of the case, Mr. Hormasji is the most suitable person to be Official Liquidator of the Company. As Official Assignee, he is the representative of Mr. Moolla and consequently the great bulk of the shares in the Company are vested in him. He is an officer of great experience and with the highest reputation for integrity and we think that his appointment will eliminate opportunities of obstructing the proper and efficient liquidation of the Company's affairs. At any rate, we are satisfied that it will afford the several creditors an opportunity of having their debts discharged.

For these reasons, we confirm the order appealed against. The appeals are accordingly dismissed.

A. N. A.

Appeals dismissed.
(2) 17 Ind. Cas. 853; 5 Bur. L. T. 193,

ODUH CHIEF COURT.

SECOND RENT APPEAL No. 33 OF 1927.

December 3, 1927.

Present.—Mr. Justice Misra.

Pandit LAKSHMI DHAR—PLAINTIFF

—APPELLANT

versus

DHOKHE LAL AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Co-sharer—Suit for profits—Calculation of rent of khudkasht land, basis of.

In a suit by a co-sharer for profits, the rent of *khudkasht* land in the possession of the defendants should not be calculated on the basis of actual collections or the circle rate but should be calculated on the basis of the boundary rate of lands of the village in which the land in dispute is situate.

Appeal against a decree of the District Judge, Sitapur, dated the 23rd May, 1927, modifying that of the Honorary Assistant Collector, First Class, Kheri, dated the 2nd August, 1926.

Mr. Moti Lal Saksena, for the Appellant.

Mr. Puttu Lal, for the Respondents.

JUDGMENT.—This is an appeal arising out of a suit for profits in respect of the *Patti* Dhokhe Lal, situate in village Birampur, Pargana Aurangabad, District Kheri. The said *patti* consists of 2 *biswas*, of which one-third is owned by Lakshmi Dhar, plaintiff-appellant; one-third by Dhokhe Lal, defendant-respondent No. 1; and one-third by Jagannath Prasad, defendant-respondent No. 2. The share of each of them, therefore, amounts to 13½ *biswas*.

The first Court decreed the plaintiff's claim for Rs. 119-12-6 against defendant No. 1 and for Rs. 1-14-4 against defendant No. 2. The calculation which was accepted by the trial Court was the calculation of the rent of the *khudkasht* land made on the basis of the circle rate. It considered it to be a fair and equitable rate for ascertaining the rent of the *khudkasht* land in the possession of the defendants. The figure had been arrived at after making a deduction of 30 per cent. from the actual rent, calculated according to circle rate.

On appeal by the plaintiff, the learned District Judge of Sitapur increased the amount decreed by the first Court to Rs. 157 by disallowing the deduction of 30 per cent. which amounted to Rs. 36.

The plaintiff-appellant has now come up to this Court in second appeal and the main contention urged on his behalf on the date of the hearing of the case be-

fore me was to the effect that the Courts below had erred in calculating the profits according to the circle rate. The argument was that either the plaintiff-appellant ought to have been given a decree for profits on the basis of the actual collections, according to which he would be entitled to Rs. 282-7-6 as shown in the statement prepared by the *Patwari* in the trial Court (Ex. 1), or in any case, according to the gross rental as calculated for the entire village Baikunwan as mentioned in Ex. 3. In my opinion the plaintiff-appellant should not be allowed profits according to any of these calculations; nor should he be allowed according to the circle rate; but he should be allowed according to the boundary rate of the lands of the hamlet of Birampur in which the land in dispute is situate. In order to find out these calculations I directed the plaintiff-appellant to summon the *Patwari* for this date.

The *Patwari* has appeared in Court and I have recorded his statement. He has also prepared a statement from which it appears that the average rate of rent of the lands which constitute the boundary of the lands in suit works out at Rs. 6 per acre; and according to that calculation the profits to which the plaintiff-appellant would be entitled for the years in suit, would be Rs. 189-10-8.

I, therefore, modify the decrees passed by the Courts below and in lieu thereof grant a decree for Rs. 189-10-8. Out of this amount a decree for Rs. 186-8-8 is passed against defendant-respondent No. 1, Dhokhe Lal, and a decree for Rs. 3-2 against defendant-respondent No. 2, Jagannath Prasad. The plaintiff will get his costs in the first Court on the amount which has now been decreed to him. In the lower Appellate Court and in this Court the parties will receive and pay costs in proportion to their success and failure in this appeal.

A. N. A.

Appeal allowed in part.

• OUDH CHIEF COURT.
SECOND CIVIL APPEAL No. 195 OF 1927.
January 3, 1928.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

RAM NARAIN—DEFENDANT—APPELLANT
versus

MANNULAL AND OTHERS—PLAINTIFFS AND
SARJU AND OTHERS—DEFENDANTS—
RESPONDENTS.

Adverse possession—Enjoyment of property by one co-sharer to exclusion of another—Assertion of exclusive title to property—Ouster—Adverse possession.

Where a co-sharer in a *patti* has been in participation of the rents and profits for a long time to the exclusion of the others and has successfully asserted his right to the sole enjoyment of the property for more than 12 years, adverse possession may be held to have been clearly established, even if the property in question is a share in a defined *patti*.

Corea v. Appuhamy (1) and *Varada Pillai v. Jeevarathnammal* (2), referred to.

Second appeal against the judgment passed by the Subordinate Judge, Hardoi, in Civil Appeal No. 78-180 of 1926, dated the 10th March, 1927, confirming that of the Munsif, Bilgram, in Suit No. 100 of 1926, dated the 7th September, 1926.

Mr. S. N. Roy, for the Appellant.

Mr. S. C. Das, for the Respondents.

JUDGMENT.—The only question to be determined in this second appeal is whether the decision of the Courts below to the effect that the plaintiffs-respondents have obtained title to the property in suit by adverse possession is a good decision in law. The decisions of fact which cannot be questioned in second appeal are as follows: The appellant's predecessor-in-interest undoubtedly obtained title to the property under a sale-deed, but subsequent to his having done so the plaintiff side have paid the land revenue on the property and made collections and enjoyed the *sir* and *khudkasht* and the appellant has not obtained any benefit of any kind from the property either by receipt of meane profits or in other manner. The case submitted by the learned Counsel for the appellant is that, inasmuch as the property in question is a share of about one-fifth in a defined *patti*, and inasmuch as the appellant is a co-sharer in that *patti*, it is impossible for the plaintiffs to assert adverse possession against him in view of the decision of the House of Lords in *Corea v. Appuhamy* (1).

(1) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 336.

But the principle laid down by their Lordships in that decision does not assist him. In that case the person asserting adverse possession had a lawful title, and their Lordships approved of a previous decision to the effect that possession is never considered adverse if it can be referred to a lawful title. In that case also adverse possession was pleaded by one co-owner as against another co-owner, the co-owners in question being members of the same family. Apart from the fact that in a subsequent decision of their Lordships of the Judicial Committee in *Varada Pillai v. Jeevarathnammal* (2) their Lordships refused to discuss whether the rule was applicable to sharers in an unpartitioned agricultural village in India holding their shares as members of a joint family, it was clearly laid down in *Corea v. Appuhamy* (1) that where an ouster or something equivalent to an ouster had been proved and the period of possession after an ouster had exceeded the statutory period provided by the law, the person ousted would have no redress. Here, in our opinion, there is a clear ouster. The case before us is in effect an ejectment. There has been an ouster. The appellant has not been in participation of the rents and profits for a considerable length of time and the plaintiffs have successfully asserted their right to the sole enjoyment of the property. In these circumstances the decision of the Courts below is correct. We dismiss this appeal with costs.

G. H.

Appeal dismissed.

(2) 53 Ind. Cas. 901; 46 I. A. 285; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 846; 38 M. L. J. 313; 18 A. L. J. 274; 43 M. 244; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.).

• OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 58 OF 1927.
December 13, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.
JAGMOHAN SINGH AND ANOTHER

—PLAINTIFFS—APPELLANTS
versus

Pandit SRI NATH AND OTHERS
—DEFENDANTS—RESPONDENTS.

Hindu Law—Gift by husband to wife—Stridhan—Widow's power to transfer—Viramitrodaya, authority of—Transfer as special gift to be enjoyed from generation to generation—Construction—Full proprietary rights, whether conveyed.

When a husband who is governed by the Mitaka

shara Law makes a gift in favour of his wife, the property transferred by gift becomes her *stridhan*, and if it is considered as self-acquired property she has ordinarily the power to transfer it and further such *stridhan* descends to her heirs and not to her husband's heirs. [p. 868, col. 2]

There are, however, peculiar restrictions, according to legal authority on the Mitakshara Law, to the widow's right to transfer landed property if the gift has been made in a particular fashion. [*ibid.*]

Where a husband transferred property to his wife as a special gift describing it as the property in his exclusive proprietary right and stating that he transferred all the rights held by him to her, that she was to hold it generation after generation, that neither himself nor his own heirs were ever to make a claim against her and that no one except her was to have any connection with the property:

Held, that the gift must be construed as a transfer of full proprietary rights with full rights of transfer. [p. 871, col. 1.]

Giridhari Lal Roy v. Bengal Government (1), *Collector of Madura v. Mutu Ramalinga Sathupathy* (2), *Surajmani v. Rabi Nath Ojha* (3) and *Fateh Chand v. Rup Chand* (4), referred to.

The Viramitrodaya is receivable as an exposition of what may have been left doubtful by the Mitakshara and declaratory of the law of the Benares School. [p. 869, col. 1.]

First appeal against a decree of the Subordinate Judge, Fyzabad, dated the 29th January, 1927

Mr. Niamat Ullah, Dr. J. N. Misra and Mr. Balbhaddar Sahai, for the Appellants.

Messrs. A. P. Sen and Ali Zaheer, for the Respondents.

JUDGMENT.—Subedar Gainsd Singh obtained in 1859 a grant, which, it is agreed, consisted of ten and a half villages in the Fyzabad District as a reward for his loyal services in the disturbance of 1857. This grant received the name of Bhati Risalpur, and the name of Subedar Gainsd Singh is entered as the ninety-second name in List VI prepared under the provisions of Act I of 1869 as the name of the grantee of the Bhati Risalpur estate. As his name was entered in List VI the succession to his property, in event of his dying intestate, was regulated by the ordinary Hindu Law under the provisions of s. 23 of Act I of 1869. Subedar Gainsd Singh did die intestate, but it is an admitted fact that at the time of his death he was not in possession of any portion of the Bhati Risalpur estate, as he had parted with the whole of it during his lifetime. He died in October, 1880. We find that in 1876 he had disposed of the major part of the estate to outsiders, and had retained only a portion of the village of Mareman in which he resided, the whole of the village of Bhati, and the whole of the village of Fatehpur, and half of the

village of Nau Sanda. His family then consisted of his wife Agand Kuar, his daughter Phuljhari who was a married woman, and his daughter Sughar Kuar who was married to Sheoambar Singh. He had no sons. On the 25th November, 1876, Gainsd Singh executed a registered deed in favour of his daughter Phuljhari, by which he transferred to her by gift with immediate possession the whole of his interests in Mareman, with the exception of certain *sir* and *khudkasht* land, the whole of one *patti* and the half of the other *patti*, which he retained in his possession for life. The deed gave Phuljhari title to this property also upon the death of her father. The deed in question transfers full proprietary rights. There can be no doubt as to that fact for in addition to words, which, in our opinion, convey an absolute proprietary right, the words are added that Phuljhari is to have the power of mortgage, sale, etc. This deed was executed on the 25th November, 1876, as a deed of gift, and on the 2nd December, 1876, he executed another deed by which he transferred by gift to Sheoambar Singh, his son-in-law, Sughar Kuar's husband, for the specific purposes of the maintenance and support of his family and children the whole of the village Bhati. The donee was to obtain immediate possession. He was to have no power of alienation during Gainsd Singh's lifetime, but was given full powers of alienation after the death of Gainsd Singh. This was the second deed. On the 7th of May, 1877, Gainsd Singh executed a third deed by which he disposed of the whole of the remainder of the property then in his ownership. This is the deed with the construction of the terms of which we are concerned in the present appeal. It is not questioned on either side that the two prior deeds gave full proprietary title to the persons in whose favour they were executed. There is considerable dispute as to the meaning of the third deed. Under the third deed Gainsd Singh transferred to his wife Agand Kuar the whole of the village of Fatehpur and half of the village of Nau Sanda, that is to say, the whole of the property which still remained undisposed of. We shall deal with the construction to be placed on the terms of the deed later. Here it is only necessary to say that possession over the property was clearly transferred to Musammam Agand Kuar from the date of the execution of the deed.

Subedar Gains Singh died in October, 1880. *Musammam* Agand Kuar transferred by sale the village of Fatehpur to Ohhedi Ram Misir on the 8th of September, 1881, by a registered deed of sale in consideration of Rs. 6,000. *Musammam* Agand Kuar died in 1886. Directly after her death a certain Badri Prasad, who alleged that he was the purchaser of the rights of a certain Bahadur Singh in the said village and that Bahadur Singh was the reversioner to Gains Singh, instituted a suit against Sri Nath and Sripat the sons of Ohhedi Ram for possession of the village of Fatehpur. This suit was instituted in the Court of the Subordinate Judge, Fyzabad. It sought to set aside the deed of sale in favour of Ohhedi Ram Misir on the ground that Agand Kuar had no right to execute it. That suit was dismissed. An appeal was filed in the Court of the District Judge of Fyzabad. That appeal was dismissed. A further appeal was taken to the Court of the Judicial Commissioner. That appeal was also dismissed. In 1904 another suit was filed by Jagmohan Singh, the present plaintiff-appellant, and his younger brother Jag Prasad Singh, now deceased, against Sri Nath, the son of Ohhedi Ram Misir in respect of the same property. This suit was filed in the Court of the Subordinate Judge of Fyzabad. Jagmohan Singh and Jag Prasad Singh were the sons of Sheoambar Singh. Their case was that, as *Musammam* Phuljhari had no children and had passed the age when she was likely to have children, and as they were sons of Sughar Kuar, the daughter of Agand Kuar, they were entitled to the possession of Fatehpur on the ground that Agand Kuar had no right to transfer the property except for her lifetime. They claimed in the alternative a declaration that they would be entitled to possession on the deaths of Phuljhari and their own mother. The learned Subordinate Judge of Fyzabad dismissed their claim for possession, but gave them a declaration that they were entitled to the possession of the village of Fatehpur on the deaths of Phuljhari and Sughar Kuar. Sri Nath appealed against this decree to the Court of the Judicial Commissioner. A Bench of that Court decided on the 4th March, 1907, that no relief could be granted to the plaintiffs, as their suit was premature. They decided nothing upon the merits. Previous to the decision of this appeal *Musammam* Phuljhari had died. She died in 1906. Sughar Kuar died in 1921. In 1925 Jagmohan Singh

joining Jang Bahadur Singh, the son of Jag Prasad Singh—Jag Prasad Singh had died—instituted the suit out of which the present appeal arises against Sri Nath and other descendants of Ohhedi Ram Misir. They asked for possession of Fatehpur setting up the following case. Their case was that the transfer of 1877 made by Gains Singh to Agand Kuar had given her the village of Fatehpur as *stridhan*, without power to alienate beyond her own life, that on the death of Agand Kuar a daughter's estate had come into existence in favour of Phuljhari and Sughar Kuar, that on Phuljhari's death Sughar Kuar had obtained this estate by survivorship, and that on Sughar Kuar's death in 1921 the estate devolved on them as daughter's sons. The learned Subordinate Judge has dismissed this suit holding that under the deed of gift of 1877 (Ex. 9) a complete proprietary estate had passed to *Musammam* Agand Kuar. He gave further reasons for this view. He dismissed the suit on this preliminary point without going into other matters. The plaintiffs appeal against this decision.

The first question which we have to decide is in respect of the limitations attaching to certain transfers made by gift by a husband in favour of his wife when the husband is governed by the Mitakshara Law. When a husband who is governed by the Mitakshara Law makes a gift in favour of his wife the property transferred by gift becomes her *stridhan*, and we have no doubt as to the fact that if the *stridhan* is considered to be her self-acquired property she would ordinarily have the power to transfer it. Further such *stridhan* would descend by intestate succession to her heirs and not to her husband's heirs. But, as the learned Counsel for the appellants has rightly pointed out, there are peculiar restrictions, according to legal authority on the Mitakshara Law, to the widow's right to transfer landed property if the gift has been made in a particular fashion. We go direct to the authority in question. It is the authority of the Viramirodaya. As to the weight to be attached to this authority it is only necessary to say that in *Giridhari Lal Roy v. Bengal Government* (1) at page 466*

(1) 12 M. I. A. 448; 1 B. L. R. P. C. 44; 3 Mad. Jur. 386; 2 Suth. P. O. J. 159; 10 W. R. P. C. 31; 2 Sar. P. O. J. 382; 20 E. R. 408; 1 Ind. Dec. (N. S.) 28.
*Page of 12 M. I. A.—[Ed.]

their Lordships of the Judicial Committee said:

"Adhering to the principles which this Board lately laid down in the case of *Collector of Madura v. Mutu Ramalinga Sathupathy* (2) their Lordships have no doubt that the *Viramitrodaya*, which by Mr. Colebrooke and others is stated to be a Treatise of high authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the *Mitakshara*, and declaratory of the law of the Benares School."

The *Mitakshara* does not contain the qualification which we find in the *Viramitrodaya* but under this rule it is clear that we must consider the *Viramitrodaya* authoritative upon the point. In Chap. V of the *Viramitrodaya*, para. 5, page 441, of Setlur's Complete Collection of Hindu Law Books on Inheritance of 1911, the author says:—

"In the disposal of woman's property, however, females have not independence without the permission of their husband. This is declared by Manu thus:—

"Women shall not make any disbursement out of family property which is common to many, or even out of their own property without the permission of their husband." Disbursement (*nirhara*) means, expenditure, (Manu IX 199).

"But in the disposal of some kinds of woman's property females have independence; this *Katyayana* having described a kind of gift, declares thus:—'The independence of women who have received a kind gift, is admitted (in respect of it) for it was given by them out of kindness, for their maintenance. With respect to a kind gift, the independence, at all times, of women is proclaimed in making sale or gift according to pleasure, even when it consists of immoveable property' (II Cole. Dig. 594, CCCCCXXV).

"But as regards property given by the husband they have independence in dealing only with property other than immoveables. This is declared by Narada, thus:—'What has been given by an affectionate husband to his wife, she may, even when he is dead, consume it or give it away as she pleases, excepting immoveable property' (Narada, 128). The meaning is, that the

wife can only enjoy the immoveable property given by the husband by dwelling on it, etc., but cannot make a gift, sale or the like. Some are of opinion that the text of *Katyayana* also, viz.—'Let the sonless wife, preserving unsullied the bed of her husband, etc.'—refers only to immoveable property given by the husband, since (if interpreted in this way) it embodies the same precept as the text of Narada. But what it refers to, has been discussed by us while explaining the text,—'The wife and the daughters also, etc.'"

Sir Gooroodass Banerjee in his *Hindu Law of Marriage and Stridhan* (Tagore Law Lectures for 1878) has, at page 370 of the 5th Edition, given the name of the property so gifted by the husband. The name is *Saudayika*. He translates the word '*Saudayika*' as a gift from affectionate kindred. This translation appears to us the correct one. But our decision as to the Hindu Law on the subject does not conclude the matter. For the decision of this case we have to determine on the construction of Ex. 9 itself, whether Gaiind Singh transferred the village of Fatehpur to his wife as *Saudayika*, or as a full proprietary estate. We can undoubtedly accept as a conclusion that Gaiind Singh was an affectionate husband, but it does not follow that because he was an affectionate husband it must be determined that Fatehpur came to *Musammatt Agand Kuar* as *Saudayika*, and that she had no power to transfer it. If it were taken that all gifts or bequests from a husband were *Saudayika* it would not be possible in any circumstances for a widow to have the power of transfer over immoveable property so received from her husband. There is an abundance of authority to show that in certain circumstances a widow has the power to transfer immoveable property so acquired. We need only refer in this connection to decisions of their Lordships of the Judicial Committee. In *Surajmani v. Rabi Nath Ojha* (3) their Lordships found that wives had obtained a full proprietary estate in property transferred to them by gift by their husband. In *Fateh Chand v. Rup*

(2) 12 M. I. A. 397 at p. 438; 1 B. L. R. P. C. 1; 10 W. R. P. C. 17; 3 Mad. Jur. 298; 2 Suth. P. C. J. 135; Sar. P. C. J. 361; 20 E. R. 389; 1 Ind. Dec. (N. s.) 1.

(3) 35 I. A. 17; 12 C. W. N. 231; 5 A. L. J. 67; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 30 A. 84 (P. C.).

Chand (4) their Lordships found that a widow had obtained a full proprietary estate in property devised to her by her husband. In *Bhaidas Shivdas v. Bai Gulab* (5) their Lordships arrived at a similar decision. In *Sasiman Chowdhurain v. Shib Narayan Chowdhury* (6) they arrived again at the same conclusion. Thus it appears clear that in order to ascertain whether *Musammam Agand Kuar* had or had not the right to transfer Fatehpur to Ohhedi Ram Misir we must look at Ex. 9 and place a construction upon it. If on the face of it Ex. 9 shows that a full proprietary estate was conferred on Agand Kuar there is an end of the matter. If it does not show that a full estate was conferred upon Agand Kuar, the gift must be considered as *Saudayika*, and it must be held that she had no power of transfer beyond her lifetime. We must in the first place remember the circumstances in which this deed was executed. Before 1876 Subedar Gaiind Singh had transferred some two-thirds of his whole estate to outsiders. In 1876 he transferred all that he had left in Mareman to one daughter and he transferred the whole of Bhiti to his other daughter's husband. He gives both the transferees full proprietary rights. All that he had then left out of the original estate was his interest in Fatehpur and half Nau Sanda, and these he proceeds in 1877, three years before his death, to transfer to his wife. He commences with a somewhat remarkable statement that he is afraid that the estate may be destroyed after his death, as he has no male issue. As by this time he had already disposed of more than five-sixths of it, it seems that this phrase was the work of the writer, and that it meant nothing in particular. He had described himself as the full proprietor of this property and he then proceeds to transfer the *zemindari* with all rights

appurtenant to his wife as by special gift (*hiba khas*). He transfers the estate to her and her heirs *naslan bad naslan* (generation by generation). He transfers his rights to her and he lays down that after the execution of the deed neither he nor any one of his own heirs and co-sharers is to bring any sort of claim against the lady. His heirs were distant collaterals. The operative part of the deed concludes with the words that with the exception of *Musammam Agand Kuar* no one else is to have the power to interfere or intervene in respect of the property transferred. This can only mean that *Musammam Agand Kuar* is the only person who has the authority to interfere or intervene in respect of the property. She is to have '*ikhtiyar dastandazi wa madakhlat*.' It is true that although in the prior deeds an express power of alienation is given to the donees, no express power of alienation is given to the donee here. The form of a deed, however, depends to a certain extent upon the draftsman. We do not know who drafted the deed in favour of Phuljhari, but the deed in favour of Sheoamber Singh was drafted by a man called Sita Ram, while the deed Ex. 9 was drafted by a man called Bans Gopal. One question which arises for our consideration in considering the intention of Gaiind Singh is what would have happened if he had not executed Ex. 9 in favour of his wife. If he had died intestate without executing this deed, Fatehpur and half of Nau Sanda, which she obtained under this deed, would have been obtained by her as a Hindu widow under the Mitakshara Law. In respect of her position she would have been in exactly the same position if the view of the appellants be accepted, whether this deed had or had not been executed. In respect of the inheritance to the estate, taking the view which we do, had Ex. 9 not been executed, the inheritance would have passed to her daughters and her daughters' sons. It is true that it is suggested by the learned Counsel for the appellants that there was a custom excluding daughters and daughters' sons from inheritance, but there is nothing upon the record to support the existence of any such custom, and in absence of such custom under the Mitakshara Law the daughters and daughters' sons would have succeeded. Thus if the view of the learned Counsel for the appel-

(4) 37 Ind. Cas. 122; 43 I. A. 183; 38 A. 446; 18 Bom. L. R. 900; 20 M. L. T. 481; 21 O. W. N. 102; 4 L. W. 597; (1916) 2 M. W. N. 567; 26 C. L. J. 182 (P. C.).

(5) 65 Ind. Cas. 974; 49 I. A. 1; 26 C. W. N. 129; 15 L. W. 412; 20 A. L. J. 289; 42 M. L. J. 385; 35 C. L. J. 314; 24 Bom. L. R. 551; 46 B. 153; A. I. R. 1922 P. C. 193 (P. C.).

(6) 66 Ind. Cas. 193; 49 I. A. 25; 15 L. W. 434; 26 C. W. N. 425; 42 M. L. J. 492; 30 M. L. T. 242; 20 A. L. J. 362; 35 C. L. J. 427; 24 Bom. L. R. 576; (1922) M. W. N. 368; A. I. R. 1922 P. C. 63; 1 Pat. 305; 3 P. L. T. 133 (P. C.).

lants be accepted, Gaiind Singh by executing Ex. 9 left the situation exactly as it was if he had not executed that deed. We think it is a reasonable presumption that he executed the deed for some specific purpose. The learned Counsel for the appellants argues that it is most unnatural that he should wish to exclude his own daughters and their children from inheritance and that it is only natural to suppose that he would have wished to keep the property intact. He can hardly be said to have excluded his daughters from inheritance in view of the fact that he had given valuable property absolutely to one daughter, and valuable property absolutely to the other daughter's husband and thereby had considerably diminished the interest which his widow would otherwise have obtained in the estate. As to keeping the property intact, in spite of the assertion that he wished to do this, the facts show that he had reduced his estate to practically nothing. Having made permanent provision for both his daughters there was nothing surprising in a wish to make an absolute provision for his wife with a full right of transfer; and when we find in these circumstances that he transfers this property to her as a special gift describing it as the property in his exclusive proprietary right, and says that he transfers all the rights held by him to her, that she is to hold it generation after generation, that neither himself nor his own heir is ever to make a claim against her, and that no one except her is to have any connection with the property, we consider that the only construction to be placed upon the deed is that it transferred full proprietary rights. We should not have been of opinion that if the deed had not transferred full proprietary rights the provisions of Act I of 1869 would have operated to transfer the property with full proprietary rights. But upon our construction of the deed we are in agreement with the decision of the learned Subordinate Judge and dismiss this appeal with costs.

G. H.

*Appeal dismissed.***ODUH CHIEF COURT.**

SECOND CIVIL APPEAL No. 164 of 1927.

December 7, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Pullan.

MAHABIR BUX SINGH—PLAINTIFF

No. 1.—APPELLANT

versus

B. SITLA BUX SINGH AND OTHERS

—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XIX of 1868), s. 5—Decree of Settlement Court, finality of—Jurisdiction of Civil Court to go behind such decree.

Where a decree of a Settlement Court in Oudh has, from the necessity of the case, been unable to decide whether a man is or is not an under-proprietor, where a decree of a Settlement Court has left in doubt the fact whether he is or is not an under-proprietor, or where there is no decree of a Settlement Court deciding the point, then the question, as to whether a man has or has not under-proprietary rights, must be decided upon other evidence. But where the decree of the Settlement Court leaves no doubt as to the fact that certain persons are occupancy tenants and not under-proprietors, it is not open to the Civil Courts to go behind it. [p. 872, col. 2.]

Where a Settlement Court of Oudh has clearly decided that certain persons are only occupancy tenants within the meaning of s. 5 of Oudh Rent Act XIX of 1868, no subsequent statements that such tenants are under-proprietors, whether contained in the mouths of witnesses, in receipts for rent or in entries in the Revenue Registers, can avail to show that they are under-proprietors. [*ibid.*]

Appeal against a decree of the District Judge, Fyzabad, dated the 7th February, 1927, upholding that of the Additional Subordinate Judge, Sultanpur, dated the 14th September, 1926.

Messrs. *Hyder Husain* and *Ali Zaheer*, for the Appellant.

Messrs. *A. P. Sen* and *S. C. Das*, for the Respondents.

JUDGMENT.—The question raised in this second appeal is one of importance and of no little difficulty. We have derived great assistance in our decision from the careful and well thought out judgment of the learned District Judge of Fyzabad who was the Court of First Appeal. The facts as he found them, and we find them, may be stated as follows: The predecessors-in-interest of the present appellant applied in the Sultanpur Settlement of 1869 for a declaration that they should be given what they called *sir* rights. They clearly were not able to explain exactly what they wanted, but were ready to take anything which put them in a position better than that of ordinary tenants. They appear to have asked for a sub-settlement. If they did not get that,

they were ready to take a decree for under-proprietary rights. If they did not get that they were ready to take the next best thing. The Settlement Officer stated that their family had held the land for generations on a service tenure and considered that they were entitled to no rights of any kind. The Settlement Commissioner stated that these persons were not *zemindars*, that they had not established an under-proprietary title, but that their position was something better than that of mere tenants-at-will. He accordingly directed that they should be declared to possess a right of occupancy in the lands held by them, taking a right of occupancy to be the right described in Chap. II of Act XIX of 1868. This right of occupancy is described particularly in s. 5 of that Act, and there can be no doubt that according to Mr. Capper's decision these persons were considered to be tenants, who, having lost all proprietary right, whether superior or subordinate, in the lands which they held or cultivated, were to have, so long as they paid the rent, a right of occupancy. It appears that after the occurrence of the large number of events which have been detailed carefully by the learned District Judge, the successors-in-interest eventually got their names recorded from 1892 to 1920 as under-proprietors. Recently, the superior proprietors of the village asked that the revenue papers should be corrected and that the appellant and his co-sharers should be recorded as occupancy tenants. The revenue papers having been corrected accordingly, the appellant and others brought the present suit for a declaration that they are under-proprietors. In support of the claim to be under-proprietors, he relies upon certain facts and upon certain facts only. The facts in question are that in a suit for arrears of rent which was brought in 1900 a witness Raghunath Singh, who is alleged to have been the ancestor of some of the defendants-respondents, stated that the predecessors of the appellant were under-proprietors. Further facts were that in certain rent-receipts those predecessors are described as under-proprietors and from 1892 to 1920 they are described in the revenue papers as under-proprietors. These are all the facts in his favour. The learned District Judge considers that, in view of the fact that Mr. Capper's judgment, which creates the rights, distinctly shows

that the rights were only the rights of occupancy tenants within the meaning of s. 5, Act XIX of 1868, no subsequent statements that such tenants are under-proprietors whether contained in the mouths of witnesses, in receipts for rent or in entries in the Revenue Registers, can avail to show that they are under-proprietors. We arrive at the same conclusion as he arrives upon the facts and we arrive at the same finding. Where a decree of a Settlement Court in Oudh has, from the necessity of the case, been unable to decide whether a man is or is not an under-proprietor, where a decree of a Settlement Court has left in doubt the fact whether he is or is not an under-proprietor, or where there is no decree of a Settlement Court deciding the point, then undoubtedly the question, as to whether a man has or has not under-proprietary rights, must be decided upon other evidence. But where, as here, the decree of the Settlement Court can leave no doubt as to the fact that the parties are occupancy tenants and not under-proprietors, it is not open to us to go behind it. Even if it were open to us to go behind it, in our opinion, the evidence adduced by the appellant would not be sufficient to show that under-proprietary rights existed. For the above reasons we uphold the decision of the learned District Judge and dismiss this appeal with costs.

A. N. A.

*Appeal dismissed.***ODDH CHIEF COURT.**

SECOND CIVIL APPEAL NO. 294 OF 1927.

December 5, 1927.

*Present:—Mr. Justice Pullan.

KUSHAR DAS AND ANOTHER—DEFENDANTS
NOS. 1 AND 2—APPELLANTS

versus

BALBHADDAR SINGH—PLAINTIFF
AND Babu MATHURA PRASAD AND OTHERS
—DEFENDANTS NOS. 3 TO 7—RESPONDENTS.

Muafi—Sale of muafi rights, whether void—Transfer of Property Act (IV of 1882), s. 43, applicability of—Creation of under-proprietary rights—Declaration of Court, necessity of—Oudh Rent Act (XXII of 1886), s. 107-H.

Muafi rights are rights held by a tenant against the *zemindar* and against no one else. Such rights cannot be sold because they are resumable by the

zemindar and the fact that such a sale is void as against the *zemindar* makes the sale absolutely void. Section 43 of the Transfer of Property Act has no application to a sale which is void such as the sale of *muafi* rights. [p. 874, col. 1.]

Dasrath v. Sandala (2), followed.

Bhairon v. Balak (1), dissented from.

Under-proprietary rights come into existence under s. 107-H of the Oudh Rent Act only when a declaration is made by the Revenue Court. [p. 874, col. 2.]

Murli v. Gajraj Singh (3) and *Umanath Bakhsh v. Ram Bakhsh Singh* (4), referred to.

Second appeal against a decree of the Subordinate Judge, Lucknow, dated the 16th May, 1927, modifying that of the Munsif, Haveli, Lucknow, dated the 31st January, 1927.

Mr. Radha Krishna, for the Appellants.

Messrs. Kashi Prasad and M. M. Ansari, for the Respondents.

JUDGMENT.—This is a second appeal from a decree of the Subordinate Judge of Lucknow in a suit where the plaintiff sought a declaration that he was an under-proprietor of three specific plots in the village of Tipnamau. The suit is a sequel to certain proceedings in the Revenue Courts. These plots were originally the *muafi* of defendants Nos. 1 and 2. These persons sold their *muafi* rights on the 16th of February, 1923, to the present plaintiff and their landlords brought a suit for resumption under s. 108, cl. (5) (a) of the Oudh Rent Act. In that suit the present plaintiff was made a party and he pleaded that he had purchased the right of the *muafidars*, and that he should be held to be an under-proprietor because the *muafidars* had held the land for more than 50 years and had, in other respects, complied with the requirements of s. 107-H of the Oudh Rent Act. The Revenue Courts held that the sale of *muafi* rights was void, that the *muafidars* did not become under-proprietors until they were declared to be such by an order of the Court and that accordingly the vendee was in a position analogous to that of a trespasser. The landlords thereupon brought a suit against the vendee for arrears of rent and the latter filed this suit in the Civil Court asking for a declaration that he was under-proprietor and, in the alternative, praying that defendants Nos. 1 and 2 be ordered to execute a fresh sale-deed in respect of the same plots. That is to say he pleaded first that he was an under-proprietor because the rights sold to him should be construed to be under-proprietary rights, and

secondly, if the Court found that the under-proprietary rights had not been transferred already the vendees should be required to make good the defect by a new sale-deed. In other words, the first sale was to be regarded as a contract to sell and the suit was to be regarded in some manner a suit for specific performance of contract. One of the issues raised in the first Court was that the suit was not cognisable by that Court. Unfortunately the learned Munsif has not decided this issue. He threw out the suit on his finding that the sale-deed of *muafi* land was void. The lower Appellate Court in its judgment, which although specious is unsound from beginning to end, set aside the decree of the lower Court and decreed the suit for declaration. In that Court also the question of jurisdiction was raised and was dealt with very briefly at the end of the judgment and regarded by the Court as a point of little or no interest. It appears to me that Civil Courts are too ready to take up and decide questions of Revenue Law which have already been decided in the Revenue Courts. There is no question that the same points were in issue in the Civil Courts as had already been determined by the Revenue Courts and primarily it is the Revenue Courts and not the Civil Courts who decide questions of under-proprietary rights. The finding of the Revenue Court was that the *muafidars* had attempted to sell *muafi* rights which cannot be sold and that consequently the vendee had no title and they also held that a *muafidar* only acquires under-proprietary title under s. 107-H of the Oudh Rent Act when he is declared by a Court to have done so. Unless these points could be decided over again in favour of the plaintiff he could not succeed in establishing the case which he has set up in the Civil Court, and as a decision on these points was within the powers of the Revenue Courts, the Civil Courts would, in my opinion, have been justified in declining to admit this case.

As, however, the learned Subordinate Judge has dealt at length with the questions in issue and given findings which are, in my opinion, entirely erroneous, I think it proper to deal with these findings. In the first place he has held that the case is governed by s. 43 of the Transfer of Property Act. He invokes that section to prove that a vendor having sold an

unsaleable right should be bound by that sale when he subsequently obtains a saleable right in the same property. In order to maintain this decision he has found that a sale of *muafi* rights although void against the *zemindar* is not void *ab initio* and he refers to certain rulings which he believes to be in favour of his view and he differentiates those rulings which he believes to be against his view. As a matter of fact, the only ruling which would directly support him is *Bhairon v. Balak* (1) which has been dissented from by the Oudh Chief Court in *Dasrath v. Sandala* (2). It appears to me that *muafi* rights are rights held by a tenant against the *zemindar* and against no one else. Such rights cannot be sold because they are resumable by the *zemindar* and the fact that such a sale is void as against the *zemindar* makes the sale absolutely void because it can be immediately defeated by the *zemindar*. Section 43 has no application to a sale which is void. It applies to a case where a person erroneously represents that he is authorised to transfer certain property and subsequently becomes able to do so. A holder of *muafi* rights who sells those *muafi* rights can never be in this position because he can never become able to sell *muafi* rights. He is not selling the land because he is not the landlord. He is only selling certain rights in that land which are unsaleable and the sale is not made good if he subsequently becomes possessed of saleable rights in the same land.

But to make his case more sure the learned Subordinate Judge went on to dispute the finding of the Munsif and also of the Revenue Courts that a *muafidar* only becomes an under-proprietor under the terms of s. 107-H when he is declared by a Court to do so. Here too the case-law was against the lower Court but he has attempted to distinguish some of the authorities and lays down the law that a *muafidar* of more than two generations and 50 years standing shall be deemed to have become an under-proprietor in the eyes of the law whether a declaration has or has not been made under s. 107-H. It is not necessary to discuss this at length. I need only say that the learned Subordinate

Judge is wrong. In *Murli v. Gajraj Singh* (3) it was laid down that "it is well settled that under-proprietary right under s. 107-H only arises on a declaration being made by the Revenue Court under that section. Such a declaration changes the status of the *muafidar* into that of under-proprietor from the date on which it takes effect." More recently the Chief Court of Oudh in *Umanath Bakhsh v. Ram Bakhsh Singh* (4) has spoken of "such under-proprietary rights as can be created under s. 107-H of the Oudh Rent Act, in other words, where potential rights in the future and not actual rights in the present are set up". Thus when the sale was made the vendors were not under-proprietors and they could only transfer those rights which they then possessed. The rights which they possessed were the rights of a *muafidar* and those rights could not be sold. As soon as the landlords came forward to resume the *muafi* and the Courts declared that the *muafi* had ceased to exist and the *muafidars* had become under-proprietors, the vendee had nothing on which to rest a title. Neither of the Courts below have considered the question as to whether the plaintiff can obtain any relief from the vendors. Whether he can do so or not is a question which I have not got to decide but on this point at least I may express an opinion, namely, that he cannot obtain the satisfaction he has sought, that is, he cannot in these proceedings obtain an order directing the vendees to execute a new sale-deed of under-proprietary rights in his favour, because the first sale-deed of *muafi* rights has been found to be void. This is a relief which no Court can grant.

This appeal has been preferred by the vendors and another Appeal No. 297 of 1927 has been filed by the *zemindars*. Both of these appeals must succeed and are decreed with costs. I accordingly set aside the order of the lower Appellate Court and restore the order of the Munsif who dismissed the suit with costs.

G. H.

Appeals allowed.

(3) 46 Ind. Cas. 443; 21 O. C. 124 at p. 130; 5 O. L. J. 241.

(4) 94 Ind. Cas. 343; 13 O. L. J. 229; A. I. R. 1926 Oudh 428; 1 Luck. 202.

(1) 68 Ind. Cas. 558; 9 O. L. J. 331; 4 U. P. L. R. (O.) 88; A. I. R. 1922 Oudh 287.

(2) 93 Ind. Cas. 310; 3 O. W. N. 217; A. I. Oudh 270; L. R. 7 A. (O.) 81; 13 O. L. J. 499.

ODDH CHIEF COURT.

CRIMINAL REFERENCE NO. 45 OF 1927.

December 1, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge.**SURAJ BALI—ACCUSED—APPLICANT**
*versus***EMPEROR—COMPLAINANT—OPPOSITE PARTY.***Criminal Procedure Code (Act V of 1898), ss. 15, 350 (a)—Bench of Magistrates—Some Magistrates not sitting throughout trial—Validity of trial.*

A Bench of Magistrates consisted of A, B and C. A and B began the trial and recorded a portion of the evidence. B and C sat at the next two hearings and all the three sat at the subsequent hearings and signed the judgment:

Held, that the trial was bad and liable to be set aside as it contravened the provisions of s. 350 (a) of the Criminal Procedure Code, even though the quorum required was only two.

Application for revision against an order of the District Magistrate, Unao, dated the 4th August, 1927.

FACTS appear from the following order of reference of the Sessions Judge:—

ORDER OF REFERENCE.

This is an application for revision against the order of the learned District Magistrate of Unao dismissing the applicant's appeal against the order of the Bench Magistrates convicting him under s. 456, Indian Penal Code, and sentencing him to six months' rigorous imprisonment.

The ground pressed in revision is that the procedure adopted by the Bench Magistrates contravened the provisions of s. 350 (a), Criminal Procedure Code, and, therefore, the trial was bad in law. The facts about which there is no dispute are these: The case was sent for decision to the Bench Magistrates sitting at Unao. The Bench Magistrates sitting at Unao is composed of Khan Bahadur Quazi Nazir Ahmad, Major Kamta Singh and Pandit Shiam Sundarnath Kaul. On receiving the case, Khan Bahadur Quazi Nazir Ahmad and Major Kamta Singh began the trial on the 6th June and recorded a portion of the prosecution evidence which was taken down by Major Kamta Singh. On the next date of hearing, i.e., 18th June, 1927, Khan Bahadur Quazi Nazir Ahmad was absent whose place was taken by Shiam Sundarnath Kaul who sitting with Major Kamta Singh heard the case in part and adjourned it for the rest of the hearing to the 25th June, 1927. On the 25th June, 1927, also

the same two members formed the Bench and heard the case in part and adjourned it to 2nd July, 1927. From the 2nd July down to the 23rd, all the three sat and the judgment was also signed by all of them. All the writing work, that is, of recording the evidence was done by Major Kamta Singh who, as has been seen, attended on all the dates and sat on the Bench.

In my opinion the proceedings should be quashed. The case of *Banwari Lal v. Emperor* (1) decided by the Lahore High Court on January 15, 1926, i.e., after the amended Criminal Procedure Code came into force, is on all fours with the present case. It was held in that case that where out of three Magistrates constituting the Bench only one is present on all hearings throughout the trial sitting some times with one, some times with the other and some times with both, the trial is bad as it contravenes the provisions of s. 350 (a), Criminal Procedure Code, even though the quorum consisted of two. The same view appears to have been taken by the late Court of the Judicial Commissioner of Oudh in *Brij Bhukhan v. Ram Kirat* (2) against the order of the District Magistrate of Gonda, dated the 4th December, 1922. In this case the trial was commenced before the Bench of two Honorary Magistrates. They heard the evidence for the prosecution and examined one of the witnesses for the defence. On a subsequent date one of the Magistrates was not present, and his place was taken by another who recorded the remaining evidence for the defence and heard the arguments and the case was eventually decided by all the three acting together and ended in the conviction of the accused. It was held that the trial was bad and was rightly set aside by the District Magistrate although the District Magistrate was not justified in passing an order of acquittal of the accused but what he ought to have done was to have set aside the conviction and direct a re-trial if the case was a fit one for the taking of that step. The learned Pleader for the opposite party relied on the case of *Mathura v. Emperor* (3).

(1) 93 Ind. Cas. 255; 27 Cr. L. J. 463; 7 Lah. 122; A. I. R. 1926 Lah. 304, 27 P. L. R. 131.

(2) 76 Ind. Cas. 566; A. I. R. 1923 Oudh 163; 25 Cr. L. J. 198; 10 O. L. J. 614.

(3) 48 Ind. Cas. 344; 41 A. L. J. 116; 16 A. L. J. 884; 19 Cr. L. J. 1004.

This case was decided before the passing of the amended Criminal Procedure Code. The rules which were framed by the Government for the conduct of business by Benches of Honorary Magistrates before the amended Act are to be found in the Manual of Government Orders VI Judicial (Criminal) Department, Chap. XXXIII, para. 814. The amendment in the law necessitated the substitution of the words "provided that the provisions of s. 350 (a), Criminal Procedure Code are carefully observed," for the proviso to r. 3 under para. 814 referred to above (correction slip No. 528). Section 350 (a) requires that the Bench should be duly constituted under s. 15 and that the Magistrates constituting the same have been present on the Bench throughout the proceedings. Reading the above with s. 15, it would appear that at least two Magistrates ought to have been present on the Bench throughout the proceedings. In the present case only one Magistrate was present on the Bench throughout the proceedings, namely, Major Kamta Singh. I find, therefore, that in this case s. 350 (a) was not carefully observed. The next argument was that the Court should not interfere because no party has been prejudiced. I think this argument cannot prevail. When the law prescribed at least two Magistrates for a proper constitution of the tribunal, it did so intentionally and for a certain object. That object has been explained by the late Court of the Judicial Commissioners of Oudh in Criminal Reference No. 7 of 1922, *Sultan v. Shamsheer* (4) "the object of constituting a Bench is that the Magistrates concerned should individually and collectively give their attention and apply their minds to the hearing of the evidence and the determination of the points at issue and arrive at an independent judgment in regard to the merits of the charge."

I, therefore, send up this case to the Hon'ble Court with the recommendation that the trial including the judgment and order of the learned District Magistrate in appeal be set aside and the orders as to re-trial or otherwise may be passed as the Hon'ble Court think fit. The papers will be submitted to the Hon'ble Court with such explanations as the learned District Magistrate and the learned Bench Magistrates might submit.

(4) 69 Ind. Cas. 376; 25 O. O. 182 at p. 183; A. I. R. 1922 Oudh 21; 23 Cr. L. J. 696.

Mr. Ram Krishna, for the Applicant.

The Government Pleader, for the Opposite Party.

JUDGMENT.—I direct that trial including the judgment and order of the learned District Magistrate in appeal be set aside. As the accused has already been imprisoned for a considerable time I direct that he stand acquitted and be not tried again.

A. N. A.

Order set aside.

OUDH CHIEF COURT.

CRIMINAL APPEAL No. 664 OF 1927.

December 20, 1927.

Present:—Sir Louis Stuart, Kt.,
Chief Judge.

MANI RAM—ACCUSED—APPELLANT
versus

EMPEROR—RESPONDENT.

Jury trial—Statement of approver—Charge to Jury—Duty of Judge—Legality of conviction.

A conviction based upon the uncorroborated evidence of an approver would ordinarily not be sustainable unless the Judge had explained carefully to the Jury that they were taking a grave risk in convicting upon uncorroborated evidence. But a conviction cannot be upset on this ground where the evidence of the approver is corroborated and the Judge explains to the Jury in his charge the nature of the corroboration and directs the Jury to arrive at their verdict after considering the evidence of the approver and the evidence of the corroboration together.

Criminal appeal from an order of the Additional Sessions Judge, Fyzabad, dated the 23rd September, 1927.

Mr. R. D. Sinha, for the Appellant.

Mr. H. K. Ghose, for the Respondent.

JUDGMENT.—Only two points have been argued in appeal. The first is that the conviction is vitiated by the failure of the Judge to explain to the Jury the law as to the necessity of corroboration of an approver's statement. The second is that the sentence is too severe. In regard to the first point it is sufficient to say that I find that the learned Judge did explain sufficiently to the Jury the law on the subject. A conviction based upon an uncorroborated evidence of an approver should ordinarily not be sustainable unless the Judge had explained carefully to the Jury that they were taking a grave risk in convicting upon such uncorroborated evidence. Here the case is perfectly different. The evidence of the approver was corroborated and

strongly corroborated. It was corroborated against the present appellant. The Judge in his charge explained the nature of the corroboration and directed the Jury to arrive at their verdict after considering the evidence of the approver and the evidence of corroboration together. This portion of the charge is open to no objection. On the second point I find that the sentence passed upon the appellant was a sentence of two years' rigorous imprisonment only. He was convicted for having participated in the commission of a serious dacoity. He is, it is true, only a young man. The learned Sessions Judge has taken his youth into consideration and has passed on him a sentence which I consider a light sentence. In view of the nature of the offence, I do not interfere on the question of sentence and dismiss the appeal.

G. H.

*Appeal dismissed.***ODDH CHIEF COURT.**

CIVIL REVISION No. 34 OF 1927.

December 2, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Pullan.

NARAYAN AND ANOTHER—DEFENDANTS

—APPLICANTS

versus

BALDEO SINGH—PLAINTIFF—

RESPONDENT.

Oudh Rent Act (XXII of 1886) as amended by Acts IV of 1901 and I of 1923, ss. 109, 119 (b)—Civil Procedure Code (Act V of 1908), s. 115—Suit for rent or profits decided by Assistant Collector of Second Class—Decree of District Judge in second appeal, whether open to revision by Chief Court.

The decree of a District Judge passed in an appeal from an appellate decree in a suit for rent or profits which does not exceed Rs. 5,000 in value and in which the original decree is passed by an Assistant Collector of the Second Class is not open to revision by the Chief Court under s. 115 of the Civil Procedure Code. [p. 878, col. 2; p. 879, col. 1.]

Kali Bakhsh Singh v. Bhagwan Das (1), followed. *Chauharja Bakhsh v. Kalka Pande* (3), distinguished.

Jagannath Pershad v. Bechu (2), dissented from.

Application for revision of a decree of the Third Additional District Judge, Lucknow, in Second Rent Appeal No. 14/18 of 1927, dated the 19th May, 1927, reversing that of the Collector, Barabanki, dated the 29th September, 1926, confirming that

of the Assistant Collector, Second Class, District Barabanki, in Suit No. 73 of 1926, dated the 17th August, 1926.

The Chief Judge before whom the case came on for hearing made the following

ORDER OF REFERENCE.—In view of the conflict of opinion in *Kali Bakhsh Singh v. Bhagwan Das* (1) and *Jagannath Pershad v. Bechu* (2), I refer the decision of this revision to a Bench of two Judges.

Mr. S. N. Roy, for the Applicants.

Mr. Haider Husain, for the Opposite party.

JUDGMENT.—This is an application in which we are asked to interfere in revision under s. 115 of the Code of Civil Procedure with an order of the Additional District Judge of Lucknow reversing a decree passed by an Honorary Assistant Collector, Second Class, which was upheld on appeal by the Collector. A preliminary objection has been taken to the effect that, as the Courts in question, in exercise of the jurisdiction which they exercised, are not subordinate to this Court, this Court has no jurisdiction to interfere in revision.

In order to understand the nature of this objection, it is necessary to examine the provisions of Local Act XXII of 1886 as amended by Act IV of 1901 and Act I of 1923 in respect of jurisdiction. The Chapter in question is Chap. VIII. Under the provisions of s. 105, Courts, other than Courts of Revenue, are prohibited from taking cognizance of a certain description of suits. The five grades of Courts of Revenue are given in s. 109. They are the Courts of the Board of Revenue, the Commissioner, the Collector, the Assistant Collector of the First Class, and the Assistant Collector of the Second Class. Assistant Collectors of the Second Class have jurisdiction to try only certain specified suits the value of which does not exceed Rs. 100. Assistant Collectors of the First Class can try and determine suits of every description which are cognizable only by a Revenue Court. A Collector has, in addition to the powers of a Collector, the powers of an Assistant

(1) 72 Ind. Cas. 1023; 10 O. L. J. 191; 9 O. & A. L. R. 848; A. I. R. 1924 Oudh 18; L. R. 5 A. (O.) 17.

(2) 80 Ind. Cas. 327; 27 O. C. 89; 9 O. & A. L. R. 931; 11 O. L. J. 77; A. I. R. 1924 Oudh 349; L. R. 5 A. (O.) 78.

Collector of the First Class. We thus have it that all original suits, which are cognizable only by Revenue Courts, are heard by the Courts of Collectors and Assistant Collectors and by no other Courts. So far this is simple. We now come to appeals. Section 119 classifies for appeal purposes certain specified classes of suits. It is not necessary to enumerate these suits. It is sufficient to say that the main suits so classified are suits for arrears of rent and suits for profits. After those suits are excluded, an appeal lies in all the remaining suits from the original Court to the Collector (or to the Commissioner, if the Collector was the Court of original trial), Assistant Collectors of the First Class being permitted to hear, when specially empowered, appeals from Assistant Collectors of the Second Class. From the Appellate Court of a Collector or of a specially empowered Assistant Collector of the First Class, appeals lie to the Commissioner and from the Commissioner appeals lie to the Board. The law here has not been materially altered. When we come, however, to appeals in the class of cases which we have noted as specially classified we find that there has been a very considerable change effected by the recent law. Formerly, when the final Court of Appeal was not the Board of Revenue, the final Court of Appeal was the Court of the Judicial Commissioner, but now a third final Court of Appeal has been added in certain cases. In these classified suits of which suits for arrears of rent and profits may be taken as the outstanding class, where the decree is the decree of an Assistant Collector of the Second Class, an appeal lies to the Collector or to a specially empowered Assistant Collector. The next appeal, however, does not lie to the Commissioner, but, where the value of the original suit does not exceed Rs. 5,000, it lies to the District Judge and, where the value of the suit exceeds Rs. 5,000, it lies direct to the Chief Court. Section 119 (b) lays down particularly that there shall not be an appeal from the decision in appeal of a District Judge except in decrees passed in appeal from the appellate decrees or orders of Collectors or Assistant Collectors of the First Class. We thus have it that in a suit, such as the suit we are now considering, the Chief Court has no jurisdiction whatever

in appeal. The first decree was passed by an Assistant Collector of the Second Class. The appeal lay to the Court of the Collector. A second appeal lay to the Court of the District Judge and there the matter ended. Can it then be said that these Courts are in any way subordinate to the Chief Court in respect of this particular matter. We are of opinion that it cannot so be said. This decision of ours is in agreement with the decision arrived at by Pandit Kanhaiya Lal, Judicial Commissioner in *Kali Bakhsh Singh v. Bhagwan Das* (1). This decision was passed on the 12th of March, 1923. It is true that in a subsequent decision passed by Mr. Dalal, who was then Judicial Commissioner, on the 30th of August, 1923—*Jagannath Prasad v. Bechu* (2)—(in which he does not refer to Pandit Kanhaiya Lal's decision) the contrary view is taken. But with due respect to Mr. Dalal we are unable to accept his view. He based his view upon a decision of a Bench of the Judicial Commissioner's Court, dated the 14th September, 1922 in *Chauharja Bakhsh v. Kalka Pande* (3). He omitted, however, to notice that this decision referred to the law as it was before the alterations which had taken place at the time when Pandit Kanhaiya Lal gave his decision. In 1922 there were only two final Courts of Appeal: the Court of the Board of Revenue in certain cases and the Court of the Judicial Commissioner in other cases. All that the decision in *Chauharja Bakhsh v. Kalka Pande* (3) lays down is that, where a Court is the Court of final appeal, the Courts whose decisions are subject to final appeal are Courts subordinate to that Court of final appeal, and that such Court of final appeal has revisional powers. That is a perfectly correct statement of the law as it then was with which we agree, but it does not follow that, where, as here, this Court is not the Court of final appeal, the Courts concerned are subordinate to it and that this Court has revisional powers. The whole situation has been altered by the change in the law which has made the Court of the District Judge the Court of final appeal in such cases. The view taken by Pandit Kanhaiya Lal was that, where the original decree was a decree of an

(1) 72 Ind. Cas. 394; 9 O. L. J. 543; A. I. R., 1923 Puch. 12.

Assistant Collector of the Second Class, this Court had no powers in revision. We accept that view. According to that view the preliminary objection must succeed. We, therefore, dismiss this application with costs.

A. N. A.

*Application dismissed.***ODUH CHIEF COURT.**

SECOND CIVIL APPEAL No. 278 OF 1927.

December 22, 1927.

Present :—Mr. Justice Pullan.

RAM SUKH DUBE AND ANOTHER—DEFEND-
ANTE —APPELLANTS

versus

RAMPAT TIWARI—PLAINTIFF AND ANOTHER
—DEFENDANT—RESPONDENTS.

*Oudh Laws Act (XVIII of 1876), s. 9—Pre-emption
—Vendee and pre-emptor equally entitled—Drawing of
lots.*

Section 9 of the Oudh Laws Act applies to a case where the vendee and the pre-emptor stand in the same position with regard to their right of pre-emption.

Wali-ul-Haq v. Mohammad Ghani-ul-Haq (1), referred to.

Appeal against a judgment of the Additional Subordinate Judge, Fyzabad, dated the 16th May, 1927, confirming that of the Munsif, Haveli, Fyzabad, dated the 30th October, 1925.

*Messrs. R. D. Sinha and G. C. Sinha, for the Appellants.

Mr. Raj Bahadur, for Mr. Rajeshri Prasad, for the Respondents.

JUDGMENT.—This is an appeal from the order of the Additional Subordinate Judge of Fyzabad in an appeal arising from a suit for pre-emption. The findings which are not challenged are that the plaintiff and the vendee have an equal right of pre-emption in respect of this property. The Court below, acting on this finding, drew lots under s. 9 of Act XVIII of 1876, the Oudh Laws Act, and the plaintiff, being successful in the lots, the appeal was dismissed. The decision is now challenged on the ground that the lower Court erred in law by deciding the case by drawing of lots and this is the only ground of appeal which has been argued. The appellant's contention is that where the vendee and the pre-emptor stand in the same position with regard to their right of pre-emption, s. 9 of the

Oudh Laws Act does not apply, because neither of them can be said to have a right of pre-emption against the other, but, under s. 9, the word pre-emption is not used and the rule that where two or more persons are equally entitled to such right "the person to exercise the same shall be determined by lot" applies to the right to buy or redeem such property and not to the right to pre-empt such property. It is also argued that pre-emption can only be sought by a person who is entitled by law to receive notice from the vendor of the property proposed for sale, and as the vendee in this case had the same right as the pre-emptor no such notice was due to the pre-emptor under s. 10. But here again the learned Counsel for the appellant would have me add certain words to the section. The section rules that any person proposing to sell any property in respect of which any person has a right to pre-empt shall give notice to the person concerned of the price at which he is willing to sell such property. The section does not say "where any person has entered into a contract to sell any property" but only "where any person proposes to sell any property" and the meaning of the section is not that after the vendor has agreed to sell the property to some person he should issue a notice to those persons who have a right of pre-emption as against the vendee, but that a person who intends to sell property which is subject to the right of pre-emption, shall issue a notice to all persons who have under the law of pre-emption a right to buy. This question was decided by the authority of the late Court of the Judicial Commissioner of Oudh, and I have to cover the same ground as the Judicial Commissioners in their decision reported as *Wali-ul-Haq v. Mohammad Ghani-ul-Haq* (1) which has formed the basis of the decisions in numerous subsequent cases. I have no doubt that s. 9 of the Oudh Laws Act was correctly interpreted by the Judicial Commissioners and that a Court in a case of this kind is bound to have recourse to lots. I dismiss the appeal with costs.

G. H.

(1) 3 O. C. 330.

Appeal dismissed.

ODDH CHIEF COURT.

SECOND RENT APPEAL No. 18 OF 1927.

December 8, 1927.

Present:—Mr. Justice Pullan.

Rani JAMWANTI KUER SAHABA

—PLAINTIFF—APPELLANT

versus

RAM TIRATH AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Landlord and tenant—Loss of proprietary or under-proprietary right—Presumption of acquisition of occupancy right.

There is no presumption that a person in occupation of land who has lost his proprietary or under-proprietary right is a mere trespasser. The presumption is just the other way and the very fact that he has lost his proprietary or under-proprietary right, of itself, would lead to an inference that he has acquired occupancy rights. [p. 881, col. 1.]

Appeal against the judgment of the District Judge, Gonda, dated the 30th March, 1927, setting aside the decree of the Assistant Collector of First Class, Gonda, dated the 22nd September, 1925.

ORDER.

Pullan, J.—(August 1, 1927).—This suit was filed along with another suit for arrears of rent under the Oudh Rent Act. The defendants were admittedly, up to the year 1835, under-proprietors. The plaintiff admitted that in one portion of the property the defendants had become tenants by means of a lease and in the suit relating to that portion of the property a decree was passed for arrears of rent. As to the other portion of the property, which is the subject-matter of this appeal, the plaintiff stated that after losing the under-proprietary title the defendants became occupancy tenants, but parted with half of their occupancy rights, and she went on to say that in this portion of the property the defendants were trespassers and, she sued, therefore, for an equitable rent coupled with ejectment under s. 127 of the Oudh Rent Act. Now the plaintiff has never shown how the defendants surrendered their occupancy rights and in what portion of the holding, but the mere fact that the plaintiff has sued at the same time for rent in the other suit on the basis of a lease indicates very clearly that that is the portion of the property in which the defendants surrendered their occupancy rights, and it would follow, unless there is some proof to the contrary, that it is the property in suit before me in which the

occupancy rights may still subsist. The Assistant Collector had this issue before him and he recorded a finding which is erroneous. He said that in a Civil Court decision it has been held that the defendants have no proprietary or under-proprietary rights in the plots "that means that they have no *qabzadari* rights, especially as it was proved in that Civil Court case that the *qabzadari* rights of defendants' ancestors were sold in arrears of rent." Now the very fact that these persons had lost their proprietary or under-proprietary rights would, of itself, prove that they had acquired *qabzadari* or occupancy rights and not the reverse, and the statement that their ancestors had sold the *qabzadari* rights is not borne out by the judgment of the Civil Court to which the Assistant Collector referred. When the case went in appeal to the learned District Judge he appears to have been of opinion that the plaintiff had not proved that the defendants were trespassers, but he himself was unable to decide what rights they held and he, therefore, dismissed the suit. In this I consider that the learned District Judge was wrong. The suit was one in the Court of an Assistant Collector who was the authority to decide the right of the defendants, if any, to be regarded as occupancy tenants. As the finding of the first Court on this point was clearly erroneous the learned District Judge should have pointed out this fact in his judgment and remanded the suit for determination as to the rights of the defendants, if any, as tenants. All that is proved is that they are no longer proprietors or under-proprietors and that they are still in occupation of the land. It is impossible to assume that they are trespassers. In fact the presumption is all the other way. I, therefore, remand the suit now to the Court of first instance for a clear finding, first as to what is the position of the defendants in regard to the plots in suit, namely, whether they are occupancy tenants and, if not, whether they have any other legal position and secondly what is the amount of rent to which they are liable. The finding on these issues should be returned to this Court through the Court of the learned District Judge within three months. Parties to be allowed to produce further evidence both oral and documentary before the Assistant Collector. Costs will follow the final result.

Mr. K. P. Misra, for the Appellant.

Mr. Aditya Prasad, for the Respondents.

JUDGMENT.—This suit was remanded by this Court's order, dated 1st of August, 1927, for determination of two points. First, whether the defendants are occupancy tenants or not and, if not, whether they have any other legal position, and secondly, what is the amount of rent to which they are liable. The lower Court has returned a finding that the defendants are occupancy tenants and no objection has been taken to this finding. On the second point the reply is, that the rent according to the roster rates after deducting two annas in the rupee for their under-proprietary rights is Rs. 12-15 a year, but at the same time it is stated that according to the sale certificate by which this property passed to the plaintiffs the accepted rents on these plots was Rs. 21-7-6. In the objection raised by the plaintiffs they have accepted the second rate but protested against being awarded the roster rates. It is now argued before me that the figure Rs. 21-7-6 is not strictly correct, but in view of the plaintiffs' own admission in their objection to accepting the sum of Rs. 12-15, I am not prepared to go into the details of the rates assessed on each separate plot. It appears to me that this Rs. 21-7-6 is approximately correct after deducting the two annas in the rupee to which the defendants would be entitled as ex-proprietors and, in my opinion, it is proper to decree the suit on this basis. It is hardly fair to go back to the roster rates when it is proved satisfactorily that the land was actually paying these rents at the time of the sale. According to this calculation the amount due for a year and a half would be Rs. 32-3-3. I, therefore, allow this appeal with costs and order that the decree of the first Court be restored but that the principal sum be reduced from the amount decreed to Rs. 32-3-3.

A. N. A.

Appeal allowed.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 248 OF 1927.

December 20, 1927.

Present:—Sir Louis Stuart, Kt.,
Chief Judge, and Mr. Justice Hasan.

BISHUN NARAIN—PLAINTIFF—

APPELLANT

versus

MAZHARUL HAQ—DEFENDANT—

RESPONDENT.

Costs—Order as to costs—Appeal and second appeal—Principles.

A Court has full discretion in the matter of awarding costs, but that discretion must be exercised on judicial principles. If that discretion has been so exercised an Appellate Court is not entitled to interfere and if an Appellate Court interferes where it has no right to do so, a second appeal will lie. If, on the other hand, the order of the trial Court is not based on judicial principles, the Appellate Court can interfere and a second appeal will not lie if the Appellate Court has exercised its discretion judicially. [p. 882, col. 1.]

The question whether an appeal or second appeal lies from an order as to costs is largely academic as it is always necessary to examine the merits before the question is decided. [p. 882, col. 2.]

Appeal against a decree of the Subordinate Judge Hardoi, dated the 19th April, 1927, in Civil Appeal No. 7/213 of 1926, reversing that of the learned Munsif, Hardoi, dated the 26th of October, 1926.

Mr. Harish Chandra, for the Appellant.

Mr. Naim Ullah for Mr. H. Husain, for the Respondent.

JUDGMENT.—The facts of the suit out of which this second appeal arises are as follows:—

The plaintiff-appellant instituted a suit against Dilasa Ram, vendor, and Mazarul Haq, vendee, to enforce an alleged right of pre-emption. He stated that the property in suit had been sold by the vendor to the vendee for Rs. 1,500 but that the consideration had been falsely stated in the deed of sale to be Rs. 2,000. He had a right of pre-emption. This was admitted by the vendee. The vendee, however, asserted that the plaintiff had lost his right by refusing to purchase the property. Upon the facts there was a finding, which is accepted as correct by the parties, that the amount of consideration was actually Rs. 2,000 and that the plaintiff had not refused to purchase the property. A decree was given on payment of Rs. 2,000. The plaintiff, therefore, failed on a very important point. The order as to costs gave no reasons of any kind. It merely said that if the plaintiff paid the amount due from him within two months

he would receive his costs from the vendee. The order as to costs was appealed against.

The lower Appellate Court in a careful reasoned judgment has decided that in the circumstances of the case neither the plaintiff nor the defendant was entitled to costs as each had failed in respect of a portion of his claim. He, therefore, directed that the parties should bear their own costs. An appeal has been filed against this appellate decree.

As there has been some doubt in the past as to the question whether a second appeal does or does not lie in such cases, the decision of this appeal was referred to a Bench. We state our findings upon it. A second appeal can only lie under the provisions of s. 100 of the Code of Civil Procedure. The provisions of that section must be complied with absolutely. In this particular case a second appeal can only be justified if it be found that the decision of the lower Appellate Court is contrary to law. We, therefore, have to decide what is the law on the subject.

The authority of a Court to award costs is regulated in the main by the provisions of s. 35 of the Code of Civil Procedure. It is in the absolute discretion of the Court, as to how costs are to be awarded but where they do not follow the event the Court must give its reasons for departure from the practice of directing costs to follow the event and those reasons must be in writing. It is well-settled law that although the Court has full discretion in the matter of awarding costs, that discretion must be exercised on judicial principles. But if that discretion has been exercised upon judicial principles, an Appellate Court is not justified in interfering with the order passed. This rule has been laid down in more than one decision. It was laid down by a Bench of the late Court of the Judicial Commissioner of Oudh in the case of *Ram Bharos v. Rampal Singh* (1) and it was laid down in Allahabad in the case of *Radhey Shyam v. Bihari Lal* (2). If the lower Appellate Court had no right to interfere with the order of the trial Court in the matter of awarding costs the decision of the lower Appellate Court is contrary to law and is a proper subject for

second appeal. But if the order of the trial Court was of such a nature as to be appealable to the lower Appellate Court and the lower Appellate Court's order is based upon a judicial discretion properly exercised, there can be no appeal to this Court. We consider that the order of the trial Court was open to the objection that the Judge has not judicially exercised his discretion. In the circumstances the lower Appellate Court had a right to modify it. In its order of modification the lower Appellate Court judicially exercised its discretion, and, therefore, no second appeal lies. The question as to whether a second appeal lies or does not lie is largely academic, for it is always necessary to examine the merits before the question is decided. If the Court below has decided the matter correctly and legally, an appeal would obviously fail even if it lay. Thus the question as to whether an appeal lies is not in practice of importance. It is of interest to note that the view enunciated in the above decisions are views which were approved in a recent judgment of the House of Lords in the case of *Donald Campbell and Company v. Pollak* (3). The procedure in the Courts in England differs in material particulars from the procedure in the Courts of India but the principle as laid down by their Lordships is the same as the principle in India. Where the discretion has been exercised judicially there should be no interference, but the discretion must be exercised judicially.

We, therefore, dismiss this appeal with costs.

A. N. A.
(3) (1917) A. C. 732.

Appeal dismissed.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 311 OF 1927.

December 16, 1927.

Present:—Mr. Justice Pullan.

MOHAMMAD SHAFI—DEFENDANT—
APPELLANT

versus

RAUNAQ ALI—PLAINTIFF—RESPONDENT.
Muhammadian Law—Marriage within period of iddat—Fasid marriage—Rights of inheritance between married parties.

A marriage which is contracted within the period of iddat, being only a fasid marriage, can give rise to a right of inheritance between married parties. [p. 883, col. 2.]

(1) 91 Ind. Cas. 111; 2 O. W. N. 901; A. I. R. 1925 Oudh 699.

(2) 48 Ind. Cas. 478; 40 A. 558 at p. 582; 16 A. L. J. 592.

Aizunnissa Khatoon v. Karimunnissa Khatoon (1) and *Tajbi Abalal v. Mowla Khan-Alikhan* (2), referred to.

A *fasid* marriage, which is vitiated only by some temporary defect, can become valid when the defect is removed. [*ibid.*]

Second appeal against a decree of the Subordinate Judge, Sitapur, in Appeal No. 1 of 1927, dated the 2nd June, 1927, confirming that of the Additional Munsif, Sitapur, dated the 20th November, 1927.

Mr. Ali Jawad, for the Appellant.

Messrs. Murli Manohar and G. N. Mukerji, for the Respondent.

JUDGMENT.—The plaintiff in this case sued for possession of a house which was formerly owned by one *Musammāt Bahauti*. The plaintiff based his claim on the fact that Bahauti was his legally married wife and that he was her heir under Muhammadan Law. The lower Courts have found that Bahauti, who was formerly a Hindu, was converted to Islam and married by *nikah* to the plaintiff and this finding cannot be challenged in second appeal. The case has, however, come before me because the appellant has raised the question whether the marriage between the plaintiff and this woman was invalid under Muhammadan Law and whether, therefore, the plaintiff had no right of inheritance. This plea is based on the plaintiff's own statement that he married Bahauti three or four months after the death of her first husband. If this statement is to be taken as accurate, the period of *iddat* which is 4 months and 10 days had not expired. This question was raised for the first time in the lower Appellate Court, and no definite finding was passed as to whether the marriage took place within the period of *iddat*, but the lower Appellate Court has held that, even if the marriage took place within that period, the plaintiff is entitled to inherit under Muhammadan Law. Marriages under Muhammadan Law are of three kinds. First, there are valid marriages, secondly, there are marriages which are void (*batil*) and thirdly, there are marriages which are *fasid*, a word which has been translated as vitiated. I have been asked to find that there is no essential difference between marriages which are *batil* and marriages which are *fasid* on the authority of certain commentators on Muhammadan Law, but the texts to which I have been referred, namely, that in the *Jamaa'r-Rumuz*, Vol. II, page 264, and that in the *Rudd-ul-Muhtar*,

Vol. II, page 444, which will be found in *Aizunnissa Khatoon v. Karimunnissa Khatoon* (1), have not been accepted by the leading commentators as being a correct statement of Muhammadan Law. Both these authorities are based on the *Dur-ul-Muhtar* and that commentary undoubtedly admits a distinction between *batil* and *fasid*, and lays down definitely that in the case of a *fasid* marriage the custom of dower is obligatory. If the dower is obligatory, the marriage cannot be altogether void, and the general opinion of the commentators is, that a *fasid* marriage, which is vitiated only by some temporary defect can become valid when the defect is removed. There is no question that a marriage contracted within the period of *iddat* is a *fasid* marriage. In a case of this kind the only objection to the marriage is that a certain period has not elapsed since the death of the first husband and this is a defect which can be removed by mere lapse of time. Mr. Amir Ali in his book on Muhammadan Law, 4th Edition, Vol. II, pages 397 and 398, has given a detailed statement showing the differences between a marriage that is *batil* and a marriage which is *fasid*. He says: "Connections which are unlawful in themselves are null and void *ab initio* (*batil*) and create no civil rights and obligations between the parties. The wife has no right of dower against the husband, and neither of them is entitled to inherit from the other." As to invalid or *fasid* marriages he says, "Marriages which are not vitiated and rendered illegal by a radical defect of the character above described, stand on a different footing. In such cases also the children are legitimate." Mr. Tyabji in his *Principles of Muhammadan Law*, 2nd Edition, page 162, says, the prohibition by *iddat* is a mere temporary prohibition, (according to the view taken by the Hanafi School) for the marriage would be valid if it were celebrated a few months later; it is, therefore, considered more favourably by the law than a marriage that can never be valid. Mr. Abdur Rahim in his book on Muhammadan Jurisprudence at page 330 says that "a *fasid* marriage, although it may be annulled by the Court when the fact is brought to its notice, is treated as capable of giving rise to certain legal effect." These views of the

(1) 23 C. 130 at pp. 158, 160; 12 Ind. Dec. (N. S.) 87.

commentators are accepted in a decision of the Bombay High Court of the year 1917, *Tajbi. Abalal v. Mowla Khan-Alikhan* (2), where their Lordships held at page 496* that "marriage with a temporarily prohibited woman, if consummated, may have legal consequences." They mention four principal consequences: Right to dower, obligation to perform *iddat*; legitimacy of issue; the establishment of *nasab* or paternity. At page 499* they say that "an examination of the text-book writers, old and relatively modern, puts it beyond all doubt that in numerous instances of temporary prohibition, all the legal consequences of marriage may follow, if in fact there has been consummation". It is true that I have been referred to no case in which a husband has claimed to inherit from a wife whom he married within the period of *iddat* but, in view of the authorities which have been cited, I am prepared to hold that such a marriage being only *fasid* or vitiated by a temporary defect can give rise to a right of inheritance between the two parties. I, therefore, dismiss this appeal with costs.

G. H.

Appeal dismissed.

(2) 39 Ind. Cas. 603; 41 B. 485; 19 Bom. L. R. 300.

*Pages of 41 B.—[Ed.]

GUJARAT CHIEF COURT.

SECOND CIVIL APPEAL No. 274 OF 1927.

December 22, 1927.

Present:—Mr. Justice Pullan.

MATHURA AND OTHERS—DEFENDANTS—

Nos. 1 TO 3—APPELLANTS

versus

SHAMBHOO DAYAL AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Hindu Law—Debts—Son separate from father, whether bound to pay debt of father.

A Hindu son is not under a pious obligation to pay his father's debt out of his separated property either in his father's lifetime or after his father's death. [p. 884, col. 2; p. 886, col. 1.]

Brij Narain Rai v. Mangla Prasad Rai (1), *Gobind Krishna Gujar v. Sakharan Narayan* (2) and *Taduri Ramachandra Jagannatha Rao v. Vadrevu Visvesan* (3), referred to.

Second appeal against a decree of the First Subordinate Judge, Bahraich, dated the 14th May, 1927, upholding that of the Munsif, Bahraich, dated the 8th February, 1927.

Mr. Muhammad Ayub, for the Appellants.
Mr. Moti Lal Saksena, for the Respondents.

JUDGMENT.—This is a second appeal from the order of the First Subordinate Judge of Bahraich confirming the decree of the Court of the Munsif allowing plaintiffs to recover a sum of Rs. 139-3 as price of certain goods which were attached and sold in execution of a decree. The decree was for a simple money debt and it was passed against the father of the plaintiff. It is proved that the plaintiff separated from his father in the year 1318 *fasli*, that is A. D. 1911. It has been proved to the satisfaction of the Court below that the property sold consisted of certain articles of furniture which were the personal property of the plaintiff. I am asked in second appeal to find that the plaintiff was liable to pay his father's debt because under Hindu Law it was his pious obligation to do so, that is, the proposition before me is that a Hindu son who has been separated from his father has the pious obligation to pay the personal debt of the father during the father's lifetime. I find that this proposition was not argued before the learned Hindu Judge who heard the appeal in the Court below and I have been asked to hold that this is the effect of the decision of their Lordships of the Privy Council, reported as *Brij Narain Rai v. Mangla Prasad Rai* (1). It is true that in that judgment their Lordships have approved of the decision of the Bombay High Court in *Govind Krishna Gujar v. Sakharan Narayan* (2) in which it is laid down that "the law is now well-established that under the Hindu Law, the pious obligation of a son to pay his father's debt exists whether the father is alive or dead." I have referred to that ruling. I observe that it deals entirely with the case of a joint Hindu family where it is sought to execute a decree by selling the son's interest in the family property. The ruling of their Lordships of the Privy Council is intended to lay down certain rules as to the powers, rights and duties of members of a joint Hindu family property in the matter of alienating or burdening the estate. It has no application to the case of a separated Hindu. As far as I am aware, there is no authority for

(1) 77 Ind. Cas. 689; 51 I. A. 129; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; A. I. R. 1924 P. C. 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.).

(2) 28 B. 383; 6 Bom. L. R. 344.

the proposition that a Hindu son can be required to pay his father's debt out of his separated property either in his father's lifetime or after his father's death. I would refer to a ruling of the Madras High Court reported as *Taduri Ramachandra Jagannatha Rao v. Vadrevu Viswesani* (3) in which it was held that after partition the creditor could sue the son to recover the debt which was in existence before the partition from the joint family properties allotted to the son in partition. This proposition could only affect the present case if it were shown, firstly, that this debt was in existence before the partition and, secondly, that the property attached was part of the joint family property which came into the possession of the son. Neither of these pleas were raised at any time by the present appellant. It is too late for him to raise them now. I have no doubt that the suit has been decided correctly by the Courts below and I dismiss the appeal with costs.

G. H.

Appeal dismissed.

(3) 80 Ind. Cas. 228; 47 M. 621; 46 M. L. J. 590; 19 L. W. 691; A. I. R. 1924 Mad. 682.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 281 OF 1927.

December 22, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

HASAN BANDI—DEFENDANT—APPELLANT
versus

BARATI LAL AND OTHERS—DEFENDANTS—
RESPONDENTS.

Agreement—Agreement to divide property on condition of financing litigation to recover property—Transfer of vested interest—Suit by person financing, maintainability of.

A who had no money to fight out a litigation for recovery of certain property, entered into an agreement with B that B should finance him and whatever property was acquired should be divided half and half between them, and that the litigation should be brought by B though the names of both were to appear. B brought a suit for possession without joining A's name:

Held, that the agreement did not effect a transfer

of any vested interest in the property to B but was a mere contract and that the suit by B alone was not, therefore, maintainable. [p. 886, col. 1.]

Indar Singh v. Kesri Singh (1) and *Qasim Ali Khan v. Ahmad Shah* (2), referred to.

Appeal against a decree of the District Judge, Sitapur, in Civil Appeal No. 66 of 1926, dated the 30th April, 1927, reversing that of the Additional Subordinate Judge, Sitapur, dated the 31st of March, 1926.

JUDGMENT.—On the 18th of December, 1908, Nawab Qasim Ali Khan executed a registered agreement on a ten-rupee stamped paper with a certain Damodar Das. On the strength of this agreement Barati Lal son of Damodar Das, instituted a suit for redemption of a 2-annas share in the village of Belahia on the ground that Nawab Qasim Ali Khan had the right to redeem 4-annas in that village. The mortgage, which it was sought to redeem, is held by *Musammam Hasan Bandi*. The trial Court decided that Barati Lal had no right to redeem and dismissed his suit. The lower Appellate Court decided in his favour. *Musammam Hasan Bandi* appeals here. The point for our decision is plain. Does this deed of the 18th December, 1908, transfer to Damodar Das a right of equity of redemption in this village? Nawab Qasim Ali Khan was claiming certain rights in the Qutubnagar estate. He had no money with which to prosecute his claim. He, therefore, entered, under this agreement, into an arrangement with Damodar Das, who undertook to finance his litigation and to recoup himself by retaining half of anything that the Courts awarded. The arrangement was an arrangement which is not prohibited by law in India. We have to see though exactly what it was. We have read the deed carefully. It is worded in a rather peculiar way. It commences by stating that Nawab Qasim Ali Khan has got no money and that Damodar Das has consented to help him. It then goes on to state that out of whatever property shall be acquired in litigation Damodar Das is to get half. It continues that Damodar Das shall have the right to take possession of immoveable property, and that he shall have the right to redeem the village of Belahia. So far every condition is in favour of Damodar Das. No condition is in favour of Nawab Qasim Ali Khan. Then follows the only condition in favour of Qasim Ali Khan which is that Damodar Das is to pay the whole of the Court expenses. Qasim Ali Khan in the rest of the deed continues to place restric-

tions upon himself. Can this deed be construed as transferring any vested interest in anything? We are of opinion that it transfers no vested interest of any kind in property. It is a contract that if Damodar Das pays all the expenses of litigation he shall take, in consideration of his agreeing to do so, one-half of the property which the Courts may award; but the litigation is clearly to be the litigation brought by Qasim Ali Khan, although there is a clause in the deed, that, whenever Nawab Qasim Ali Khan appears as a litigant, the name of Damodar Das is to be joined with his name. We consider that the arrangement made here was very similar to the arrangement which was made in a case which was decided on appeal in the late Judicial Commissioner's Court in 1911. That was the case of *Indar Singh v. Kesri Singh* (1). There a man called Inderjit Singh, after certain rights in property had become vested in him, agreed with a man called Kesri Singh that if Kesri Singh paid the whole expenses of litigation he would hand over half the property, which he acquired in favour of Kesri Singh. The Additional Judicial Commissioner decided that the transaction was not a sale, that it did not create a transfer, and that it was a contract which gave no vested rights. We consider that he approached the subject in the correct way. Approaching the subject here in the same manner we find that there is no transfer and no sale, only a contract. The right to obtain redemption remained with Nawab Qasim Ali Khan and passed after his death to his heirs. If they brought a suit to redeem they would have under the terms of the agreement to join Damodar Das and after his death his heirs with them, and whatever they obtained they would have to divide in equal moieties. But it is not the case here that the heirs of Nawab Qasim Ali Khan and the heirs of Damodar Das have instituted the suit for redemption jointly. The amount of the share to be redeemed was 4-annas. Barati Lal did not come in asking for a redemption of a 4-annas share, and joining with him the heirs of Nawab Qasim Ali Khan, or citing them as defendants because they had refused to join with him. He instituted this suit to redeem a 2-annas share for his sole benefit giving the heirs of Nawab Qasim Ali Khan nothing. This he obviously was not entitled

to do. The learned Counsel for the respondent Barati Lal has pointed out to us that in a previous litigation a Bench of the late Judicial Commissioner's Court decided that Qasim Ali Khan and Damodar Das held half of the equity of redemption in the 8-annas share in Belahia. The learned Counsel has stated the facts correctly. The decision in question will be found in *Qasim Ali Khan v. Ahmed Shah* (2). But this circumstance does not affect the present case. We have sent for the record of that appeal and we find that what happened there was that Nawab Qasim Ali Khan and Damodar Das sued jointly on an allegation that Damodar Das was a joint partner with Nawab Qasim Ali Khan in his rights. This statement was incorrect. But it was not challenged on the other side, and the Judicial Commissioner's Court naturally accepted a statement, which had not been challenged. The fact that they did accept the statement can in no way prejudice *Musammam* Hasan Bandi, who was not a party to those proceedings. But apart from that the decision of the Judicial Commissioner's Court does not help Barati Lal. The part of the decision which affects this matter is a declaration that Qasim Ali Khan and Damodar Das hold a half share in the equity of redemption of 8-annas in Belahia. There is nothing in that decision which states that Damodar Das alone can come into Court to redeem a quarter share. For the above reasons we consider that the trial Court was right and that the lower Appellate Court has not construed the agreement in question correctly. The suit as framed was bound to fail and the dismissal of it should have been upheld. We accordingly allow this appeal and direct that Barati Lal's suit be dismissed. Barati Lal will pay his own costs and those of *Musammam* Hasan Bandi in all Courts.

G. H. *Appeal allowed.*
(2) 32 Ind. Cas. 516; 2 O. L. J. 758.

OUDH CHIEF COURT.

CIVIL REVISION NOS. 35 AND 37 OF 1923.

December 21, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

TIKAI CHOBAY—DEFENDANT—APPLICANT
versus

FIRM SHEO DAYAL-RAMJI DAS—

PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXIII, 1—“Other sufficient grounds”, meaning of—Ejusdem generis—Absence of formal defect or ground ejusdem generis—Permission to withdraw suit with liberty to bring fresh suit—Material irregularity—Revision—Omission to produce material document, whether ‘sufficient ground’.

‘Other sufficient grounds’ referred to in cl. (b) of O. XXIII, r. 1 (2), Civil Procedure Code, must be grounds *ejusdem generis* with the ground mentioned in cl. (a). [p. 889, col. 1.]

Chhajju Ram v. Neki (5) and *Muhammad Ejaz Rasul Khan v. Mubarak Husain* (2), relied on.

Where the trial Court allows withdrawal of a suit with liberty to bring a fresh suit under O. XXIII, r. 1, when there is no formal defect nor any other grounds *ejusdem generis*, it commits a material irregularity in the exercise of its jurisdiction by utilizing its jurisdiction so as to give it authority which the law does not give, and its order is open to revision under s. 115, Civil Procedure Code. [p. 889, cols 1 & 2.]

Jhunku Lal v. Bisheshar Das (1), explained.

Balkrishna Udayar v. Vasudeva Ayyar (3) and *Robert Watson & Co. v. Collector of Zillah Rajshahye* (4), referred to.

Failure of the plaintiff to produce some of his important documents in time is not a ground for permitting the plaintiff to withdraw from the suit with liberty to bring a fresh suit. [p. 889, col. 2.]

Appication for revision of an order of the Subordinate Judge, Bahraich, dated the 15th August, 1927.

Mr. Niamat Ullah, for the Applicant.

JUDGMENT.—These are applications in revision under s. 115 of the Code of Civil Procedure which have arisen in the following circumstances. A firm called Sheodayal-Ramjidas, which carries on business in Calcutta and is also engaged in commercial activities in Oudh, instituted a suit on the 27th November, 1926, in the Court of the Subordinate Judge of Gonda against the Secretary of State for India in Council and Tikai Chobay on the following allegations. The firm asserted that it was a lessee from the Nepal State under a lease dated approximately September, 1925 of the right of cutting and removing Bankas grass for commercial purposes over a certain tract in Nepal. The plaint continued that a Calcutta firm called Heilgers & Company held a similar contract on the

British side for collecting such grass as grew in the Government Forest and that Heilgers & Company had assigned their rights under their contract to the plaintiff firm. It is not clear what connection this latter allegation had with the subject-matter of the suit. The actual allegations of importance in the plaint were allegations that the plaintiff firm had cut and stacked some thirteen hundred maunds of Bankas grass in the Nepal Territory over which they held the contract, and that the Forest Ranger of the Sohelwa Circle had, without any shadow of right, removed this grass to British Territory and sold it in collusion with Tikai Chobay. Therefore, the plaintiff firm claimed Rs. 4,000 damages. The hearing of the suit was transferred to the Subordinate Judge at Bahraich. Written statements were filed by the defendants, in which they stated that they had no knowledge as to whether the plaintiff firm had or had not a contract to collect Bankas grass in Nepal. They absolutely denied that they had ever removed any Bankas grass in the possession of the plaintiff at any time or any place. The 22nd April, 1927, was fixed for the framing of issues, but the issues were not actually framed until the 12th of May, 1927. Before the issues were framed it was within the knowledge of the plaintiff firm that it was necessary for them to produce their contract with the Nepal Government if they wished to rely on it, and under O. VII, r. 14, Part 2 as it then stood if they relied upon this lease they should have noted its existence in a list filed with the plaint. They did not do so. Further under O. XIII, r. 1, as it then stood, it was their duty at the first hearing of the suit to produce all the documentary evidence in their possession. They did produce certain documents but we find that they did not produce others. The 4th of August, 1927, was fixed for hearing of evidence, and on that date the plaintiff firm applied for permission to produce a large number of documents in evidence. The trial Judge under the provisions of O. XIII, r. 2 refused to receive this evidence as no good cause had been shown for its non-production previously. The plaintiff firm then proceeded to produce oral evidence on the 4th of August, 1927. The hearing was then adjourned to the 15th of August, 1927. On that date the plaintiff firm put up an application of which the following is the translation:—

"It is submitted that in the above noted case, certain important documents had been rejected by the Court from being made part of the evidence, that as the documents are the basis of the suit and consequently a legal defect has arisen in the case, and as it is apprehended that in future this would be a defect on the merits of the case; hence it is prayed that permission to withdraw the present suit and to bring a fresh one be granted under O. XXIII, r. 1."

Both the defendants opposed this application but the learned trial Judge allowed it in the following words:—

"I allow the suit to be withdrawn with liberty to the plaintiff firm to bring a fresh suit. In view of the fact that the case has not advanced far after the framing of the issues, I think it proper to allow only half the costs to the defendants barring the costs of summoning witnesses which they will get in full."

It is against this order that the present applications in revision have been filed. Notice has been served upon the plaintiff firm. They have not, however, appeared. We have satisfied ourselves that the notice has reached them, and proceed with the matter *ex parte*. The first question which we have to decide is, whether an application in revision under s. 115 of the Code of Civil Procedure does or does not lie. There is a decision of the Allahabad High Court in *Jhunku Lal v. Bisheshar Das* (1) which might be read as showing that in no circumstances can a decision under O. XXIII, r. 1 be questioned in revision. As we shall point out later, we do not consider that the decision really lays down such a proposition. There is a decision of the late Court of the Judicial Commissioner in *Muhammad Ejaz Rasul Khan v. Mubarak Husain* (2) which we consider is of great assistance. But before we approach that decision we consider it advisable to refer to the remarks of their Lordships of the Judicial Committee in *Balkrishna Udayar v. Vasudeva Ayyar* (3) where they lay down the limitations within which a right of

revision under s. 115 of the Code of Civil Procedure can be exercised. They say there:—

"It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. And if the appellant's contention be correct, then if the Civil Court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed there would not, in a case such as the present, by any remedy available under this section and no appeal would lie."

We consider that the words of the greatest importance here are "that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it." Unless it can be established that the Court has acted without jurisdiction, has failed to exercise its jurisdiction vested in it or acted in the exercise of its jurisdiction illegally or with material irregularity s. 115 has no application. But in each particular instance we have to look at the fact as to whether the necessary conditions have been satisfied. In our opinion in *Jhunku Lal v. Bisheshar Das* (1) the Bench laid down no more than that the particular application before them must be rejected because it did not raise any ground which came under s. 115. We agree absolutely with the decision to that effect, but this decision in no way lays down as a general proposition that no order under O. XXIII, r. 1 can be challenged under s. 115. What we have to look at is whether the particular circumstances bring or do not bring an order under s. 115, and it is in considering this latter question that we find the decision in *Muhammad Ejaz Rasul Khan v. Mubarak Husain* (2) of great value. This decision is authority for the proposition that, before a Court can grant the plaintiff permission to withdraw from a suit with liberty to institute a fresh suit in respect of the same subject-matter, the Court must be satisfied that the suit must fail by reason of some formal defect or that there are other sufficient grounds *ejusdem generis* for allowing the plaintiff to institute a fresh suit. We consider that the decision of their Lordships of the Judicial Committee in *Robert Watson & Co. v. Collector of*

(1) 46 Ind. Cas. 71; 40 A. 612; 16 A. L. J. 495.

(2) 79 Ind. Cas. 1033; 27 O. C. 231; 10 O. & A. L. R. 685; 11 O. L. J. 613; A. L. R. 1925 Oudh 291; 1 O. W. N. 388.

(3) 40 Ind. Cas. 650; 44 I. A. 261 at p. 267; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 O. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501; 22 O. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

Zillah Rajshahye (4) is of assistance in deciding the point, and we further consider that the decision of their Lordships of the Judicial Committee in *Chhajju Ram v. Neki* (5) is of great assistance. There their Lordships laid down that in construing the meaning of the words "for any other sufficient reason" where they occur in O. XLVII, r. 1 the only proper construction to be placed upon these words was that the other sufficient reason must be *ejusdem generis*. The words used in O. XXIII, r. 1 are "other sufficient grounds" but the same process of reasoning must, in our opinion, be applied and we are in complete accord with the views taken in *Muhammad Ejaz Rasul Khan v. Mubarak Husain* (2). We approach this particular case then with the preliminary remarks that before the trial Court could grant the plaintiff firm permission to withdraw from the suit with liberty to institute a fresh suit it was necessary for it to be satisfied that it must fail by reason of some formal defect or that there were other sufficient grounds *ejusdem generis* for permitting them to institute a fresh suit. What are the facts? The facts are that the plaintiff firm came into Court asserting the existence of a certain contract. As far as we can see the success or failure of the suit in no way required that assertion to be proved. The plaintiff, however, preferred to assert it. The other side had put him to proof. He then failed to prove the point as required by law. Now even had the matter rested there, there would have been no harm done to the plaintiff firm for if the plaintiff firm had been able to establish that this grass had been cut and stacked by them, that it was in their possession in the place in which it was alleged that it was in their possession that it was removed by the Forest Subordinate Official as alleged from their possession, that it had then been disposed of by that official and Tikai as joint tortfeasors and that the damages had amounted to a certain figure, the plaintiff firm could undoubtedly have succeeded without the production of

any documents at all. What the plaintiff firm did at that stage was to produce one witness. They then refused to continue with the case. There was nothing to show that the suit must fail by reason of some formal defect. There was no formal defect. It could not be suggested seriously that there was any formal defect. There were certainly not sufficient grounds, in our opinion, of any sort or kind for permitting the withdrawal with liberty to bring a fresh suit, and there can, in our opinion, be no possible doubt as to the fact that there were no grounds *ejusdem generis*. The case put forward by the plaintiff firm was this alone. They said "Our firm has in contravention of the law upon the subject endeavoured to produce documentary evidence at a period when it cannot be admitted. Our firm does not want to go on and produce any further evidence. It would prefer to withdraw its suit and bring it again and then when the suit is brought again to produce the evidence which it omitted to produce at the right time before." The Court allowed this. In our opinion in so doing the Court committed a material irregularity in exercise of its jurisdiction by utilising its jurisdiction so as to give it authority which the law had not given it, and for these reasons we accept the revision on the main point. It is unfortunate that the plaintiff firm is not represented. It has, however, had every opportunity of being represented. We set aside the order by which the plaintiff firm is permitted to bring a fresh suit upon the same cause of action. One further point remains. The learned trial Judge had for a reason which we do not quite understand awarded the successful defendants only half costs. He has not, in our opinion, exercised his discretion judicially. We allow these applications each with costs against the plaintiff firm and direct that the plaintiff firm pay each of the applicants separately his full costs in the Court below.

G. H.

Revision accepted.

A. N. A.

(4) 13 M. L. A. 160; 12 W. R. P. C. 43; 3 B. L. R. P. C. 48; 2 Suth. P. C. J. 269; 2 Sar. P. C. J. 500; 20 E. R. 511 (P. C.).

(5) 72 Ind. Cas. 566; 49 I. A. 144; 30 M. L. T. 295; 26 O. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 435; A. I. R. 1922 P. C. 112; 16 L. W. 37; 17 P. W. R. 1922; 3 Lah. 127; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.).

• **ODUH CHIEF COURT.**

FIRST CIVIL APPEAL No. 46 OF 1927.

December 2, 1927.

Present:—Sir Louis Stuart, Kt., Chief

Judge and Mr. Justice Hasan.

Babu MITAR SEN SINGH—PLAINTIFF—
APPELLANT

versus

MAQBUL HASAN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Caste Disabilities Removal Act (XXI of 1850), s. 1, scope and application of—Conversion of Hindu to Muhammadanism—Right of Hindu collaterals to succeed to estate of convert—Applicability of Act to Oudh.

The rule that in questions of succession and inheritance the Hindu Law should be applied to Hindus and the Muhammadan Law to Muhammadans refers to Hindus and Muhammadans, not by birth merely, but by religion also. [p. 891, col. 2.]

Abraham v. Abraham (2), referred to.

The Caste Disabilities Removal Act can be held applicable to the Province of Oudh only from the date of its annexation and it is open to serious doubt whether that enactment will have the effect of restoring rights lost and of divesting persons of their status acquired, before the date of the annexation. [*ibid.*]

The Caste Disabilities Removal Act does not lay down any Code of inheritance prescribing the line of succession to the estate of a convert, nor does it create new rights. It merely removes obstacles arising by reason of the claimant renouncing his religion or losing his caste. The Act has no application to a case where the claimant of rights has neither renounced nor has been excluded from the communion of any religion or has been deprived of his caste. [p. 892, cols. 1 & 2.]

A Muhammadan, whose father had become a convert to Muhammadanism from Hinduism, died leaving him surviving only children by a predeceased daughter. His father's uncle's great-grandson who was a Hindu claimed title to his estate by right of inheritance as reversioner pleading that, by custom, daughters and their issue had no right to inherit:

Held, that The Caste Disabilities Removal Act had no application to the case and could not confer on the claimant any right to the estate. [p. 892, col. 2.]

Khunni Lal v. Kunwar Gobind Krishna Narain (3) and *Vaithilinga Odayar v. Ayyathorai Odayar* (5), followed.

Bhagwant Singh v. Kallu (4) and *Rupa v. Sardar Mirza* (6), distinguished and dissented from.

First appeal against a decree of the Additional Subordinate Judge, Fyzabad, dated the 14th February, 1927.

Messrs. P. L. Banerji, Jaijai Ram Radha Krishna and H. D. Chandra, for the Appellant.

Messrs. Bisheshwar Nath, Ali Zaheer and Ali Mohammad, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal from the decree of the Additional Subordinate Judge of Fyzabad, dated the 14th of February, 1927. By the decree under appeal the appellant's suit for the

recovery of certain moveable and immoveable property described in the two schedules A and B attached to the plaint has been dismissed.

The property in suit was last held in full ownership by one Hasan Khan, who died on the 11th of October, 1921. Agha Hasan Khan had a daughter, *Musammât Sajjadi Begam*. The daughter predeceased her father. The daughter's children Maqbul Hasan Khan, son, defendant No. 1, *Musammât Amatul Kubra*, defendant No. 2 and *Musammât Amatul Sughra*, [defendant No. 3, daughters, are now in possession of the estate of their grandfather, Agha Hasan Khan. Agha Hasan Khan's widow, *Musammât Kaniz Zainab*, also died on the 5th of November, 1922.

The plaintiff, Babu Mitâr Sen Singh, claims title to the estate in suit by right of inheritance as the nearest reversioner and pleads family custom of the exclusion of daughters and their issue in defeasance of the natural rights of the defendants in the estate of their grandfather, Agha Hasan Khan. This is the plaintiff's case as set forth in the plaint.

The custom pleaded by the plaintiff was denied by the defendants and the issue relating to it has not been tried so far. Besides the daughter's issue, who are the defendants in the suit, it also appears that Agha Hasan Khan had a sister, *Musammât Askari Khanam*, who survived him and that *Musammât Askari Khanam* on her death has left children as heirs-at-law. The defendants denied the plaintiff's right of succession to the estate of Agha Hasan Khan and this is the issue which has been tried and found in favour of the defendants by the Court below.

The facts are as follows:—

Agha Hasan Khan's father, Ali Hasan Khan, embraced the religion of Islam in the year 1843 A. D. It is admitted that the sect to which he attached himself on conversion was the Shia sect. Ali Hasan Khan's name before his conversion was Jagardeo Singh. It is agreed that his father, Sarabdawan Singh, was a Hindu as were his ancestors from the earliest times. Sarabdawan Singh had a brother, Ranjit Singh, and the plaintiff, Mitter Sen Singh, is the great-grandson of Ranjit Singh. It is also agreed that the plaintiff's father, his grand-father and his great-grandfather were all born and died in Hindu faith and that the plaintiff is a

Sanatan Dharam Hindu both by birth and conviction.

Before proceeding further we desire to state at the outset that at some stage of the proceedings in the trial Court the plaintiff seems to have set up the case of his right to succeed to the estate in suit upon some general custom of the family whereby a Hindu is permitted to succeed to the inheritance of a Moslem blood relation. This was the subject-matter of issue No. 2. At the hearing of the appeal however, this case was expressly abandoned by the learned Advocate, who appeared before us on behalf of the plaintiff. He rested his client's right to succeed on law alone subject, of course, to the proof of the custom of exclusion of daughters. For the purposes of the decision of the case in the trial Court and the appeal before us it was assumed that the last mentioned custom exists. During the progress of the arguments at the Bar there was some confusion as to the precise nature and extent of the custom pleaded by the plaintiff but we are quite clear in our minds that a plea of custom may be entertained in modification of the personal law; Hindu Law or Muhammadan Law, but not in entire abrogation of such law. This conclusion is fully borne out by s. 3, sub-s. (b), cl. (2), of the Oudh Laws Act, 1876. The plaintiff's case as to the modification of the personal law by custom is set forth in para. 4 of the plaint. It may be mentioned here that it was agreed by the parties in the Court below, and the agreement was adhered to before us, that the property now in suit is not the property which Ali Hasan Khan might have acquired from or after the death of his brother, Amresh Singh. It was also stated on behalf of the plaintiff that Ali Hasan Khan on his conversion ceased to be a member of the joint Hindu family.

The first question which, on the premises stated above, arises for determination is, what law of inheritance governs the succession to the estate of Agha Hasan Khan? The answer to this question does not appear to us to be involved in any doubt. We think that in determining the heir or heirs to the estate of such a person recourse must be had to the Shia Law of inheritance which was the personal law of the propositus. As observed by their Lordships of the Judicial Committee in the case of *Jawala Buksh v.*

Dharum Singh (1), "the written law of India has prescribed broadly that in questions of succession and inheritance the Hindu Law is to be applied to Hindus, and the Muhammadan Law to Muhammadans; and in the judgment delivered by Lord Kingsdown in *Abraham v. Abraham* (2), it is said that 'this rule must be understood to refer to Hindus and Muhammadans, not by birth merely, but by religion also.' " It is quite clear that the plaintiff is not an heir-at-law according to that law even if the children of the daughter of the propositus are also not his heirs by virtue of the family custom. This conclusion was not seriously disputed by the learned Advocate for the appellant. It was argued, however, that though the plaintiff has no right of inheritance according to the Muhammadan Shia Law to the estate in suit yet he has such a right under the provisions of Act XXI of 1850 and this was the only point argued at the Bar.

We think it necessary to note that the annexation of the Province of Oudh to the British territories took place on the 13th of February, 1856. Previous to that day it must be presumed that the law regulating rights to property was the Hindu Law in case of Hindu and the Muhammadan Law in case of Muhammadans and that conversion from one religion to another entailed all the consequences and penalties provided by those laws. Therefore, when Jagerdeo Singh (afterwards Ali Hasan Khan) renounced the Hindu religion and embraced the faith of Islam he forfeited his rights to property under the Hindu Law and acquired rights under the Muhammadan Law. One of such rights was the "status" with all its consequences with which he came to be endowed on his conversion by the Muhammadan Law. Regulation VII of 1832 or Act XXI of 1850 can be held to be applicable to the Province of Oudh from the date of annexation at the earliest. This being so, we seriously doubt that those enactments will have the effect of restoring rights lost and of divesting persons of their 'status' acquired before the date of the annexation. This will not be so in the Province of Agra which was a part of the Presidency of Bengal on the date of the Regulation and part of the British territories in India on the date of the Act. It was assumed in the Court below and in the arguments before us that

(1) 10 M. I. A. 511 at p. 537; 2 Sar. P. C. J. 189; 19 E. R. 1066.

(2) 9 M. I. A. 195; 1 W. R. P. C. 1; 1 Suth. P. C. J. 501; 2 Sar. P. C. J. 10; 19 E. R. 716.

the Act of 1850 will apply if it is applicable in terms thereof to the facts of this case.

The trial Court is of opinion that the provisions of Act XXI of 1850 have no application to the facts of this case and we agree with that opinion. Before interpreting those provisions certain preliminary observations fall to be made. Act XXI of 1850 neither professes to nor does in fact create a new class of heirs constituted of persons who are not heirs under the personal law of the propositus. The Act does not lay down any Code of inheritance prescribing the line of succession to the estate of a convert. It does not create new rights. It only removes obstacles to the enforcement of existing rights. The obstacles intended to be removed are clearly obstacles arising by reason of the claimant renouncing his religion, having been excluded from the communion of any religion, or being deprived of caste. We think that the substantive enactment may be interpreted in no other sense and we think that this interpretation is supported by the preamble. The substantive enactment is as follows:—

"1. So much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories." The interpretation which we place on it can best be brought on surface by analysing s. 1 as follows:—

So much of any law or usage as.....

(1) inflicts on any person forfeiture of rights or property	By reason of his or her	
or	(a) renouncing	any
	or	religion
(2) may be held in any way to impair or affect any right of inheritance.	(b) having been excluded from the communion of	
	or	
	(c) being deprived of caste.	

shall cease to be enforced as law.....

We are of opinion that both class of cases covered by cls. 1 and 2 as given above are controlled by the condition precedent of conversion or exclusion or deprivation from caste of the person whose rights are questioned in a given case, such rights being rights which such a person has under the law which was applicable to him immediately preceding the change of religion or deprivation of caste.

Clause (1) deals with one class of rights while cl. (2) deals with another class of rights. Under the former fall rights which have come to be vested prior to conversion in the person who has changed his religion and under the latter fall inchoate rights of the nature of *spes successionis*. The former class of rights may be illustrated by the right of a member of a joint Hindu family who has acquired his right in the family property from the moment of his birth, by the right of a legatee in the subject-matter of bequest after the death of the testator and generally by the right which a person has acquired by right of inheritance after the death of the propositus. Clause (1) provides for the protection of such vested rights as against the effect of the rule of personal law entailing the destruction of such rights by reason of conversion. Clause (2) contemplates protection of rights of a person who has changed his religion prior to the vesting of such rights: in other words, if an heir has changed his religion before the opening of succession that fact will not stop the devolution of inheritance on him whenever it comes to happen. In each case it seems to us rights, whether vested or inchoate, are protected by the Statute but only of the person whose rights are forfeited in one case or affected in the other by reason of that person renouncing or having been excluded from the communion of any religion or being deprived of caste. We are of opinion that the Act has no application to a case where the claimant of rights either of one class or of the other has neither renounced nor has been excluded from the communion of any religion or been deprived of caste as the present case is. The words "forfeiture" and "impair or affect any right" in the first part of the section and the words "by reason of his or her" in the second part of the section are important words. In short, we are unable to read the section in any wider sense than that it removes

the personal disability of the person who has changed his religion from enforcing his rights which he possessed prior to the change. Further, even if the Act be assumed to be applicable to a case where the person whose inheritance is in question has changed his religion the present case is not of that nature and, therefore, it is not necessary to give reasons against the soundness of the assumption. But surely it cannot be contended that if any ancestor of the propositus in any degree of ascent has changed his religion the Act would apply in determining the status of an heir to such a propositus. If it were so the results would be startling, if not revolutionary. In families of more than half the population of Moslems of British India and similarly in Indian Christian families conversion from Hinduism may well be traced to some near or remote ancestor and when the inheritance comes to fall on collaterals the Hindu relations of the Moslem or the Christian convert must be held to displace if nearer in degree the rights of the Moslem collaterals more remote. Not only that, the females who have succeeded in the past must be held to possess only such rights of property as they would have possessed if their ancestor had remained a Hindu.

The interpretation which we have placed on the substantive enactment contained in Act XXI of 1850, is, it appears to us, supported by the preamble as well. The important words of the preamble are "the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled". This language clearly means the recognition and subsistence of pre-existing rights either under the Muhammadan or the Hindu Law and it does not create new rights. It, however, removes the penalty of losing existing rights which the personal law imposes on the party or parties by reason of difference in religion. The removal of penalty is clearly intended for the benefit of the party who has incurred the penalty and not for others.

We think that the interpretation which we have placed on Act XXI of 1850 is also supported by the decision of their Lordships of the Judicial Committee in the case of *Khunni Lal v. Kunwar Gobind Krishna*

Narain (3). A few facts of that case may first be stated. A joint Hindu family possessing of considerable property within the British territories consisted of two persons Ratan Singh, and his son, Daulat Singh. Each of these two persons was thus entitled in joint tenancy to a moiety of the family property. In 1845, Ratan Singh abandoned Hinduism and adopted the Muhammadan faith. Change of religion, however, made no change in the status of the family until the death of Daulat Singh in January, 1851. Daulat Singh left him surviving a widow named Sen Kuar and two daughters, Ohhattar Kuar and Mewa Kuar. Ratan Singh died in September, 1851. Thereafter the name of his widow, Raj Kuar, was recorded in the revenue register in place of her deceased husband in respect of the entire family property. After the death of Sen Kuar and also of Raj Kuar a settlement was arrived between the daughters of Daulat Singh and one Khairati Lal, who was the son of a daughter of Ratan Singh. According to this settlement Ohhattar Kuar and Mewa Kuar obtained an 8½-annas share while Khairati Lal received the remaining 7½-annas share. Possession followed in accordance with the allotment. Ohhattar Kuar died first and then died Mewa Kuar in 1899. The plaintiffs in that case were the sons of Mewa Kuar. The defendants were transferees from Khairati Lal. The case of the plaintiffs was that on the abandonment of Hinduism by Ratan Singh he forfeited his half share in the joint property which vested in Daulat Singh. They claim the entire 16-annas in the character of heirs of Daulat Singh, challenging the validity of the compromise under which Khairati Lal had acquired the 7½-annas share. On the question of the effect of the abandonment of Hinduism by Ratan Singh on his rights in the joint property their Lordships of the Judicial Committee interpreted s. 9 of Regulation VII of 1832, and the provisions of Act XXI of 1850. After having quoted these enactments their Lordships said as follows:—

"The intention in both enactments is perfectly clear; by declaring that the Hindu or Muhammadan Law shall not be

(3) 10 Ind. Cas. 477; 38 I. A. 87; 15 O. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 33 A. 356 (P. C.).

permitted to deprive any party not belonging to either of those persuasions of a right to property, or that any law or usage which inflicts forfeiture of rights or property by reason of any person renouncing his or her religion, shall not be enforced, the Legislature virtually set aside the provisions of the Hindu Law which penalizes renunciation of religion or exclusion from caste. The effect of the legislation of 1832 and 1850 was that on Ratan Singh's abandonment of Hinduism Daulat Singh did not acquire any enforceable right to his father's share in the joint family property which he could either assert himself or transmit to his heirs for enforcement in a British Court of Justice." This pronouncement clearly means that Daulat Singh by reason of conversion of his father did not come to possess any new right in the family estate which he did not otherwise possess. It further means that Ratan Singh's rights in the family property were not forfeited by the conversion. The enactments simply removed the penalty of forfeiture of rights imposed by the personal law on conversion.

The learned Advocate for the appellant strenuously pressed on us the decision in the case of *Bhagwant Singh v. Kallu* (4) and contended that it afforded complete support to his client's case. One of the two learned Judges who formed the Bench was Sir John Edge and he delivered the judgment. The other learned Judge simply recorded his concurrence. We feel that out of respect to so eminent a Judge as Sir John Edge we must examine the decision with great care. We have done so and have come to the conclusion that the decision in the first instance is inapplicable to the facts of this case and in the second instance we find ourselves, with utmost respect, in disagreement with grounds of the decision. The facts were these. In that case the grand-father of the plaintiff, Hari Singh, had three sons, Mohan Singh, Bacha Singh, and Mahipat Singh. Mahipat who was the father of the plaintiff, was converted to Muhammadanism. The property in suit had belonged to Bacha Singh. The plaintiff was a Muhammadan as was his father, Mahipat. Bacha Singh on his death was succeeded by his widow, Banño, who had alienated

the property which had devolved on her by right of inheritance. The alienees were the defendants. The plaintiff Kallu in support of his title to the estate of Bacha Singh relied upon the provisions of Act XXI of 1850. This was upheld by the High Court at Allahabad.

It will be seen that on the fact the case before us is materially different from the case under consideration. In that case the claimant's title was sought to be defeated on the ground that his father had embraced Islam and, therefore, the right of inheritance which would have devolved upon the plaintiff in the estate of his uncle, Bacha Singh, was killed by reason of the conversion. This defence was sought to be supported by the only argument that Act XXI of 1850 would have saved the situation only if the plaintiff had renounced his religion. The argument was repelled on two grounds. It was observed that the argument, if sound, would have the effect of cutting down or curtailing the principle of s. 9 of Regulation VII of 1832. This could not be allowed for the reason that "no one can read s. 9 of Regulation VII without seeing that if Mr. Bajpai's argument is correct the operative portion of the Act, instead of extending the principle to the rest of the Company's provinces, would have limited the relief it was intended to extend." With great respect the preamble nowhere expresses the intention of extending the scope of the principle. The extension intended is only of the territorial limits and not of the principle. The second ground was that "if the latter part of the section was restricted to the protection of the right of inheritance of the persons renouncing their religion or being excluded from caste, their case was covered by the words of the early part of the section." With great respect again we do not agree with this view. As we have already shown, the first portion of the section relates to the forfeiture of rights, that is vested rights, by reason of change in religion of the person in whom those rights reside and prevents forfeiture of such rights. The latter portion of the section relates to rights of inheritance before the opening of succession and protects the loss of such rights of the person who has renounced his religion or been excluded from caste while he occupies the status of an heir *simpliciter*. We are clearly of opinion

(4) 11 A. 100; A. W. N. (1888) 288; 6 Ind. Dec. (N. S.) 492.

that the words "renouncing his or her religion" apply to both classes of cases, that is the law affords against the forfeiture of vested rights and protection against the loss of status as an heir and in both cases of the person who renounces his or her religion. The Act of 1851 was recently interpreted in the sense in which we have interpreted it by the High Court of Madras in *Vaithilinga Odayar v. Ayyathorai Odayar* (5) and the Allahabad case was dissented from. The decision of the High Court at Lahore in the case of *Rupa v. Sardar Mirza* (6) was also quoted on behalf of the appellant. In that case the learned Judges simply followed the decision in the Allahabad case and advanced no fresh arguments in support of the conclusion. There are other decisions for the opinion which we have formed and they are noted in the judgment of the trial Court. It will serve no usual purpose to recapitulate them in this judgment.

The result is that we uphold the decree of the trial Court and dismiss the appeal with costs.

A. N. A.

Appeal dismissed.

(5) 37 Ind. Cas. 753; 40 M. 1118.

(6) 55 Ind. Cas. 420; 1 Lah. 376; 88 P. W. R. 1920.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 318 OF 1927.

December 16, 1927.

Present :—Mr. Justice Pullan.

MIRZA ABID HUSAIN KHAN—

DEFENDANT—APPELLANT.

versus

SRI THAKURJI UNDER THE MANAGEMENT

OF Musammat ROOP DEVI—

PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Want of jurisdiction to decide an issue—Decision of Court on such issue—Res judicata.

Where a Court decides an issue which it is not competent to decide, its decision must be regarded as an *obiter dictum* and cannot operate as *res judicata*. [p. 895, col. 2.]

Midnapur Zemindary Co., Ltd. v. Naresh Narayan Roy (1), distinguished.

Appeal against the judgment and decree of the Subordinate Judge, Mohanlalganj, Lucknow, in Regular Appeal No. 40/89 of 1927, dated the 28th July, 1927, confirming the decree of the Second Munsif, in addition to strength, Lucknow District, dated the 5th of March, 1927.

Mr. Radha Krishna, for Mr. Ali Zaheer, for the Appellant.

Dr. J. N. Misra, and Mr. Salig Ram, for the Respondent.

JUDGMENT.—The plaintiff in this suit is an under-proprietor who has brought a suit for a *nankar* allowance of Rs. 50 against the *zemindars*. The lower Courts have decreed the claim and an appeal has been filed on many grounds. It is now, however, admitted that most of those grounds are ineffective, because it cannot be contended in view of the terms of the Oudh Rent Act that a suit for *nankar* cannot be brought in a Civil Court. The learned Counsel for the appellant after conceding this point urges that certain decisions of the Revenue Courts should be held to operate as *res judicata*. It appears that the *zemindar* sued for arrears of rent and the defendant in that suit, who is the present plaintiff, pleaded that he was entitled to a sum of Rs. 50 as a set-off on account of *nankar*. The Revenue Courts have found that, as a suit for *nankar* does not lie in the Civil Court, such a set-off cannot be awarded, but they also went out of their way to hold that the present plaintiff had no claim for *nankar*, because no such right was contained in the settlement decree. I have been asked to find on the authority of their Lordships of the Privy Council in *Mindnapur Zemindry Co. Ltd. v. Naresh Narayan Roy* (1) that this finding of the Revenue Courts is binding, because it is an issue raised by the present plaintiff herself, but I am not prepared to find that that ruling is in any way applicable to a case where a decision has been passed by a Court on an issue which it was not competent to decide. In my opinion such a finding must be regarded as an *obiter dictum*, and it cannot operate as *res judicata* in the present suit. When the plea of *res judicata* is disposed of it only remains to be seen whether the plaintiff had valid claim for *nankar* as against the *zemindar*. The lower Appellate Court has shown that, although the settlement decree was silent as to the right of *nankar*, the decree was itself based upon a report of the Assistant Commissioner which clearly asserted this

(1) 80 Ind. Cas. 827; 51 I. A. 293; A. I. R. 1924 P. C. 144; 26 Bom. L. R. 651; 47 M. L. J. 23; 51 C. 631; 35 M. L. T. 169; (1924) M. W. N. 723; 29 O. W. N. 34; 20 L. W. 770; L. R. 5 A. (P. C.) 137; 23 A. L. J. 76; 3 Pat. L. R. 193; 6 P. L. T. 750 (P. C.).

right and in appeal the Commissioner passed an order showing that, as a matter of fact, the payment of *nankar* was confirmed by the Settlement Officer. It is also proved that this sum has continued to be recorded as due to the plaintiff in the revenue papers. There is, therefore, no ground to interfere with the decrees of the Courts below. The plaintiff has been proved to be entitled to this *nankar* and she can bring her case for it in the Civil Court. I dismiss this appeal with costs.

G. H.

*Appeal dismissed.***ODDH CHIEF COURT.**

SECOND CIVIL APPEAL No. 273 OF 1927.

December 16, 1927.

Present:—Mr. Justice Pullan.

GUR SARAN AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

JAGANNATH AND ANOTHER—DEFENDANTS

—RESPONDENTS.

Landlord and tenant—Lease by thekadar—Lessee's right to possession as against landlord.

A tenant who has come into possession of land under a *thekadar* without having any reason to believe that the *thekadar* was acting contrary to law in leasing the properties to him is entitled to hold the land as against the landlord until he is ejected according to law.

Lal v. Raja Udey Partap Udaya Dutta Singh (1), followed.

Second appeal from a decree of the First Subordinate Judge, Bahraich, dated the 9th May, 1927, modifying that of the Munsif, Bahraich, dated the 6th December, 1926.

Mr. Zahur Ahmad, for the Appellant.

Messrs. A. P. Sen and Radha Krishna, for the Respondents.

JUDGMENT.—This is a second appeal from an order of the First Subordinate Judge of Bahraich who allowed an appeal from a decision of the Munsif of Bahraich. The facts of the case are as follows. This village belongs to the Nanpara Estate which was at that time under the Court of Wards. The village was on *theka* till the end of the year 1331 *Fasli*, corresponding to the 30th June, 1924. The *thekadar* had leased certain land to the defendants in this case for three years from 1329 *Fasli*. Shortly before the expiry of the year 1331, that is in March, 1924, the Special Manager of the Nanpara Estate gave a lease of the land in suit to the plaintiffs. It has now been found that the land for which the lease was given to the plaintiffs includes certain land which was in the cultivation of the

defendants. The plaintiffs have been unable to obtain possession and they have brought this suit for damages against defendants. The first Court decreed the suit but the lower Appellate Court allowed the appeal mainly on the ground that defendants were entitled to hold the land until they were legally ejected and, as no such ejection according to law had ever taken place the plaintiffs could not claim possession in virtue of their lease. The main argument in appeal is that the *thekadar* had, under the terms of his *theka*, no right to let land out to the defendants and that, therefore, these persons have no right, and the plaintiffs must be held entitled to the land in virtue of their lease from the landlord. It certainly appears that the terms of the *theka* do not contemplate that the *thekadar* should create new tenancies, and there is a clause in the *theka* prescribing the penalty in case he should do so. But a tenant who cultivates the land direct from a *thekadar* has his rights, and this was held by the Board of Revenue in *Lal v. Raja Udey Partap Udaya Dutta Singh (1)*, where it is laid down that in such a case it is for the land owner to show as against the tenants who have been admitted to tenancy by the *thekadar* (a) that he restricted his *thekadar's* ordinary powers as a landlord and made restriction known to the tenants and (b) that the transactions between the *thekadar* and the tenants were not made in good faith in the ordinary course of village business and management. In the present case I would lay stress particularly on the second portion of the first clause and the whole of the second clause. When these defendants came into possession they had no reason to suppose that the *thekadar*, who put them in possession, was acting contrary to the terms of the *theka* and no step was taken by the landlord to interfere with their tenancy. As the landlord made enquires before giving the land to the plaintiffs, he should have ascertained that these defendants were in possession and he should have taken steps to secure their ejection according to law. Not only did he not do so but he disregarded his own lease in favour of the plaintiffs and accepted rents from these very defendants. In my opinion the decision of the Court below is correct, and I dismiss this appeal with costs.

A. N. A.

(1) S. D. No. 9 of 1892.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 58 B OF 1927.

November 18, 1927.

Present:—Mr. Kinkhede, A. J. C.

MAROTI SURYABHAN AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

RAIWANT RAO AND OTHERS—DEFENDANTS
—RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 6, 43—Hindu reversioner's interest, whether property—Transfer, validity of—S. 43, whether applicable—Limitation Act (IX of 1908), Sch. I, Art. 44—Void transfer of minor's property by guardian—Art. 44, whether applicable—Suit for setting aside transfer barred—Defence of invalidity, whether barred.

The interest of a reversioner expectant on the death of a Hindu female is a mere *spes successionis*, which is neither property nor clothed with the attribute of alienability incident thereto, and cannot, therefore, be validly transferred. [p. 898, col. 1.]

A transfer of such an interest is void *ab initio* and cannot be validated by recourse to the doctrine of estoppel. [p. 893, cols. 1 & 2.]

Sham Sundar Lal v. Achhan Kunwar (1), and other cases referred to.

Section 43 of the Transfer of Property Act has no application to such a transaction as the Transfer of Property Act does not regard *spes successionis* as property for purposes of transfer. [p. 898, col. 2.]

Where an alienation by a guardian is absolutely void, Art. 41 of Sch. I of the Limitation Act does not apply and the ward can bring a suit for possession against the alienee within 12 years of the date of sale. [p. 899, col. 1.]

The fact that the remedy of a suit to set aside a transfer is barred, does not necessarily bar the defence of invalidity of the transfer. [*ibid.*]

Lakshmi Doss v. Roop Lal (7), *Ramaswami Chettier v. Malleppa Reddiar* (8), *Rangnath Sakharum v. Govind Narasiva* (9) and *Minalal Shadiram v. Kharsetji Jivaji* (10), referred to.

Appeal against a decree in Civil Appeal No. 140 of 1926, of the First Additional District Judge, Akola, dated the 18th October, 1926, arising out of the decision in Civil Suit No. 154 of 1924 of the Third Sub Judge, Second Class, Akola, dated the 16th June, 1926.

Mr. G. P. Dick, for the Appellant.

Mr. M. B. Niyogi, for the Respondent.

JUDGMENT.—The plaintiffs are the appellants in this case. They base their title on a sale-deed executed on 11th January 1915 by one Bablaji, the husband of Musammatt Jani defendant No. 6, who was then a minor. The plaintiffs' case is that they were put in possession, of the property purchased by them, in November, 1919, but were unlawfully dispossessed by the defendants in July, 1920. Hence this suit was instituted on 28th June, 1924, for recovery of possession of the property from the defendants. Plaint is silent as

to how the property became the property of Musammatt Jani.

The defendant No. 1 contended that the property in suit was originally the property of Ganpat who died in 1911 leaving widow Musammatt Soni, mother Gopi and sister Jani. On his death his widow Soni inherited it, that as she was alive and Jani had only a contingent reversionary interest at the date of sale there could be no transfer in view of s. 6 of the Transfer of Property Act in plaintiffs' favour, and that plaintiffs acquired no title under the sale-deed. Defendants Nos. 1 and 2 purchased one-fourth share of the field in suit from Ganpat's widow Soni and she gifted another one fourth share to Maroti's temple defendant No. 4 the same day and the remaining half share was sold by her to defendant No. 3 on 14th April, 1919, and that ever since their purchase defendants Nos. 1 to 4 had been in peaceful and uninterrupted possession of their respective shares. On 17th April, 1924 defendant No. 1 sold 8 acres of the land purchased by him and his brother defendant No. 2 to Jani defendant No. 6, and that ever since she had been in possession thereof. Defendant No. 5 had purchased one-eighth share in the field in suit under a sale-deed dated 11th February, 1915, from defendant No. 1.

There were several oral pleadings, the gist whereof is that the property in suit originally belonged to one Baliram, that on his death it came to Ganpat who died in 1911 and that on his death without issue his widow Soni inherited it, but that she re-married in 1919 and that Jani the sister of Ganpat had, therefore, only *spes successionis* in 1915, when the property was sold by her guardian. Defendants denied that plaintiffs had ever any possession over the property and that they were dispossessed. Defendants also pleaded an oral Will in favour of Ganpat. The plaintiffs denied the alleged Will in favour of Ganpat; but asserted that according to the oral Will of Baliram the property had become the property of Gopi. On behalf of Jani, who was joined as a party, a defence was raised that the transaction of sale in favour of plaintiffs was not real or for consideration and was not binding on her in the absence of any legal necessity or benefit. To this the plaintiffs replied that this defence of Jani was barred inasmuch as she did not

sue to set aside the sale within three years of her attaining majority. There were several other pleadings but with them I am not concerned for the purposes of second appeal. The pleadings reproduced above sufficiently cover the points actually argued before me.

As regards the question of oral Will of Baliram being in favour of Ganpat or Gopi, the Courts below have come to the conclusion that Baliram willed away the fields in suit to Ganpat and not to Gopi. It may here be mentioned that Gopi admittedly died in 1913 when Soni, the widow of Ganpat, had not re-married. If the alleged Will in favour of Gopi had been proved then Gopi would have been fresh stock of descent and her daughter Jani would have succeeded on her death in 1913 to the field as her *stridhan*. But in view of the finding that Baliram's oral Will was in favour of Ganpat and, that he died in 1911, Ganpat was the last male owner and as such succession had to be traced to him, and, Jani being only his sister, his widow Soni had a more preferential claim to the property which devolved on her in preference to Ganpat's mother Gopi or sister Jani; Soni thus continued to be the owner of the property so long as she had not either sold it away or got herself re-married. As Ganpat's mother died before Son's re-marriage, succession could open out in favour of Jani in case she chanced to be alive at Soni's civil death which she brought about in 1919. So the position is clear that at no time prior to 1919, much less on 11th January, 1915, when her guardian sold the property on her behalf, Jani had any transferable interest in the property in suit.

The Courts below have held, and I think rightly, that the interest of Jani was of Hindu reversioner expectant upon the death of a Hindu female and could not be validly transferred by her. It is no more than a mere *spes successionis* which is neither property nor clothed with the attribute of alienability incident thereto. It was not, therefore, open to her or her guardian, when she was a minor, to bargain with it, or bind herself by an agreement in respect thereto. Such a dealing with estate was void and not binding on her, even by estoppel or otherwise when the succession opened out to her on her (Soni's) re-marriage in 1919. The transfer being void, it could not be

validated by recourse to the ordinary doctrine of estoppel. This position is established beyond doubt by the series of decisions of their Lordships of the Privy Council: *Sham Sundar Lal v. Achhan Kunwar* (1), *Janaki Ammal v. Narayanasami Aiyar* (2), *Harnath Kuar v. Indar Bahadur Singh* (3), *Ananda Mohan Roy v. Gour Mohan Mullick* (4), *Amrit Narayan Singh v. Gaya Singh* (5) and *Gur Narayan v. Sheo Lal Singh* (6).

It is contended on behalf of the appellants that Jani's guardian erroneously represented that Jani was authorised to transfer the property in suit in 1915 and, that as Jani actually acquired interest in 1919, she is under the provisions of s. 43, Transfer of Property Act, bound to make good the transfer out of her subsequently acquired interest; to which the respondents reply, and I think rightly, that s. 43 has no application, for the simple reason that the Transfer of Property Act does not regard *spes successionis* as "property" for purposes of transfer. I, therefore, uphold the decision of the lower Appellate Court that the sale by Jani's guardian was void and inoperative, and gave no title to the property in suit to plaintiffs. The necessary consequence of this is that plaintiffs had no right to sue and, therefore, their present suit was rightly dismissed.

The next point which the plaintiffs urged was that the defence as to the invalidity of the sale, dated 11th January, 1915, was not open to Jani, as she had not sued within three years of her attaining majority to set aside the sale made by her husband, who was her lawful

(1) 21 A. 71; 25 I. A. 183; 2 O. W. N. 729; 7 Sar. P. O. J. 417; 9 Ind. Dec. (N. S.) 755 (P. O.).

(2) 37 Ind. Cas. 161; 39 M. 634 at p. 638; 20 M. L. T. 168; 31 M. L. J. 225; 14 A. L. J. 997; (1916) 2 M. W. N. 188; 20 O. W. N. 1223; 18 Bom. L. R. 856; 24 C. L. J. 309; 4 L. W. 530; 43 I. A. 207 (P. O.).

(3) 71 Ind. Cas. 629; 45 A. 179; A. I. R. 1922 P. O. 403; 9 O. & L. A. I. R. 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 O. L. J. 346; 27 O. W. N. 949; 50 I. A. 69; 18 L. W. 383; 26 O. O. 223; 33 M. L. T. 261; 5 P. L. T. 281; 2 Pat. L. R. 237 (P. O.).

(4) 74 Ind. Cas. 499; 50 O. 929; 21 A. L. J. 718; 4 P. L. T. 609; A. I. R. 1923 P. O. 189; (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L. R. 1269; 33 M. L. T. 365; 50 I. A. 239; 28 O. W. N. 713; 40 O. L. J. 10 (P. O.).

(5) 44 Ind. Cas. 408; 45 O. 590; 23 M. L. T. 142; 22 O. W. N. 409; 27 O. L. J. 296; 34 M. L. J. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 306; 7 L. W. 581; 20 Bom. L. R. 546; 45 I. A. 35 (P. O.).

(6) 49 Ind. Cas. 1; 46 O. 566; 17 A. L. J. 66; 26 M. L. J. 88; 9 L. W. 335; 23 O. W. N. 521; 1 U. P. L. R. (P. O.) 1; 46 I. A. 1; 12 Bur. L. T. 122 (P. O.).

guardian. I think that the finding that at the date of the sale (*viz.*, 11th January, 1915) the property in suit was not the property of Jani is fatal to this contention. Article 41, Limitation Act, applies to a suit by a ward to set aside a transfer of property by his guardian; this must necessarily relate to property in which the minor is interested or of which the minor is the owner. The sale being void, Art. 41 was inapplicable and a suit could be brought by the minor to recover possession from the plaintiffs within a period of 12 years. It may be observed that even though the remedy of a suit may be barred, the defence of invalidity of the transfer is not necessarily barred: *cf. Lakshmi Doss v. Roop Lalul* (7), *Rameswami Chettiar v. Mallappa Reddiar* (8), *Rangnath Sakharam v. Govind Narasiva* (9) and *Mineral Shadiram v. Kharsetji Jivaji* (10).

Here the defendants Nos. 1 to 5 are claiming under transfers by Musammam Soni, and Jani herself as stated above claims to possess 8 acres under a title derived from Soni's alienor. Thus none of the defendants including Jani can be said to be precluded from urging his or her defence merely because Jani may have failed to set aside the so-called transfer effected by her husband in 1915 during her minority of property which was not then hers, but which was yet to come to her and actually devolved on her in 1919.

The appeal fails and is dismissed with costs.

G. R. D.

Appeal dismissed.

(7) 30 M. 169; 17 M. L. J. 19; 2 M. L. T. 4.
(8) 59 Ind. Cas. 947; 43 M. 760 at pp. 776, 777; (1920) M. W. N. 572; 39 M. L. J. 350; 28 M. L. T. 170; 12 L. W. 475 (F. B.).

(9) 28 B. 639; 6 Bom. L. R. 592.

(10) 30 B. 395; 8 Bom. L. R. 296.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 35 OF 1926.

October 31, 1927.

Present :—Mr. Findlay, J. C.

RAJE BAHADUR RAGHOJI RAO AND

OTHERS—DEFENDANTS—APPELLANTS

versus

SITARAM DAJIBA PANDE—PLAINTIFF

—RESPONDENT.

Pensions Act (XXIII of 1871), ss. 3, 4, 5, 6, 28—Charitable grant—Management entrusted to trustees—Suit to recover moneys under grant—Collector's certificate, whether necessary—Suit filed without certificate,

whether ab initio bad—Procedure—Construction of the Act, principles relating to.

Suits relating to grants for religious or pious purposes are not outside the purview of s. 4 of the Pensions Act. [p. 901, col. 2.]

Miya Vali Ulla v. Sayed Bava Saheb (1), *Harnam Das v. Faiyazi Begam* (7) and *Vyankaji v. Sarjarao Apajirao* (8), followed.

Venkateswara Aiyar v. Secretary of State for India (6), dissented from.

The mere circumstance that a grant is not directly paid by the British Government but is distributed through a non-official agency does not take the case out of the purview of the Pensions Act. [p. 900, col. 2.]

Miya Vali Ulla v. Sayed Bava Saheb (1) and *Satrapi Dongerchand Firm v. Mahdo Singh* (2), relied on.

A suit falling within the purview of the Pensions Act, which is filed without a certificate from the Collector is not bad *ab initio* and liable to be dismissed summarily but the plaintiff should be given an opportunity of producing the certificate at a later stage. [p. 901, col. 2.]

The Pensions Act, being one which tends to restrict the ordinary legal rights of the subject to have recourse to the Court for remedy of grievances, is one to be strictly construed. [p. 900, col. 2.]

Ravjinarayan Mandlik v. Dadaji Bapuji Desai (3) and *Gurushidgavda v. Rudragavda* (4), referred to.

Appeal against a decree of the Additional District Judge, Nagpur, dated the 12th July, 1926, in Civil Appeal No. 15 of 1926.

Sir B. K. Bose, Kt., and Mr. A. D. Pande, for the Appellants.

Messrs. M. R. Bobde and W. R. Puranik, for the Respondent.

JUDGMENT.—The plaintiff-respondent, Sitaram Dajiba Pande, brought the present suit in the Court of the Second Subordinate Judge, Second Class, Nagpur, as *wahiwatdar* of the Shri Jagriteshwar Deosthan at Nagpur. His claim was for three instalments of the years 1922, 1923 and 1924 of Rs. 23-4 each, which he claimed, were due him in respect of his services as *wahiwatdar* of the temple. The present defendant-appellants are admittedly the trustees who formed a committee of the temple. The preliminary objections were raised in the first Court, which need be mentioned here. One of these was that the consent of the Advocate-General under s. 92 of the Civil Procedure Code was necessary to the institution of the suit. The Subordinate Judge held that the suit was barred, such consent having not been obtained, and the lower Appellate Court held, on the contrary, that s. 92, Civil Procedure Code, did not apply. This point was not pressed for the defendant-appellants on the present appeal coming on for hearing.

I am, therefore, solely concerned in the present appeal with the question of

whether or not the present suit is maintainable without a certificate from the Collector, having regard to the provisions contained in ss. 5 and 6 of the Pensions Act of 1871. The Judge of the first Court held that the real plaintiff was, in reality the deity itself and that, as the deity claims the amount from the trust fund, which has been set apart by the British Government and placed under the control of the defendant-trustees, [vide the indenture, dated 24th October, 1866 (D. 1)] the payment in essence remained one of the nature which would fall under the Pensions Act quoted above. In those circumstances, he held that the suit was barred for want of a certificate from the Collector.

The Additional District Judge, on the plaintiff appealing to his Court, took the view that the plaintiff has described himself as the *wahiwatdar* of the temple but that, in reality, the gist of his claim is on the basis of his being a hereditary servant of the temple and that, on this basis, the provisions of the Pensions Act do not apply to the case. As a result of the remand of the case for further trial by the Additional District Judge, the defendants have now come up to this Court on appeal.

The present case raises a somewhat interesting point of law with regard to the construction to be placed upon the provisions of Act XXIII (Pensions Act) of 1871. It is perfectly clear that what the plaintiff claims is a part of a sum of Rs. 1,200 which under the indenture already referred to (D. 1), is annually payable for the support of the said temple. In this connection, it is apposite to refer to the history of the relations of Government with such religious institutions. Up to 1863, it may be said that Government was in direct charge of such institutions. The preamble of Act XX of 1863 shows the reasons why Government then decided to have itself relieved of this duty. This Act did not apply to the Central Provinces and apparently here another device was adopted for the purpose, arriving at the same end. Government had recourse to the expedient of executive orders in the matter, and apparently it was as a result of such executive orders that the indenture (D. 1) was executed in the year 1866. Under the said indenture, Government Promissory Notes of a value of Rs. 29,300 two hundred and ninety three thousands were

made over to the Bhonsla Raja and the income to be derived from these promissory notes was to be devoted to the upkeep of the institutions shown in the schedule to the indenture institutions, of which the present temple admittedly forms one. Under the indenture, the Bhonsla Raja, after receiving the Government Promissory Notes, was to endorse the same for the payment of the interest thereof to three of his officials who may be taken as equivalent to the present defendants. These officials were, in turn, to be responsible for allocating the income to the institutions covered by the indenture, and it was expressly provided in the deed that, if the institutions should cease to exist, the securities and the interest thereof should revert and belong to the Government of India. The case for the defendant-appellants, therefore, is that, in these circumstances, as the money formed part of a grant made by the former Government as well as by the British Government, the provisions of the Pensions Act, having regard to s. 4 thereof, apply *proprio vigore* and the suit was not cognizable without the sanction of the Collector. It is admitted that, under the arrangement made in the indenture, the interest for the upkeep of the institutions, is not directly paid by the British Government but is distributed through a non-official agency. It has, however, been urged that the mere circumstance that this is so does not take the case out of the purview of the Act *cf.* *Miya Vali Ulla v. Sayed Bava Saheb* (1) and *Satraji Dongerchand Firm v. Mahdo Singh*. In the latter case, it was held that a pension payable to a political prisoner by the Government of India by a statutory obligation to maintain that person does not cease to be a political pension because the Government of India, under a special arrangement, has the money remitted by a Foreign State to the Government Treasury for payment.

On behalf of the respondent it has been urged so far quite correctly that the Pensions Act, which is one, which tends to restrict the ordinary legal rights of the subject to have recourse to the Court for remedy of grievances, is one to be strictly construed *cf.* *Ravjinarayan*

(1) 22 B. 496; 11 Ind. Dec. (N. S.) 913.

(2) 103 Ind. Cas. 339; 50 M. 711 at p. 717; 25 L. W. 640; 52 M. L. J. 622; (1927) M. W. N. 374; 38 M. L. T. 299; A. I. R. 1927 Mad. 604.

Mandlik v. Dadaji Bapuji Desai (3) as well as *Gurushidgavda v. Rudragavdati* (4). I have also been referred to the decision of Banerji and Tudball, J.J., in *Amna Bibi v. Najmunnissa Bibi* (5) but the facts of that case do not seem to me to be peculiarly helpful for the decision of the question of principle I am concerned with. Therein, certain immovable property had been granted in lieu of a pension and the *sanad* provided that, upon the death of the original grantee, the estate would be continued in perpetuity as an hereditary holding. Moreover, at the desire of the grantee, revenue was assessed thereon and the members of the family had treated it as ordinary *zemin-dari* property subject only to the payment of Government Revenue. In those very special circumstances, the learned Justices held that the *zemin-dari* in question was not a pension within the meaning of s. 11 of the Pensions Act. It has been urged, in short, on behalf of the plaintiff-respondent that what was meant to be covered by the Pensions Act were payments by Government which are at its disposal and which it can discontinue at any time.

After full consideration, however, of the question, which is by no means free of difficulty, I am of opinion that this *ex gratia* grant by Government without consideration cannot be looked on or regarded as one of which Government has divested itself of all responsibility. The indenture provides for the money being properly applied and it further provides that the money will revert to Government if the institutions cease to exist. What it has, in reality, done is to hand over the management of the disbursements to the defendant-appellants whether they be regarded as agents or as trustees. It is perhaps, a moot point, but, as present advised, I am of opinion that Government could at any moment, by an act of State, recall the indenture and discontinue the payment. In essence, the payment in question is, in reality, one made by Government and it seems to me to be immaterial whether that payment is made direct or through the instrumentality of the present defendants and whether they be designated trustees or agents. The grant is, in reality, a purely voluntary and charitable one and not contractual. Whatever contract exists in the

matter, only exists between the Bhonsla Raja and the three persons appointed under the indenture to carry out the arrangement and make the disbursements. The object of the Pensions Act, as stated in the Legislative Council when the Bill was introduced, was to reserve to the Government the determination of all questions affecting grants of money, the bestowal of which was an act of grace or State policy on the part of the Ruling Powers. In those circumstances, I am of opinion that the present suit required the certificate of the Collector before it could be instituted.

It has also been suggested, on the strength of the decision in *Venkateswara Aiyar v. Secretary of State for India* (6) that a suit like the present one relating to an endowment for religious or pious purposes does not fall within the purview of s. 4 of the Pensions Act. For my own part, with all deference, I am unable to accept the various decisions of the Madras High Court on this matter, and I prefer to follow the view taken in *Miya Vali Ulla v. Sayed Bava Sabeel* (1) quoted above as well as many other decisions of that Court. I can see no reason why s. 3 of the Pensions Act should be arbitrarily limited in the manner suggested. Under the said provision, "grant of money or land-revenue includes anything payable on the part of Government in respect of any right, privilege, perquisite or office." The phraseology is perfectly general and I am unable to see any reason for excluding therefrom a grant for pious or religious purposes: cf *Harnam Das v. Faiyazi Begam* (7) and *Vyankaji v. Sarjarao Apajirao* (8). I am, therefore, of opinion that the present suit was not maintainable without a certificate from the Collector.

I do not think, however, that the Judge of the first Court was correct in summarily dismissing the suit as he did on this ground. The suit as such was not bad *ab initio* owing to the plaintiff's failure to produce the Collector's certificate. What the Subordinate Judge should have done was to give a reasonable adjournment to the plaintiff to enable him to obtain the required certificate. If the certificate was then obtained, the suit could proceed, but if it was refused the suit was bound to fail. The judgments

(3) 1 B. 523 at p. 529; 1 Ind. Dec. (N. S.) 345.

(4) 1 B. 531; 1 Ind. Dec. (N. S.) 351.

(5) 2 Ind. Cas. 100; 31 A. 382; 6 A. L. J. 519; 5 M. L. J. 388.

(6) 31 M. 12; 17 M. L. J. 549; 3 M. L. T. 104.

(7) 65 Ind. Cas. 645; 44 A. 354; 20 A. L. J. 172; 4 U. P. L. R. (A.) 22.

(8) 16 B. 537; 8 Ind. Dec. (N. S.) 837.

and decrees passed by both Courts are, therefore, set aside and the case will go back to the first Court for disposal of Civil Suit No. 131 of 1925 according to law and in conformity with the above remarks. Costs hitherto incurred in all Courts will follow the event.

A cross-objection has also been filed by the plaintiff-respondent to the effect that the lower Appellate Court was wrong in holding that *Musammam* Parbati was a necessary party to the suit. I agree, however, with the Judge of the lower Appellate Court that, if the position be that *Musammam* Parbati claims or may claim against the present plaintiff a right to perform all or some of the services which formed the basis of his claim, it is desirable in the interests of all parties that *Musammam* Parbati be joined either as a plaintiff or as a defendant as the case may be. If she does put forward any claim of the kind alleged and if she were not joined and subsequent litigation ensued between her and the plaintiff-respondent, needless trouble and confusion would arise. The cross-objection, therefore, fails and is dismissed. I allow no separate costs as regards the cross-objection. The parties will bear their own costs therein.

G. R. D.

Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 262 OF 1927.

December 12, 1927.

Present:—Mr. Hallifax, A. J. C.

Seth KASTURCHAND—APPLICANT

versus

SECRETARY MUNICIPAL COMMITTEE, BETUAL—NON-APPLICANT.

C. P. Municipalities Act (II of 1922), s. 66 (1) (n)
—“Circumstances within Municipal limits”, meaning of—Haisiyat Tax—Circumstances arising from agricultural property within the District, whether can be considered.

Under s. 66 (1) (n) of the C. P. Municipalities Act “the circumstances within certain limits” mean circumstances within those limits and not property giving rise to them and circumstances arising out of agricultural property situated in the same District (as the limits mentioned or elsewhere) are in that respect not different from circumstances arising out of other kinds of property.

Reference made by the Deputy Commissioner, Betual, dated the 3rd August, 1927.

Mr. M. B. Niyogi, for the Non-Applicant.

ORDER.—Under s. 83 (2) of the Municipalities Act the Deputy Commissioner of Betul has referred to this Court a question concerning the principles of the assessment of Haisiyat Tax on Seth Kasturchand under s. 66 of the Act. The same question is submitted in respect of the assessment on Seth Misrilal (Civil Reference No. 265 of 1927). Each of them lives in the Betul Municipality and owns villages outside the Municipality but in the Betul District from which he derives an income.

The question on which the Deputy Commissioner says he has reasonable doubt is no where formulated, but it is in respect of the words of cl. (n) of s. 66 (1), which says that a Haisiyat Tax can be imposed on residents within the limits of a Municipality “according to their circumstances and property within those limits.” It is stated in the reference that the assessee in each case “says that his *malguzari* villages are not property within the Municipal limits of Betul, nor can they be called circumstances within those limits” and that “the Municipal Committee on the other hand says that they constitute his circumstances within those limits.” The opinion expressed in the reference is that in the phrase under consideration, the words “within those limits” do not qualify the word “circumstances,” but only the word “property” and also that “the word ‘circumstances’ includes land revenue paid by the assessee.”

The mention of land-revenue in this last phrase and in other parts of the letter of reference is only a minor instance of the laxity of thought displayed all through the case. In the assessment it was found that the annual income from the villages was a certain sum of money, and that finding has been accepted by everybody. That sum happens to be the same as the land revenue payable on the villages, and indeed that fact was the basis of the finding, but we are in no way concerned with that.

But the cases themselves and the references in them have arisen out of such deplorably careless and distorted thinking that it can hardly be called thought at all. It has been assumed by everybody, even in the argument of the matter in this Court, that in one particular case, which is not very clearly defined, the word “circumstances” does not mean circum-

stances at all, but the source of the income which creates those circumstances and is the proper measure of them. The case so excepted seems to be the case of income derived from agriculture in the same District as that in which the Municipality is situated (or perhaps the same Province). It is not considered apparently that money received by the assessee in Betul is not a part of his "circumstances" if it is derived from agriculture in the Punjab or in England or from shares in a Mill in Manchester or even in another town of the Betul District.

It is always hard to explain the obvious, and I cannot see that the meaning of the words under discussion could possibly have been put more clearly, but perhaps the mistake that has been made can be explained in this way. The contention of the assessee, that his *malguzari* villages outside the limits of the Municipality cannot be called circumstances within those limits, is obviously correct, and that of the Municipality, that they constitute circumstances within those limits, obviously incorrect, villages cannot possibly be called circumstances nor can they constitute circumstances. But ownership of them can give rise to circumstances, which may exist in them or elsewhere, and we are concerned with the place where the circumstances exist not with the place where the property out of which they arise is situated. It is of course equally incorrect to say that the words "within those limits" do not qualify the circumstances, or that the circumstances include land-revenue payable.

If any further or more specific answer to the reference is required it may be stated as follows. When the Act speaks of circumstances within certain limits it means circumstances within those limits, and not property giving rise to them, and circumstances arising out of agricultural property (situated in the same District as the limits mentioned or elsewhere) are in this respect not different from circumstances arising out of other kinds of property.

It cannot be said that either party is more to blame than the other for the deplorable waste of time and money that has occurred in these futile proceedings. There will, therefore, be no order in respect of the payment of costs.

G. R. D.

Reference answered.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 24 OF 1927.

October 28, 1927.

Present:—Mr. Kinkhede, A. J. C.

Pandit GOPAL RAO AND OTHERS—

DEFENDANTS—APPELLANTS

versus

BABU AND ANOTHER—PLAINTIFFS—

RESPONDENTS.

Contract Act (IX of 1872), s. 23—Contract opposed to public policy—Burden of proof—Pleader lending money on interest, legality of—Rules of Judicial Commissioner, 1880, whether have retrospective effect.

If a contracting party alleges that an agreement entered into by him is opposed to public policy, it is for him to set out and prove the special circumstances which invalidate the contract. [p. 904, col. 2]

Bakshi Das v. Nadu Das (1) and *Sonba v. Ganesha* (2), followed.

Rules framed by the Judicial Commissioner of Central Provinces about the Enrolment of Pleaders and published in 1880 are not applicable to Pleaders who were enrolled before the date of their publication. [*ibid.*]

A money-lending transaction entered into by a Pleader cannot be held to be invalid or unenforceable in the absence of any statutory bar positively prohibiting a legal practitioner from being engaged in trade or business. [p. 905, cols. 1 & 2.]

First appeal against a decree of the Sub-Judge, First Class, Khandwa, dated the 22nd November, 1926, in Civil Suit No. 33 of 1925.

Mr. D. W. Kathalay, for the Appellants.

Mr. J. Sen, for the Respondents.

JUDGMENT.—The plaintiffs-respondents instituted the suit out of which this appeal arises on the basis of a registered mortgage-deed, dated 6th January, 1914, executed in the name of plaintiff No. 2 by Govindrao Reshimwale the deceased father of appellants Nos. 2 and 3 and cousin (by adoption) of appellant No. 1 in consideration of Rs. 5,000 advanced by the late Mr. Pyarelal Gangoli, Pleader of Khandwa, on the security of Govindrao's 8 annas share of certain property mentioned in the deed, with a condition of sale thereof in case of non-payment. The mortgage contains a stipulation for payment of simple interest annually and for compounding the interest in case of default. The principal sum was to fall due on the expiry of 10 years from the date of the mortgage. The first Court overruled the several defences taken and decreed the full claim except as to a small portion which was disallowed on the ground of mistakes in the calculation of interest.

The defendants are the appellants before

me. Their main contention is that the mortgage is void and against public policy on the ground that the late Mr. Pyarelal, Pleader, was the real mortgagee, but that he could not carry on money-lending under rules framed by the High Court under the Legal Practitioners Act. They also urged absence of legal necessity or benefit and took up a new plea in the shape of an additional ground that the plaintiffs-respondents were not entitled to compound interest under the terms of the mortgage on the principal sum of Rs. 5,000 before it fell due.

As to the additional ground of appeal, I think, the plaintiffs have expressly alleged in the plaint that they were entitled to charge compound interest on the whole debt and also framed their account on that basis. The only defence the defendants took as to this claim for interest was that there were mistakes in the calculation. They never challenged the operation of the stipulations as to payment of interest and compound interest. I do not think, I can entertain this plea for the first time here as the question of how the stipulation as to compound interest was to work, is a question of fact and the defendants were bound to take it as a specific plea in answer to the claim as laid. I, therefore, disallow the plea raised in the additional ground.

The plea of legal necessity or benefit would have been material had the property mortgaged been the joint property of defendants and the mortgagor. It is conceded before me that the finding of the lower Court that the 8-annas share mortgaged formed the separate and self-acquisition of Govindrao, the mortgagor; no question of benefit or legal necessity, therefore, strictly arises in the case. Even assuming that the property was treated by Govindrao as joint property of himself and his sons which, however, is not a fact, the mortgagee is sufficiently protected by the representations made and the reasonable enquiry by which the mortgagee had satisfied himself as to the need for the transaction of the mortgage in suit.

The lower Court has held that the mortgage was operative only against Govindrao's 8 annas share, and also observed that the remaining 8-annas share owned by appellant No. 1 remained unaffected by the mortgage; the learned Advocate for

the appellants, therefore, did not press the question of the mortgage not being binding against appellant No. 1.

Having disposed of minor points raised in this appeal, I now turn to the main defence repeated in the appeal, viz., of the mortgage being void and against public policy. The learned Advocate for the appellant was asked whether he would point out the particular rules by which he thought the mortgage transaction was governed, as different rules were framed by this Court from time to time. In short, he was asked to argue the case with reference to the specific rules applicable, as there was material difference in the rules in force at the date of the mortgage and the earlier rules. There is nothing on record to show when the enrolment of Mr. Pyarelal Gangoli as a Pleader of this Court took place, and whether any rules were then framed prohibiting legal practitioners from having any concern with money-lending business. The defendants have not at all framed their pleadings with reference to any particular rules framed by this Court. The result was that the learned Advocate found it difficult to bring the case under the rules now in force, or even under those in force at the date of the mortgage, as they would not apply to a practitioner already enrolled prior to the date of their publication in the Local Official Gazette which gave them the force of law.

If a contracting party alleges that an agreement is opposed to public policy, it is for him to set out and prove those special circumstances which will invalidate the contract: *Bakshi Das v. Nadu Das* (1), cf. *Sonba v. Ganesha* (2) where this Court laid down that the burden of proving at the date of the transfer challenged as invalid under s. 325-A of the Civil Procedure Code of 1882, (r. 11 of Sch. III, Civil Procedure Code, 1908), the Collector was exercising any of the powers conferred on him by the Statute, was on the party challenging. Similarly here, it was the defendants' duty to set out and prove the invalidating circumstances which rendered the mortgage void on the ground of public policy. They have laid no proper basis in their pleadings for the defence of public policy and cannot catch at random

(1) 1 C. L. J. 261.

(2) 17 Ind. Cas. 887; 8 N. L. R. 182.

at this or that rule of the rules framed by this Court to justify the stand taken up by them. I am, therefore, of opinion that there is no allegation, much less is there any proof, before me in this case on which a finding that the mortgage in question was void and opposed to public policy could be based. I do not, therefore, feel myself called upon to decide the point sought to be argued in appeal for want of proper material.

The respondents were, however, asked whether they could state the approximate year of the enrolment of their father as a Pleader of this Court. They gave out that it was sometime about 1879. The appellants thereupon argued the case as if the rules published in 1880 were applicable to Mr. Gangoli. Reliance is placed on r. 16 of the rules. Suffice it to say that that rule speaks of the state of things obtaining at the date of the application for admission as a Pleader, and is not made applicable to the Pleaders enrolled prior to that date, as it casts on the applicant for enrolment the duty of stating the fact of his carrying on any trade or other business, in his application, and it also provides for the giving of a notice to the Judicial Commissioner if he subsequently enters into any trade or other business, and gives power to the Judicial Commissioner to pass such orders as he shall think fit. That rule nowhere lays down what the consequences of the failure to give notice shall be, and whether that will entail forfeiture of the right to enforce the transfer or mortgage or to realise the debt from the debtor.

The said Pleader having died, the files relating to his enrolment, etc., have been eliminated and there is, therefore, no means of knowing anything one way or the other as to any compliance or failure of compliance on his part with the requirements of the said rule. Even assuming that the rules of 1880 applied to this case there is nothing to show that the Pleader concerned did not comply with the requirements of the rules.

Without expressing any opinion as to the rules framed by this Court, it is sufficient for the purposes of this appeal to say that in the absence of any statutory bar positively prohibiting a legal practitioner from being engaged in trade or business, the mortgage in suit is valid and

enforceable, and the plaintiffs' claim was rightly decreed. The appeal fails and is dismissed with costs.

G. R. D.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 347-B of 1925,
December 5, 1927.

Present:—Mr. Pridaux, A. J. C.

SHEIKH AHMAD—DEFENDANT—

APPELLANT

versus

AMIRKHAN AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Specific performance—Agreement to sell by father—Possession given—Person in possession, whether can be ejected by son—Part performance, doctrine of.

A contract for sale of immoveable property made by a Hindu father can be specifically enforced against his sons if the father dies intestate and if the prospective vendee has obtained possession in pursuance of this agreement he can successfully resist a suit for ejectment by the sons.

Bansi Seth v. Pandoba (1), Bapu. Apaji v. Kashinath Sadoba (2) and Venkatesh Damodar v. Mallappa Bhimappa (3), followed.

The doctrine of part performance is applicable to such cases and the heir of the person who has benefited by the part performance of the contract will be estopped from taking advantage of the breach thereof.

Mahomed Musa v. Aghore Kumar Ganguli (4), Lakshmi Venkayamma Rao v. Venkatanarasimha Appa Rao (5), Kunti v. Gajraj Tewari (6) and Sandu Valji v. Bhikchand Surajmal (7), followed.

Under Art. 113 of Sch. I of the Limitation Act limitation for a suit for specific performance begins to run only from the date when the person, in whose favour the agreement is made learns that performance of the contract is refused.

Appeal against a decree of the Second Additional District Judge, Akola, dated the 25th August, 1925, in Civil Appeal No. 15 of 1923.

Mr. M. R. Bobde, for the Appellant.

Messrs. M. Y. Sharif and K. V. Deoskar, for the Respondents.

JUDGMENT.—This case was last before me as Second Appeal No. 18-B of 1924 when I remanded it to the lower Appellate Court. That Court has again decreed the plaintiffs' claim. The plaintiffs sued for joint possession of their 7/8th share in Survey No. 5/1 of Dawalpur in the Balapur Taluq. This field has been sold by their mother to defend-

ant after their father's death in 1911 when they were minors. The first Court had dismissed the plaintiffs' suit but in appeal it was successful. The defence was that Umraokhan, the father, entered into an agreement to the sale and was paid Rs. 200, and after his death his widow took another Rs. 300 and executed the sale-deed. There was a further plea that by an oral Will Umraokhan had directed his widow to dispose of the field to the defendant. The findings as they now stand are that the contract for sale was made by the plaintiffs' father and part of the consideration was received and the property was sold by the plaintiffs' mother in pursuance of the contract of the father. The lower Appellate Court finds that even so, the sale is not binding on the plaintiffs, and quotes cases to show that a *de facto* guardian of a Muhammadan minor cannot convey to another any interest in the minor's property. The Court finds that the mother was not appointed an executrix and that the mother is an heir and cannot validly sell the property in discharge of the debts of her deceased husband. The Judge finds that the plaintiffs' claim cannot, therefore, be resisted. On the finding that Umraokhan himself entered into a contract for sale, it seems to me, that the conclusion come to by the lower Appellate Court is wrong. The defendant is in possession under a valid contract made by the father in his favour and inheritance would be subject to the contract. Illustration to s. 27 (b) of the Specific Relief Act says:—

"A contracts to convey certain land to B by a particular date. A dies intestate before that date without having conveyed the land. B may compel A's heir or other representative-in-interest to perform the contract specifically."

Bansi Seth v. Pandoba (1) is a similar case, in which it was held "the sale was complete by the transfer of possession and payment of consideration". In *Bapu Apaji v. Kashinath Sadoba* (2) it was held that "where the plaintiff being the owner of certain immoveable property seeks to recover possession of that property and there are no facts operating to his prejudice it is a valid defence to the suit that the plaintiff has agreed to sell the property to the defendant, the agree-

ment being at the date of suit still capable of specific enforcement, but there being no registered conveyance passing the property to the defendant, who has taken possession under the agreement for sale", and in *Venkatesh. Damodar v. Mallappa Bhimappa* (3) a similar case, it was held that even if defendant's right to obtain specific performance had become time-barred, the defendant was entitled to remain in possession against the plaintiffs.

Under Art. 113 of the Limitation Act the date for commencement of limitation against the defendant would be when he learnt that performance of the contract was refused and, therefore, there is no question here of defendant's right of specific performance being barred by time. The doctrine of part performance also seems to be applicable to the present case: see *Mahomed Musa v. Aghore Kumar Ganguli* (4) *Lakshmi Venkayamma Rao v. Venkatanarasimha Appa Rao* (5) and *Kunti v. Gajraj Tewari* (6) and to these cases may be added *Sandu Valaji v. Bhikchand Surajmal* (7).

In the present case, the mother gave the defendant possession under the contract entered into by her husband and though the deed of sale does not mention that she executed that document also on behalf of her minor sons, the present plaintiffs, it is clear, that she did so in pursuance of her husband's agreement. The alienation is made not on the woman's own account but in discharge of an obligation made by her husband and as regards the present plaintiffs in pursuance of a contract made by their ancestor. Under these conditions, it seems to me, the defendant's possession cannot be disturbed: *Hasan Ali v. Mehdi Husain* (8).

It seems to me clear if the mother had not put the defendant in possession and

(3) 66 Ind. Cas. 868; 46 B. 722; 24 Bom. L. R. 242; A. I. R. 1922 Bom. 9.

(4) 28 Ind. Cas. 930; 42 C. 801; 17 Bom. L. R. 420, 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

(5) 34 Ind. Cas. 921; 39 M. 509; 20 C. W. N. 1054; 14 A. L. J. 797; 31 M. L. J. 58; (1916) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651; 24 C. L. J. 279; 43 I. A. 133 (P. C.).

(6) 83 Ind. Cas. 297; 46 A. 817; 22 A. L. J. 779; A. I. R. 1924 All. 826; L. R. 5 A. 568 Civ.

(7) 75 Ind. Cas. 118; 47 B. 621; 25 Bom. L. R. 381; A. I. R. 1923 Bom. 473.

(8) 1 A. 533; 1 Ind. Dec. (N.S.) 368.

(1) 12 C. P. L. R. 154.1

(2) 39 Ind. Cas. 103; 41 B. 438; 19 Bom. L. R. 100.

conveyed the field to him, a suit by the defendant for specific performance of his contract with Umraokhan against the widow and her minor sons would have been bound to be decreed. It is here argued for the respondents that one co-heir cannot dispose of the whole property, i. e., the property of herself and her co-heirs. That contention I will not deny. But in the present case the conveyance was made in fulfilment of an agreement entered into by the husband and father. It is true that a guardian cannot increase the liabilities of minors but in this case the mother only did what she and her minor sons could have been forced to do.

In my view of the case the lower Appellate Court's decision is erroneous. I, therefore, set it aside and restore the decision of the trial Court, dismissing the plaintiffs' claim with costs. The respondents here will pay the appellants' costs in all three Courts.

A. N. A.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 317 OF 1927.

January 3, 1928.

Present:—Mr. Ghulam Mohiuddin, A. J. C.
EMPEROR—APPLICANT

versus

RAGHUNATH AND ANOTHER—NON-
APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 145—Evidence not discussed—Reasons for decision not given—Order, legality of—Evidence—Roznamcha reports, whether evidence of facts mentioned.

An order under s. 145 of the Criminal Procedure Code, which only contains a very brief statement of some of the facts of the case, does not discuss the evidence adduced by the parties and states no reasons is not a decision as required by law.

Roznamcha reports are not evidence of the facts mentioned in the reports which must be proved like other facts.

Criminal reference by the Sessions Judge, Raipur, under s. 438 of the Criminal Procedure Code, on the application by Bori against an order of the First Class Magistrate, Bilaspur under s. 145 of the Criminal Procedure Code in Criminal Case No. 27 of 1927, dated the 20th June, 1927.

ORDER.—The order dated 20th June, 1927, passed by Mr. Purshottam Lal, Sub-Divisional Magistrate, Bilaspur, in Miscel-

laneous Criminal Case No. 27 of 1927 gives no reasons for the decision he has arrived at. The order only contains a very brief statement of some of the facts of the case, does not discuss the evidence adduced by the parties and states no reasons as to why the claim of actual possession by the said Raghunath Singh is true. Such an order is not a decision as required by the law and must be set aside.

The preliminary order dated 31st March, 1927, does not contain a proper description giving dimensions and boundaries of the land in dispute. This must be done now. The sale-deed dated 13th March, 1927 filed by Bori is about a plot 120 cubits by 20 cubits, while Bhaorao Prasad says that he had given a plot 60 cubits by 14 cubits to Raghunath Singh, it is thus clear that the parties are not agreed about the dimensions of the plot in dispute.

Bori in his written statement dated 16th May, 1927, para. 4, stated as follows. "Hence there is no fear of the breach of the peace" Raghunath Singh did not say anything about the likelihood of the breach of the peace. The witnesses also do not say much about it. It seems that they have not been properly examined on that point in this case.

The reports filed by the Station House Officer Kota have not been proved. They are only *Roznamcha* reports and even if proved will not be evidence of the facts mentioned in the reports which must be proved like other facts.

The preliminary order and the final order are, therefore, set aside, and it is ordered that the case be re-opened at the point reached on 31st March, 1927, and that after recording a proper preliminary order, hearing the parties afresh, recording further evidence if necessary and recording a statement of his reasons for the decision, the learned Magistrate do dispose of the matter in accordance with law.

G. R. D.

Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JURISDICTION CASE

No. 30 of 1926.

November 30, 1927.

Present:—Mr. Findlay, J. C.

ONKAR LALA AND OTHERS—PLAINTIFFS
APPLICANTS

versus

YADO PRASAD AND OTHERS—DEFENDANTS
—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1
—Review—Erroneous view of law, whether ground for review.

The mere fact that a judgment contains a wrong exposition of law is no ground under O. XLVII, r. 1 of the Civil Procedure Code, for allowing a review, *Chhajju Ram v. Neki* (4), followed.

Application for review of the judgment of the Judicial Commissioner in Second Appeal No. 543 of 1925, dated the 4th August, 1927.

Mr. M. R. Bobde, for the Applicants.

ORDER.—I have heard Counsel for applicants in this application for review. It has been suggested that the view of Mittra, A. J. C., in *Raghunath v. Sheolal* (1) was overruled in *Jogeshwar v. Moti*. (2) decided on 9th July, 1921, but that was not so, as the remarks of Hallifax, A. J. C., at the conclusion of his Reference Order and of Hallifax and Kotwall, A. J. Cs., in their opinions show. The decision in *Rangasamy Naiken v. Komarammal* (3) was also quoted in support of the view that the present applicants' rights remained unaffected, even if they failed to join Andhare in the earlier suit. Even if this proposition be accepted, that would afford no ground for review, because even if the view I have taken of the law applicable be incorrect, that would be no ground under O. XLVII, r. 1, Civil Procedure Code, for allowing review.

Their Lordships of the Privy Council in *Chhajju Ram v. Neki* (4) have laid down the limits of a Court's jurisdiction in a review application like the present and the mere fact, if we assume for the moment that this is so, that there was a wrong exposition of law in my judgment is no

ground for allowing review. The error supposed to have occurred is very far from being apparent on the face of the record or anything analogous thereto and the present application, therefore, practically amounts to an attempt to have the appeal re-argued on the merits. This I cannot allow for the reasons just stated. The application is dismissed without notice to non-applicants.

G. R. D.

Application dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 88 of 1927.

November 15, 1927.

Present:—Mr. Findlay, J. C.

Seth NARSINGH DAS—APPLICANT

versus

DOMDOOLAL AND OTHERS—
NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXXIX, r. 1—Temporary injunction, order refusing—Revision, whether lies—Practice—Interference with interlocutory orders, when justifiable.

No revision lies against an interlocutory order refusing to grant a temporary injunction pending a civil suit. [p. 909, col. 1.]

Amolaksao v. Govindrao (1), *Achalsingh v. Seth Jiwandas* (2) and *Buddoo Lal v. Mewa Ram* (3), relied on.

Abdullah Khan v. Banke Lal (4) and *Israil v. Samset Rahman* (5), distinguished.

A High Court will not interfere in revision with interlocutory orders unless its non-interference will cause an irremedial injury or lead to a failure of justice. [*ibid*]

Civil revision application against an order of the District Judge, Nagpur, dated the 21st February, 1927, in Miscellaneous A. No. 35 of 1926.

Mr. M. R. Bobde, for the Applicant.

Mr. R. N. Padhay, for the Non-Applicants.

ORDER.—The facts of this case which has led to the present revision application are so far correctly stated in the application. The order of the first Court refusing to grant a temporary injunction was a summary one, merely rejecting the connected application. The learned District Judge, in the appeal against this order and in the connected order in which he also refused the

(1) 39 Ind. Cas. 849; 13 N. L. R. 69.

(2) 66 Ind. Cas. 631; A. I. R. 1922 Nag. 89 (F. B.).

(3) 26 M. 484; 13 M. L. J. 131.

(4) 72 Ind. Cas. 566; 3 L.A.M. 127; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 435; A. I. R. 1922 P. C. 119; 16 L. W. 37; 17 P. W. R. 1922; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459; 49 I. A. 144 (P. C.).

application for a temporary injunction, has dealt with the case in detail on the merits.

In this Court it has, first of all, been urged on behalf of the non-applicants that no revision lies against an interlocutory order of the kind in question. In this connection, the decisions in *Amolaksao v. Govind-rao* (1) and *Achalsingh v. Seth Jiwandas* (2) as well as the majority decision in the Full Bench case of *Buddhoo Lal v. Mewa Ram* (3) have been relied on on behalf of the applicants, while the applicant, in urging that revision lies, has quoted *Abdullah Khan v. Banke Lal* (4) and *Israil v. Shamset Rahman* (5) in favour of the opposite view, but, from the principles laid down in the latter Nagpur case quoted, it is perfectly obvious that there is no true analogy between an application for revision of an order rejecting an application to sue as a pauper and an order refusing a temporary injunction like the present one.

It is utterly impossible to postulate of the present case that the interlocutory order in question goes to the root of the case; it relates merely to an incidental matter connected with the trial of the connected suit. It seems unnecessary, in the circumstances of the present case, to go into the vexed question of what is to be termed the decision of a case within s. 115 of the Civil Procedure Code. That question is the subject of a great diversity of decisions, particularly as between the Allahabad and the Lahore High Courts and the remaining High Courts of India. Even, in the case of the latter High Courts, however, it has again and again been laid down that the High Court will not interfere in revision with interlocutory orders unless its non-interference will cause an irreparable injury or lead to a failure of justice. It is impossible to postulate any such premises of the present case. At the most, if the non-applicant No. 2 is allowed to remain in possession, the applicant may have to alter the nature of his relief and pay some additional Court-fees. Apart from this, however, even if I were of opinion that it was open to this Court to interfere in the case of an order like the present

refusing a temporary injunction, I am satisfied on the merits that here there would be no cause for doing so. It is utterly impossible to postulate of the careful and reasoned order of the District Judge that either of the conditions A, B or C laid down in s. 115 of the Civil Procedure Code has been fulfilled. It would appear that the real object underlying the wish of the applicant to obtain a temporary injunction is to avoid having to sue for possession and having to pay Court-fees accordingly. As the case at present stands, the present applicant is, under the order passed under O. XXI, r. 98 of the Civil Procedure Code, under an obligation to deliver possession and, until that order is upset in the Civil Court, the equities seem to me to be largely in favour of the non-applicants being allowed to hold possession.

Considering the time of the day at which the sale-deed was taken, the explanation offered for the delay, viz., applicant's absence from Nagpur, does not seem to me a satisfactory or an adequate one. The applicant's position is, in my opinion, both from the legal and equitable points of view, a peculiarly weak one in striving to obtain a temporary injunction. Even, therefore, if, on the merits, I had deemed it to be open to this Court to interfere, it would be quite impossible for me to hold that the learned District Judge has not exercised his discretion in a reasonable and equitable manner in refusing to grant a temporary injunction.

I decline, therefore, to interfere and dismiss the application. The applicant must bear the non-applicants' costs irrespective of the result of the connected litigation. I fix Rs. 20 as Pleader's fees.

G. R. D.

Appeal dismissed.

(1) 49 Ind. Cas. 34; 15 N. L. R. 21.

(2) 75 Ind. Cas. 993; 19 N. L. R. 165; A. I. R. 1924 Nag. 44.

(3) 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558 (F. B.).

(4) 7 Ind. Cas. 183; 32 A. 79; 7 A. L. J. 932.

(5) 21 Ind. Cas. 861; 41 C. 436; 18 C. W. N. 176; 19 C. L. J. 47.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 89 of 1927.

November 22, 1927.

Present:—Mr. Findlay, J. C.

SADASHIO RAO DESHMUKH—

DEFENDANT—APPELLANT

versus

LAXMAN RAO KALAR—PLAINTIFF—

RESPONDENT.

Practice—Res judicata, plea of, whether can be raised in second appeal for first time—C. P. Land Revenue Act (II of 1917), s. 159, scope of—Right to recover share of land revenue from co-sharers, date of accrual of.

A plea of *res judicata* cannot be raised for the first time in second appeal where it involves questions of law and fact. [p. 910, col. 1.]

The word 'thereupon' in s. 159 of the C. P. Land Revenue Act does not mean that the right to recover land revenue from co-sharers does come into existence and has effect only as from the date of the Deputy Commissioner's order, from the beginning of the next agricultural year or the like. Such a right arises independently of the provisions of s. 159 of the Act which merely provides the instrument or weapon, by which to recover the land revenue for any of the years which do not fall under the ban of limitation. [p. 910, col. 2.]

Appeal against a decree of the Additional District Judge, Nagpur, dated the 22nd October, 1926, in Civil Appeal No. 65 of 1926.

Messrs. M. R. Pathak and A. D. Pande, for the Appellant.

Mr. R. N. Padhay, for the Respondent.

JUDGMENT.—The plaintiff's suit has succeeded in both the lower Courts, and the defendant has now come up here on second appeal against the decree of land revenue for five years from 1920 to 1925 in respect of the sir plot No. 23 leased by the defendant to the plaintiff.

The facts of the case are fully stated in the judgment of the lower Appellate Court and only three points have been raised on appeal. For the first time in this Court it has been urged that the present suit was barred by *res judicata* in view of the decisions in the previous Suits No. 32 of 1923 and No. 273 of 1920. It seems to me that this contention has been raised far too late and cannot properly be considered now. Questions of fact and of law are both involved, and I do not think it would be proper to allow the contention, even it had any merits to succeed now. On the materials before me I feel bound to and that, in my opinion, there is no force whatever in the present plea of *res judicata*. The parties were suing and being sued in a

different capacity in the previous suit; the causes of action were different, and the whole nature of the suits was different.

The second point is whether the plaintiff was entitled to the benefit of s. 14 of the Limitation Act in respect of his claim for the years 1920 to 1923. For my own part, I entertain not the slightest doubt but that the decision of the lower Courts on this point was correct. Before the new Land Revenue Act came into force, the Civil Court had power to make apportionment in a case like the present: cf. *Chaturbhuj v. Chandirmool* (1). There is not the slightest reason to suppose that the plaintiff would have indulged in unnecessary litigation for the recovery of what was, if not a legal, undoubtedly an equitable claim. The point involved in the suit, which led to the decision of Baker, J. C. in *Laxmanrao v. Sadasheo* (2) was a moot one, and the case has been deemed of sufficient importance to be published in the Official Reports. The present case is one which most obviously falls both within the letter and spirit of s. 14 of the Limitation Act, and I am in full agreement with the finding of the two lower Courts on this point.

The third contention offered on behalf of the defendant-appellant is an equally futile one. It is urged that the word "thereupon" in s. 159, sub-s. (3) of the C. P. Land Revenue Act, 1917, means that revenue shall only be payable on the land concerned from the date of the Deputy Commissioner's order, or even from the beginning of the agricultural year next following thereon. I can see no substance whatever in this contention. The right to reimburse the land revenue concerned was already in existence. The procedure laid down in s. 159 merely gives the proprietor the actual weapon or instrument by which to recover the land revenue in question, and it *ipso facto* follows that, subject to the limitation applicable, such land revenue can be recovered for any of the years which do not fall under the ban of limitation. All that the provision in question does, in short, is to change an inchoate right into a choate one. Had the Legislature intended to lay down that the right to recover land revenue was only to come into existence and to have effect as from the date of

(1) 5 Ind. Cas. 705; 6 N. L. R. 27.

(2) 89 Ind. Cas. 292; 22 N. L. R. 121; A. I. R. 1925 Nag. 419.

the Deputy Commissioner's order or as from any other date, e. g., the beginning of the next agricultural year or the like, it is inconceivable that the Legislature would not have framed their intention in language precisely indicating this. Very obviously, once the liability of the defendant to contribute his quotum of land revenue has been affirmed by the Revenue Court, the present plaintiff can claim such land revenue for any years which do not fall under the ban of limitation applicable. Holding, as I do, that the time spent by the plaintiff-respondent in pursuing his remedy in the wrong Court must be excluded, the whole of the present plaintiff's claim is within time.

These findings govern the present appeal which is dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

G. R. D.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 549 OF 1926.

November 28, 1927.

Present:—Mr. Prideaux, A. J. C.

NATHU BOWA—DEFENDANT—APPELLANT
versusPANDURANG AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Joshipana income, suit for, whether maintainable in C. P.—Right to hereditary Joshipana, whether question of fact—Civil Procedure Code (Act V of 1908), s. 100.

A suit for *Joshipana* income is maintainable in Central Provinces proper.

Balwant v. Tulsibai (1), followed.

The question whether a particular person is a hereditary *Joshi* of a village, entitled to do the duties of the village *Joshi* and to exclude anybody else from doing so, is a question of fact and not of law.

Second appeal against a decree of the Additional District Judge, Ohanda, dated

the 19th August, 1926, in Civil Appeal No. 6 of 1926.

Mr. G. G. Hatwalne, for the Appellant.

Mr. D. T. Mangalmurti, for the Respondents.

JUDGMENT.—The plaintiffs in this case stated that they are *watandar Joshis* of *Mauza Ekarjuna* and entitled as such to perform the religious ceremonies of the villagers. The defendant was said to have officiated at certain religious ceremonies which the plaintiffs should have been called upon to perform, and they, therefore, sued to recover Rs. 8 by way of damages. The plaintiffs obtained a decree in the first Court, which has been confirmed in appeal, directing the defendant to pay to the plaintiffs Rs. 8 as damages; the decree also restrains the defendant perpetually from acting as *Joshi* and interfering with the plaintiffs' right. Against the lower Appellate Court's decision the present appeal has been filed.

There was a previous litigation between the parties in Suit No. 304 of 1922 in the Court of the Munsif, Warora, and one of the issues framed in that case was: "Whether the plaintiffs are *watandar Joshis* of *Mauza Ekarjuna*?" That issue was found in the affirmative; and both the lower Courts in the present case find that that decision acts as *res judicata* and prevents the defendant from re-agitating the matter. It is here argued in second appeal that the finding as regards the *Joshipana* of the village is one of law, not of fact, and that the defendant is entitled to re-open the matter and to obtain another finding on it. It seems to me that the question whether a particular person is a hereditary *Joshi* of a village, entitled to do the *Joshi's* duties of the village and to exclude anybody else from doing so, is a question of fact, not of law; and I have no hesitation in upholding the finding of the Courts below on this point. It is then contended that the office of hereditary *Joshipana* does not exist in these Provinces as separate from Berar, and that no *watandar Joshi* in the Central Provinces proper can sue for his dues. But this is not so. *Balwant v. Tulsibai* (1) decided by the Judicial Commissioner on the 11th of April, 1918, shows that a suit for *Joshipana* income is maintainable in the Central Provinces proper.

(1) 46 Ind. Cas. 782.

The decision of these two points decides the appeal as argued: it fails and is dismissed with costs. The appellant will pay the respondents' costs.

G. R. D.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 211-B OF 1927.

December 19, 1927.

Present:—Mr. Kinkhede, A. J. C.

GUNWANT PARASHRAM NAIK—

COMPLAINANT—APPLICANT

versus

GOVIND BHAU—ACCUSED—NON-

APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 561—Sentence, enhancement of—High Court, powers of, how to be exercised—Order expunging remarks—Notice to lower Court, whether necessary.

A High Court will not ordinarily exercise its power of enhancing a sentence except on the motion of the Local Government.

A High Court has inherent jurisdiction under s. 561 of the Criminal Procedure Code to act *suo motu* and order expunging of objectionable remarks in the judgment of a subordinate Court without issuing the notice to the District Magistrate or to the trying Magistrate to show cause as to why the deletion should not be made.

Criminal revision against an order of the Sub-Divisional Magistrate, Akola, dated the 16th August, 1927, in Criminal Case No. 20 of 1927.

Mr. G. G. Hatwalne, for the Applicant.

ORDER.—The object of this revision application was three-fold, (a) to obtain an enhancement of the sentence, (b) to alter the charge from s. 355 to s. 353, Indian Penal Code, and (c) to expunge certain remarks from the judgment of the trying Magistrate against the complainant, on the ground that they are objectionable.

As to the first object it is conceded that on the authorities, the High Court would not ordinarily exercise its power of enhancement except on the motion of the Local Government, so I need not discuss that point. As to object (b) I fail to see the propriety of it unless it be to enhance the sentence, which I decline to do at the instance of a private complainant. As to object (c) a very long argument was

addressed to me, with a view to show that the accused inserted some words in the endorsement in the visitors' book underneath the remarks passed by the complainant as precedent imputing theft of registers to him. Suffice it to say that the Sessions Judge has rightly held that the whole of the endorsement was there, and the story told by the complainant that he forgot to draw the attention of the Deputy Inspector pointed to its existence long before the time, he now says it was inserted in it. The trying Magistrate had no specific need to indulge in those remarks and use the strong language unless it was intended to show that there were extenuating circumstances which showed that the sentence must be very light. The sentence imposed by him was one of imprisonment which, however, was altered to one offence only by the Appellate Court. This shows that the case did not deserve any serious condemnation of the complainant in order to lessen the magnitude of the guilt of the accused. In the exercise of my jurisdiction under s. 561-A, Criminal Procedure Code, I order that the following remarks do stand deleted from the trial Magistrate's judgment para. 12.

Paragraph 12:—

"The several matters disclosed by the evidence on record do not become the complainant as a President of the School committee.....Several mischievous and misleading statements which he was not able to prove.....he does not deserve that respect which a gentleman acting as President of a Committee.....can claim." As I exercise the inherent jurisdiction vested in the High Court, I have not thought fit to issue any notice to the trying Magistrate or the District Magistrate to show cause why the objectionable remarks should not be deleted. I have done so *suo motu* as it were as the record has come up before me.

G. R. D.

Order accordingly.

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Before the passing of the Probate and Administration Act, 1881, an administrator acting under the Hindu Wills Act had the same authority as an executor under s. 269 of the Succession Act, which was made applicable to Hindus by s. 2 of the Hindu Wills Act.

An executor or administrator has no absolute power to dispose of property of the deceased for purposes not necessary for the administration of the estate.

Where a Hindu widow who had taken out Letters of Administration of the estate of her deceased husband granted a permanent lease of property belonging to the estate describing herself as the widow of the deceased, without legal necessity, and for purposes unconnected with the administration of the estate, and the lessee was not even aware of the fact that Letters of Administration had been granted to the widow:

Held, that the lease was not binding on the estate and that the reversioners were entitled to recover possession of the property after the death of the widow. C ANNADA BANDHU DAS v. AMBICA CHARAN BHATTACHARJEE, 47 C. L. J. 569; A. I. R. 1928 Cal. 412

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— *Enjoyment of property by one co-sharer to exclusion of another—Assertion of exclusive title to property—Ouster—Adverse possession.*

Where a co-sharer in a *patti* has been in participation of the rents and profits for a long time to the exclusion of the others and has successfully asserted his right to the sole enjoyment of the property for more than 12 years, adverse possession may be held to have been clearly established, even if the property in question is a share in a defined *patti*. O RAM NARAIN v. MANNULAL, 5 O. W. N. 85

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— *Joint family—Exclusive possession by one member—Possession for and on behalf of family—Acquisition of title under Statute of Limitation.*

Where under the substantive law governing the parties, there is no individual ownership in land, the title to which is vested in the family, and the head of the family for the time being is a quasi-trustee for the members thereof, no title to the land can be acquired under the Statute of Limitation by mere length of possession. The party in possession (that is, the head of the family) is, in contemplation of law, holding for and on behalf of the family, and not on his own sole account. On his death, if one of his sons gets into possession, he too must be deemed to have got in consistently with a rightful title, that is to say, on behalf of his brothers and sisters and the family generally. Exclusive possession by him does not, therefore, confer on him a

Adverse possession—concl'd.

title under the Statute of Limitation. P C SUNMONU v. DISU RAPHAEL, 54 M. L. J. 394; 47 C. L. J. 333; A. I. R. 1927 P. C. 270; 27 L. W. 824

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— *Landlord and tenant—Unsuccessful plea of permanent tenancy—Possession for twelve years thereafter—Acquisition of permanent tenancy.*

A person who is in fact in possession as an annual tenant cannot by the mere unsuccessful assertion of a permanent tenancy in a judicial proceeding and the lapse of twelve years without that assertion having been challenged by the landlord obtain a title to permanent tenancy by adverse possession. B BHAILAL NATHABHAI v. KALANSANG GULABSANG, 29 Bom. L. R. 1558; 52 B. 55; A. I. R. 1927 Bom. 667

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— *Trespass over land in possession of mortgagee—Possession, whether adverse to mortgagor—Practice—Revenue records—Trespasser, entries as to, in Revenue papers—'Cultivation' and 'kaifiat' columns to be read together.*

Although as a general rule adverse possession against a mortgagee is ineffectual against the mortgagor, especially when it began at a time when the mortgagee was in possession, yet, when a trespasser takes possession of the mortgaged property and asserts a title which is hostile not only to the mortgagee but which also assails the title of the mortgagor, and the mortgagor allows 12 years to elapse, the title of the trespasser will become indefeasible not only against the mortgagee but also against the mortgagor.

Persons who take possession, without any title are shown in Revenue papers in the 'cultivation' column as non-occupancy tenants as long as changes in the proprietary columns are not made by mutation. Entries in the 'cultivation' column, therefore, are always to be read along with those in the 'kaifiat' column. L HANSA v. RAM LOK, A. I. R. 1928 Lah. 147

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Agra Pre-emption Act (XI of 1922), ss. 3, 7, 12—Bundelkhand Alienation of Land Act (II of 1903), ss. 3, 16-A as amended by Act (IV of 1915)—Sanction of Collector to pre-empt, effect of—Pre-emptor, whether becomes person entitled to purchase—Pre-existing rights to pre-emption, whether enforceable.

In view of the provisions of s. 3 of the Agra Pre-emption Act, there can be no right of pre-emption in areas where the Act applies except in accordance with the provisions of the Act or under the Muhammadan Law.

Section 7 of the Agra Pre-emption Act expressly prevents the Act from conferring any benefit on persons who are, under the Bundelkhand Alienation of Land Act not entitled to purchase the property in dispute.

A person who has merely obtained sanction, under s. 16-A of the Bundelkhand Alienation of Land Act, to pre-empt a property does not thereby become a person 'entitled to purchase' the property under that Act within the meaning of s. 7 of the Agra Pre-emption Act, and s. 7 of the latter Act does not, therefore, confer on him a right of pre-emption.

Section 16-A of the Bundelkhand Alienation of Land Act has not been repealed by the Agra Pre-emption Act. A PHOOL CHAND v. RAM NATH, 26 A. L. J. 142; A. I. R. 1928 All. 186

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— **s. 5—Record of custom in mauza, whether applicable to all tolae—'Tola', 'arazi', meanings of**

Agra Pre-emption Act—concl'd.

Where a *wajib-ul-arz* records the prevalence of a custom of pre-emption in a *mauza*, the custom must be taken to apply to all the *tolas* of the *mauza*.

The word '*tola*' does not ordinarily mean a subdivision of a *mauza* in the language of the Revenue Law but denotes a portion of a village or town which is inhabited by a particular class.

The term "*arazi*" means plots of land which, though included within the area of *mauzas* and *mahals*, are held on a distinct tenure from, and convey no title to rights or interests in other parts of the *mauzas* and *mahals*. *Arazidari* lands do not constitute a separate revenue unit by themselves. **A RAM RAOHHA TEWARI v. GIRJA DAT PANDE, A. I. R. 1928 All. 50**

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— **s. 7.** See AGRA PRE-EMPTION ACT, 1922, s. 3

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— **s. 10—Right of pre-emption—Transfer under compromise decree, whether amounts to sale and gives rise to pre-emption.**

A transfer which is effected under a decree of a Court, even though the decree is based on a compromise, is not a sale and cannot, therefore, be pre-empted under the Agra Pre-emption Act. **A PARAS RAM v. NEKSAI, A. I. R. 1928 All. 67**

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— **s. 12.** See AGRA PRE-EMPTION ACT, 1922, s. 3

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Agra Tenancy Act (II of 1901), ss. 154, 193—Order remanding case for assessment of revenue and otherwise dismissing suit—Second appeal, whether lies—Order of remand, nature of.

In a suit under s. 154 of the Agra Tenancy Act of 1901, the Assistant Collector held that the defendants were rent-free grantees and liable to resumption and accordingly assessed the rent. On appeal by the defendants the District Judge held that the defendants had been in adverse proprietary possession and declared them to be proprietors under s. 158 of the Act. He accordingly made an order to the following effect: "I would remand the case to the Assistant Collector with instructions to assess revenue on the land; 'otherwise' the plaintiffs' suit stands dismissed with costs".

Held, that the order of the District Judge, in spite of the order dismissing the suit, was one of remand and that consequently no second appeal lay from it.

Even though all the important points in a case have been disposed of and the case has practically been decided on the merits, if something is still left to be done by the Court of first instance before the suit is finally disposed of, the order can only be an order of remand and not a final decree. **A PHULBANS KUAR v. BHAGDAT SINGH, L. R. 8 A. 361 Rev.; A. I. R. 1928 All. 13; 26 A. L. J. 103; 12 R. D. 37**

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— **s. 164—Co-sharers—Suit for profits—Lambardar's liability—Negligence, whether can be based merely on short collections—Negligence, when question of law—Liability for collections of sir and khudkasht—Presumption—Death of Lambardar—Son's liability.**

Negligence on the part of a *Lambardar* cannot be based merely on short collections.

It is always a question of law what sort of evidence is admissible to prove negligence, and presumably what sort of evidence is admissible to disprove an initial presumption or inference of negligence.

Agra Tenancy Act—1901—concl'd.

There is a strong presumption against a *Lambardar* being responsible for the collection of the rent due from the private tenants of the co-sharers holding *sir* and *khudkasht*.

A son cannot be made liable for the debts incurred by his father in a personal capacity such as a *Lambardar*, nor can he be made liable for negligence shown by the father in that personal capacity, unless he has personal assets of the father in hand. **A BHAGWATI SARAN v. DEO SARAN SINGH, L. R. 9 A. 23 Rev.; A. I. R. 1928 All. 166; 12 R. D. 53**

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— **s. 193.** See AGRA TENANCY ACT, 1901, s. 154

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Agreement—Agreement to divide property on condition of financing litigation to recover property—Transfer of vested interest—Suit by person financing, maintainability of.

A who had no money to fight out a litigation for recovery of certain property, entered into an agreement with B that B should finance him and whatever property was acquired should be divided half and half between them, and that the litigation should be brought by B though the names of both were to appear. B brought a suit for possession without joining A's name:

Held, that the agreement did not effect a transfer of any vested interest in the property to B but was a mere contract and that the suit by B alone was not, therefore, maintainable. **O HASAN BANDI v. BARATI LAL, A. I. R. 1928 Oudh 298**

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— **for mortgage—Suit for specific performance—Equitable relief.**

Where, by an agreement for a mortgage, the defendant agreed to grant a mortgage of his immoveable property for the true amount of his indebtedness to the plaintiff, the Privy Council held that the property being identified and the terms of the loan being fixed, the document constituted an agreement which equity would enforce, unless there were circumstances which the Court would consider sufficient to justify the unqualified refusal on the defendant's part to carry out its terms. The plaintiff having brought a suit to obtain this equitable relief, their Lordships held that there was a valid agreement charging the property with whatever sum was actually due to the plaintiff, together with interest at the rate provided for in the agreement, and that a proper mortgage ought to be executed to carry out these terms. **P C JEWAN LAL DAGA v. NILMANI CHAUDHURI, 26 A. L. J. 124; 30 Bom. L. R. 395; (1928) M. W. N. 154; 54 M. L. J. 325; 47 C. L. J. 302; A. I. R. 1928 P. C. 80; 32 C. W. N. 565; 27 L. W. 710; 7 Pat. 305**

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Allahabad High Court Rules, Chap. XVI, r. 2—General Rules (Civil), Chap. XXI, rr. 22, 26—Application for Probate—Taxation of costs.

An application for Probate, though contested, is not a 'suit', and for purposes of taxation of costs falls within the purview of r. 26 of Chap. XXI of the General Rules (Civil) of the Allahabad High Court and not within r. 22.

Rule 2 of Chap. XVI of the Allahabad High Court Rules refers to suits and applications tried by the High Court itself on the Original Side and does not apply to suits and applications tried by subordinate Courts. **A KANHAIYA LAL v. GUNDO, 25 A. L. J. 972; A. I. R. 1928 All. 51; 50 A. 238**

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Appeal. See COSTS

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Appeal from preliminary decree—Stay of further proceedings till disposal of appeal, desirability of.

Where an appeal is preferred from a preliminary decree all further proceedings in the lower Court should be stayed until the disposal of the appeal.

Obiter.—Once a preliminary decree has been appealed against, especially when the appeal has been launched before a final decree is passed, then the presence of a final decree does not make the appeal from the preliminary decree unmaintainable even if the final decree is not appealed from. **L. RUP NARAIN v. SHIBBU MAL** 486

Court refusing to entertain plea not taken in grounds of appeal—Second appeal—Interference.

When the lower Appellate Court in the exercise of its discretion has refused to entertain a plea not taken up in the grounds of appeal, the High Court will not interfere with this exercise of discretion by entertaining that plea where the discretion has not been exercised improperly or unjudicially. **L. RALLIA SINGH v. PARSHOTAM SINGH**, A. I. R. 1927 Lah. 776 283

Decree in favour of several plaintiffs one of whom is dead, effect of—Appeal by defendants—Appellate Court, proper procedure for.

A decree passed in favour of a number of plaintiffs one of whom is dead at the time is not necessarily a nullity in its entirety in every case.

Where a decree is passed in favour of all the plaintiffs though one of them had died before the date of the decree and no legal representative of his had been brought on the record, and the defendants appeal, the proper procedure for the Appellate Court to follow is either merely to dismiss the appeal without any remarks, leaving the question as to the effect of the death of the deceased plaintiff on the decree as a whole for determination in appropriate proceedings or to accept the appeal and pass a decree dismissing the plaintiffs' suit and thereby leaving them the right to second appeal. It is not a proper procedure to dismiss the appeal and incorporate in the decree that the decree of the trial Court was a nullity. **L. SIKANDAR KHAN v. BALAND KHAN**, A. I. R. 1927 Lah. 435; 8 Lah. 617; 29 P. L. R. 81 596

effect of.

Under the Indian Law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted when the decree is one of dismissal. **A. SALIG RAM MISIR v. LACHHMAN DAS**, 25 A. L. J. 937; A. I. R. 1928 All. 46; 50 A. 211 42

filed without vakalatnama by oversight. See PATNA HIGH COURT RULES, CHAP. VII, R. 2 537

Preliminary and final decree—Appeal against preliminary decree after passing of final decree, competency of.

An appeal cannot be preferred against a preliminary decree alone after the final decree has been passed. **L. LAL CHAND v. THAKUR DASS**, A. I. R. 1928 Lah. 73 610

Right of appeal—Substantive right.

The right of appeal is a substantive right of a very valuable kind of which a party should not be lightly deprived. **P. C. V. P. K. V. CHOCKALINGAM OHETTY v. SEETHAI ACHÉ**, A. I. R. 1927 P. O. 252; 4 O. W. N. 1231; 27 L. W. 1; 54 M. L. J. 88; (1928) M. W. N. 20; 47 O. L. J. 136; 32 O. W. N. 281; 1 L. T. 40 Rang. 18; 30 Bom. L. R. 220; 26 A. L. J. 371; 6 R. 29 237

Appellate Court. See HINDU LAW.

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Finding of fact by trial Court which saw and heard witnesses, not to be lightly reversed.

On a question of pure fact, namely, whether the signature on a certain document was genuine, the trial Court, which had the opportunity of seeing the witnesses give their evidence, accepted their evidence and decided in favour of the genuineness of the signature. The learned Judges of the High Court, who did not see the witnesses, rejected their evidence and came to the contrary conclusion:

Held, by the Judicial Committee, that there were no cogent reasons for overruling the finding of fact arrived at by the trial Court. **P. C. BHAGWAN SINGH v. UJAGAR SINGH**, A. I. R. 1928 P. O. 20; 30 Bom. L. R. 267; 47 O. L. J. 189; 54 M. L. J. 254; 29 P. L. R. 182; 32 O. W. N. 528; 1 L. T. 40 Lah. 49; 27 L. W. 672; 26 A. L. J. 553 20

Apportionment of rent. See BENGAL LAND REGISTRATION ACT, 1876, s. 78 91

Approver. See EVIDENCE ACT, 1872, ss. 114, illus. (b) 97

Arbitration—Arbitrator, right of, to decide binding nature of reference.

A limited Tribunal such as that of an Arbitrator or Umpire has no jurisdiction to decide finally whether the reference to arbitration is itself valid and binding on all the parties before it. **M. ARUNACHELA IYAH v. LOUISDREYFUS & Co.**, 39 M. L. T. 583; A. I. R. 1928 Mad. 107; (1928) M. W. N. 132; 27 L. W. 267 793

Dispute as to construction of Will—Reference to arbitration—empowering arbitrators to decide in contravention of Will—Award contrary to Will, validity of—Award dealing with rights of strangers, effect of.

Where certain persons who had been appointed as executors under a Will without acting in any way in defiance of its terms put forward the Will and relied on its contents, but, being unable to agree as to its construction, referred the matters in dispute between themselves and the legatees to arbitrators to settle the matters in the best way they could either in accordance with or in contravention of its terms, and the arbitrators made an award in violation of the terms of the Will:

Held, (1) that the reference amounted to acceptance of the office on the part of the executors;

(2) that the reference and the award were illegal inasmuch as the object of the agreement of reference was to attain something which the law did not permit, namely, to allow the parties to acquire title to property in contravention of the terms of a Will in a case where the title was claimed under the Will itself, to allow the executors to have the Will construed by a Tribunal of their own choice without proving the Will and evading the duty fixed by law, and to allow the executors and some of the legatees to join together and make an arrangement for the distribution of the properties contrary to the testator's intention and to the prejudice and detriment of the remaining legatee or legatees under the Will.

An award is not invalid as between the parties to the reference merely because it purports to determine the rights of strangers. **C. JNANENDRA NATH MUKHERJEE v. JITENDRA NATH MUKHERJEE**, 32 O. W. N. 106; A. I. R. 1928 Cal. 275 70

Long and unexplained delay in making award—Misconduct—Civil Procedure Code (Act V of 1908), Sch. II, para. 15.

Arbitration—concl'd.

Unreasonable and unexplained delay on the part of an arbitrator in making an award amounts to misconduct and is sufficient to vitiate the award.

Per Marten, C.J.—The word 'misconduct' in reference to arbitrations does not necessarily or at all imply anything in the nature of fraud, but it includes failure to perform the essential duties which are cast on an arbitrator as such. **B BHOGILAL PURSHOTTAM v. CHIMANLAL AMRITLAL**, 30 Bom. L. R. 92; 1 L. T. 40 Bom. 29; A. I. R. 1928 Bom. 49; 52 B. 116. **707**

— *Reference of disputes relating to partnership accounts—Power of arbitrator to decide dispute as to assets—Award—Direction to transfer all title-deeds, whether vague.*

An award cannot be held to be invalid for want of finality merely because it directs one party to transfer or endorse to another all the title-deeds and securities relating to certain properties without specifying particularly what those deeds are. If in the course of the execution of the decree passed in terms of the award any question arises as to whether or not a particular title-deed relates to the properties referred to, the question can be settled by the execution Court. **L AGYA SINGH v. SENDER SINGH**, A. I. R. 1928 Lah. 137. **756**

Arbitration Act (IX of 1899)—Umpire, whether bound to state case to Court on questions of law—Obtaining legal opinion independently of parties, whether misconduct.

Under the Arbitration Act, an Umpire is not bound at the instance of one of the parties to the reference to state a case to the Court on questions of law arising for decision.

It is legal misconduct on the part of an Umpire who is not a lawyer to take independent legal opinion without reference to the parties on a matter arising for decision before him.

Under the Arbitration Act, unlike the Civil Procedure Code, it is not necessary to convert an award into a decree of Court that there should be an order that it should be filed. Where a notice of motion to set aside an award is dismissed, the award becomes a decree and a right of appeal arises.

Per Cornish, J.—It is incumbent on an arbitrator who takes legal or other expert advice, which may influence his determination of the matter submitted to him for arbitration to inform the parties of his intention to do so and of the question upon which the advice is taken, since otherwise the parties have no assurance that the advice is material, or given on a correct statement of the case, or that the arbitrator has not, in effect, simply surrendered his responsibility for deciding the question in arbitration to the opinion of his legal or other adviser. **M ARUNACHALA IYAH v. LOUISDREYUS & Co.**, 39 M. L. T. 563; A. I. R. 1928 Mad. 107; (1928) M. W. N. 132; 27 L. W. 267. **793**

— **ss. 8, 9—Submission providing for reference to two arbitrators—Sole arbitrator appointed on default by one party—Refusal or neglect of arbitrator to act—Procedure to be followed—S. 8, applicability of—Contract Act (IX of 1872), s. 28, Excep. 1—Time-barred claim, when can form subject-matter of reference to arbitration.**

Clauses (a) and (b) of s. 8 of the Arbitration Act do not apply to a submission which provides for the appointment of two arbitrators, one by each party, but apply only to a submission which provides for

Arbitration Act—cont'd.

the appointment of a single arbitrator from its very inception; the former case is governed by s. 9 of the Act.

On a refusal or neglect of the sole arbitrator appointed by one of the parties to a submission under s. 9, cl. (b) of the Act, the machinery provided in the section may be invoked over again and the whole procedure gone through from the beginning to the end.

When a suit brought within the period of limitation is stayed and the plaintiff compelled to resort to arbitration, the question of limitation cannot arise.

Per Bilaram, A. J. C.—In the case of an ordinary submission clause contained in a commercial contract which provides for a reference to arbitration of disputes arising out of the contract and does not purport to bar the right of a party to enforce his claim in Court before he has obtained an award in respect thereof, there can be no valid reference to arbitration, if at the time of the reference, the claim which is the subject-matter of dispute is time-barred, although different considerations arise in respect of an agreement falling within the four corners of Exception 1 to s. 28 of the Contract Act.

Quære.—Whether Limitation Act applies to arbitration. **S FIRM OF UTTANCHAND-BRINJAL v. FIRM OF BALMOKAND**. **435**

— **s. 19—Submission—Provision for reference to two arbitrators—No provision for appointing arbitrator on behalf of defaulting party, effect of—Suit by such defaulter, whether can be stayed—Discretion of Court—Ready and willing to go to arbitration, meaning of.**

Where a submission clause in a contract provides for a reference to two arbitrators, one to be appointed by each party, but makes no provision for the appointment of an arbitrator on behalf of the defaulting party in the event of his refusal to appoint his arbitrator, the Court has a discretion under s. 19 of the Arbitration Act to stay a suit brought by such party, as, otherwise, it would be permitting a party to take advantage of his own wrong.

All that an applicant for stay of a suit under s. 19 of the Arbitration Act is required to show is that he was ready and willing to go to arbitration at the time of the commencement of the proceedings. He is not required to give an intimation to the plaintiff before he institutes his suit, that he would enforce the submission clause. **S SHIVALDAS HOTCHAND v. JAPAN COTTON TRADING COMPANY**, A. I. R. 1928 Sind 91. **434**

— **s. 19—Suit disputing factum or validity of contract—Reference relating to payment of loss during pendency of suit, if competent—Notice regarding appointment of arbitrator issued in new name of one of the parties to reference—Reference and award in old name, validity of.**

The institution of a suit by one of the parties to a contract for sale of goods disputing the factum or validity of the contract does not bar disputes regarding payment of the loss which has accrued on re-sale of the goods being referred to arbitration under the submission clause of the contract, nor is it a bar to the arbitrators proceeding with the reference, the matters referred to the arbitrators not being the same as those forming the subject-matter of the action; and it is not necessary to obtain an order staying such suit before proceeding with the arbitration.

Arbitration Act—concl'd.

Where a contract was entered into in the name of a party and since then there was a mere change in that name and the notice calling upon the opposite party to appoint his arbitrator was given in the new name but the reference and the award were in the old name in which the contract was made :

Held, that this did not invalidate the award, especially as the party receiving the notice was not misled on account of the change of name. **S DONALD GRAHAM & Co. v. BASANTRAM JHINGAN, A. I. R. 1928 Sind 91 220**

Arms Act (XI of 1878), ss. 19, 29—'Institution of proceedings,' meaning of—Sanction obtained after submission of charge sheet but before Magistrate takes it up for consideration—Legality of prosecution.

A proceeding is instituted within the meaning of ss. 29 and 30 of the Arms Act where for the first time the adjudication of a Court of competent jurisdiction is sought.

'Proceedings' in s. 29 of the Arms Act mean legal proceedings in Court and not searches or arrests or investigations made by the Police in the exercise of the powers conferred upon them by the Criminal Procedure Code or any other law.

A complaint was made against A and B on the 30th of June, 1925. The Police continued to investigate and on the 13th of August the Police submitted a charge sheet against A, B and C. This application was considered by the Magistrate on the 17th August. Formal sanction for prosecuting C was obtained on the 17th of August and produced before the Magistrate on that date :

Held, that the prosecution of C was not bad for want of previous sanction inasmuch as no proceeding within the meaning of s. 29 of the Arms Act had been instituted against C till the 17th of August. **PAT EMPEROR v. GHULAM NABI, 6 Pat. 768; A. I. R. 1924 Pat. 146; 29 Cr. L. J. 301; 9 A. I. Cr. R. 335 835**

ss. 19 (f), 20—Concealment of arms—Question of fact—Sentence—Mere suspicion of Police that accused was about to commit dacoity, whether can be taken into consideration.

In every case it is a question of fact whether the person found in possession of a concealed weapon is carrying the weapon in such a way as to indicate an intention to hide the article from the classes of persons referred to in s. 20 of the Arms Act.

The fact that a person is concealing a weapon in his loin cloth while he is on a Railway platform indicates an intention to conceal that weapon from, *inter alia*, Railway officials within the meaning of s. 20, Arms Act.

Section 20 of the Arms Act is not confined to cases where the import or export of arms is attempted. 'In the absence of any aggravating circumstance a sentence of five years' rigorous imprisonment for an offence under s. 20, Arms Act, is too severe.

The mere fact that there was a suspicion in the mind of the Police that the accused was about to take part in a dacoity is not a circumstance which a Court can take into consideration in arriving at an appropriate punishment for the actual offence which has been proved. **L. ABDUL WAHID v. EMPEROR, 9 Lah. 1. J. 533; A. I. R. 1928 Lah. 110; 29 Cr. L. J. 256; 29 P. L. R. 329; 9 A. I. Cr. R. 454; 9 Lah. 302 495**

Attestation of deed, when estoppel.

Attestation of a deed by itself estops a man from denying nothing whatever except that he witnessed

Attestation of deed—concl'd.

the execution of the deed, and by itself it does not show that he consented to the transaction which the document effects. When, however, in addition to the fact that he attested the deed, there is evidence to show that he took an active part in the consultation which resulted in the transaction and acquiesced in it afterwards, it is a legitimate inference to draw from such evidence that he not only witnessed the execution of the mortgage by the mortgagor, but also that he consented to the transaction. **P. C. BHAGWAN SINGH v. UJAGAR SINGH, A. I. R. 1928 P. C. 20; 30 Bom. L. R. 267; 47 O. L. J. 189; 54 M. L. J. 254; 29 P. L. R. 182; 32 O. W. N. 538; 1 L. T. 40 Lah. 49; 27 L. W. 672; 26 A. L. J. 553 20**

Auction-purchaser's right to recover purchase-money from decree-holder—Conditions.

Unless the auction-purchaser can prove fraud or any other abuse of the process of the Court, the sale in his favour would be absolute under O. XXI, r. 91, Civil Procedure Code and it will not be competent for him to file a suit against the decree-holder to recover the purchase-money. **M. BOROJO CHARCHI v. ODHIKARI BASUDEB DAS, 1 L. T. 40 Mad. 11; (1928) M. W. N. 83; A. I. R. 1928 Mad. 152 653**

Award—Direction by arbitrators that plaintiff should execute mortgage in favour of defendant for a certain sum and declaring cancellation of gift—Award, whether vague or indefinite—Civil Procedure Code (Act V of 1908), Sch. II, para. 16 (2)—Trial Court setting aside award and deciding case on merits—Appellate Court passing decree in accordance with award—Second appeal, maintainability of.

A suit for cancellation of a deed of gift and for recovery of possession of the property conveyed was referred to arbitration and the arbitrators gave an award as follows: "We decide the case in this way that by declaring the deed of gift cancelled and non-existent we award Rs. 680 due to the defendant from plaintiff for which the plaintiff shall execute within one month a deed of possessory mortgage in favour of the defendant. In the event of default the defendant shall be entitled to obtain execution of the possessory mortgage from the plaintiff through Court".

Held, by the Full Bench, that the portion of the award by which the arbitrators directed that the defendant should remain in possession of the property transferred until the plaintiff paid Rs. 680, was not objectionable either under the provisions of para. 12 or para. 14 of the Second Schedule, Civil Procedure Code, and that it could not be set aside on any of the grounds mentioned in para. 15.

Per Hasan and Misra, JJ.—The provision in cl. (2) of para. 16 of Sch. II of the Code of Civil Procedure applies only where a decree has been passed by the trial Court in accordance with the terms of the award. Where, however, the Court of first instance sets aside the award and passes a decree on the merits and the lower Appellate Court sets aside that decree and passes a decree in accordance with the award, a second appeal is maintainable.

Per Misra, J.—The arbitrators are Judges of law as well of facts and their error in law will not vitiate the award.

An award cannot be set aside merely upon the ground that the decree passed by the arbitrators is not one which would have ordinarily been passed by the Court in which that suit was instituted. **O. GANESH SINGH v. BHIKHAM SINGH, 4 O. W. N. 1085; A. I. R. 1928 Oudh 1; 3 Luck. 1 545**

Banker and customer—Bills of Exchange—Sale of goods by shipment—Arrangement by purchaser with Bank for confirmed credit—Documents forwarded by vendor to another Bank for discounting—Duty of discounting Bank—Delivery of Bills of Lading to purchaser—Dishonour of Bills of Exchange at maturity—Rights of discounting Bank against vendor—Forwarding of draft D/A, meaning and effect of.

Messrs. Sassoon and Co. entered into a contract with Messrs. Knowles and Co. for the sale of 25 bales of gunnies by certain shipments. After the first purchase and sale had been concluded Messrs. Knowles and Co. entered into an agreement with the Eastern Bank by which the latter undertook to make advances against negotiable bills drawn by Messrs. Sassoon and Co. on Messrs. Knowles and Co. provided the Bills of Lading were presented to the Bank in complete sets. The Bank further agreed with Messrs. Sassoon and Co. to give confirmed credit. Messrs. Sassoon and Co. made a contract with the International Banking Corporation for the discounting of approved Bills of Exchange drawn at three months' sight D/A (delivery against acceptance). In pursuance of this agreement Messrs. Sassoon and Co. forwarded to the Banking Corporation drafts drawn by them on Messrs. Knowles and Co. against shipment with the shipping documents and the letter of advice of confirmed credit from the Eastern Bank, with a requisition for discounting the drafts and passing the amounts to their credit. The drafts were presented for acceptance to Messrs. Knowles and Co. and the documents of title were handed over to them on acceptance. Messrs. Knowles and Co. became bankrupts and the bills were dishonoured at maturity. International Banking Corporation sued Messrs. Sassoon and Co. as drawers for the amounts covered by the bills. The latter contended that in view of the confirmed credit from the Eastern Bank, the Banking Corporation ought to have delivered the Bills of Lading to the Bank and not to Messrs. Knowles and Co., that owing to the misdelivery of the documents they (Messrs. Sassoon and Co.) were deprived of their right to proceed against the Eastern Bank and that consequently they were not liable to the International Banking Corporation:

Held, (1) that as discounters the primary duty of the International Banking Corporation, both to Messrs. Sassoon and Co. and to themselves was so to present the drafts for acceptance as either to get them accepted or to get them dishonoured for lack of acceptance and that the Bank was entitled and bound to follow this instruction:

(2) that as the drafts were for the acceptance of Messrs. Knowles and Co., D/A, the Bank was entitled to deliver the Bills of Lading to them on acceptance;

(3) that the primary liability of Messrs. Sassoon and Co., to the Banking Corporation as drawers was not in any way discharged by the conduct of the latter and that the plaintiff was, consequently entitled to recover the amounts due under the bills: **P C M. A. SASSOON & SONS v. INTERNATIONAL BANKING CORPORATION**, 53 M. L. J. 42; A. I. R. 1927 P. C. 195; 1 Luck Oas 241; 25 A. L. J. 665; 29 Rom. L. R. 1181; 46 O. L. J. 61; (1927) M. W. N. 6148; 32 O. W. N. 30; 39 M. L. T. 659; 5 I. A. 317; 27 L. W. 582; 55 C. L. 225

Bengal Alluvion and Diluvion Regulation (XI of 1825), cl. 4—U. P. Land Revenue Act (III of 1901), s. 99—Land added by alluvion from one permanently settled village to another—Assessment to revenue, legality of—Alluvion, meaning of.

Bengal Alluvion and Diluvion Regulation—conold.

Land belonging to a permanently settled village which is added to another permanently settled village by alluvion is not exempt from being assessed to revenue.

Alluvion means the accession to land by gradual or momentarily insensible addition of matter by the action of water, or by the insensible reliction of water from its Bank. **A RAMANAND v. SECRETARY OF STATE FOR INDIA**, L. R. 9 A. 3 Rev.; 26 A. L. J. 134; A. I. R. 1928 All. 199; 12 R. D. 10

566

Bengal Land Registration Act (VII of 1876),

s. 78—Land comprised in several estates—Right of co-sharer landlord to recover his share of rent—s. 78, whether applicable—Entry in Collector's register, effect of—Apportionment of rent—Principles—Long payment of rent—Inference.

Section 78 of the Bengal Land Registration Act has no application to a case where the land in the possession of the tenant is comprised in more than one estate.

The plaintiffs whose names were registered in the Collectorate for a share of 4-annas 8-gandas in three *touzis* and of a 19½ *gandas* in another *touzi*, and who were receiving their share of rent at the rate of Rs 49-4-8 *gandas* for over thirty years from the defendants, sued the defendants for arrears of rent at that rate alleging that they were entitled to a share of 4-annas 12-*gandas* in all the four *touzis*. The defendants contended that in view of the entry in the Collector's register and s. 78 of the Bengal Land Registration Act the plaintiffs' claim could not be decreed in full:

Held, (1) that s. 78 of the Bengal Land Registration Act had no application to the case as the lands were comprised in more than one estate;

(2) that the rent could not be apportioned upon the assumption that each of the *touzis* was of equal value;

(3) that the rent which was being paid by the defendants, must under the circumstance be held to be correct amount of rent due to the plaintiffs on account of their share in the *touzis*, and that the plaintiffs' claim must be decreed. **C NARIPENDRA NATH MUKHERJI v. DHARENDRANATH NATH**, 46 O. L. J. 584; A. I. R. 1928 Cal. 115

91

Bengal Tenancy Act (VIII of 1885), ss. 105, 107

—Enhancement of rent—Decree of Settlement Officer, binding nature of—Erroneous decision, whether binding on Civil Court.

A decree of a Settlement Officer in proceedings under s. 105 of the Bengal Tenancy Act operates as a Civil Court decree and cannot be treated as a nullity even if it happens to be erroneous. **C MANMATHA NATH SARKAR v. DEBENDRA NATH SAMANTA**

743

ss. 148-A, 163, 167—Rent decree—Attachment and sale proclamation not issued simultaneously—Sale, effect of—Notice annulling incumbrances, validity of—Burden of proving that notice was not in accordance with law.

Where a rent-decree is obtained in a suit framed as a rent suit under the provisions of s. 148-A of the Bengal Tenancy Act and the decree-holder takes every step necessary to be taken under the Act to execute the decrees as a rent-decree, the mere fact that the orders for attachment and sale were not issued simultaneously as required by s. 163 of the Bengal Tenancy Act is not a ground for holding that the sale held under the decree is not a rent sale.

Bengal Tenancy Act—contd.

Under s. 167 of the Bengal Tenancy Act once the Collector has issued notice of annulment, the incumbrance must be deemed to have been annulled. Though this does not mean that the validity of the notice and the consequent annulment of the incumbrance cannot afterwards be called in question, the section casts the burden of proof upon the person questioning the validity of the notice to establish that the notice under s. 167 was not served in accordance with law. **Pat KULDIP NARAIN TEWARI v. RAM LAL MANDAL**, 7 Pat. 260; A. I. R. 1928 Pat. 318

821

— **s. 153—Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Order setting aside execution sale—Right of appeal—Allegation of fraud, effect of.**

Fraud in publishing or conducting a sale is not meant to be kept separate from irregularities in the publication or conduct thereof for the purpose of the Explanation to s. 153 of the Bengal Tenancy Act and where an application is made under O. XXI, r. 90 of the Code of Civil Procedure for setting aside a sale on the ground of material irregularity or fraud, the mere fact that fraud is alleged would not give rise to a question of title within the meaning of the Exception so as to take the case out of the substantive provision of s. 153 of the Bengal Tenancy Act and thus give a right of appeal which is forbidden by that section. **C MUJIBUDDIN CHOWDHURY v. REAJUDDI MATBAR** 471

— **s. 153—Rent decree—Appeal—Decision as to question of amount of rent annually payable.**

In order to bring a case within the exception to s. 153 of the Bengal Tenancy Act it is not necessary that there should be a declaration in the order or decree as to the amount of rent annually payable in respect of the *jama*. It is sufficient if a question as to the amount of rent annually payable has been decided in the decree or order.

The plaintiff claimed rent in respect of a tenancy alleging that it comprised an area of 41 acres and bore a rental of Rs. 3 per year. His case was that originally the *jama* consisted of 53 acres on a rental of Rs. 4 but that afterwards 12 or 13 acres were taken out of the *jama* and the rent reduced to Rs. 3. The defendant contended that the area of the *jama* was 53 acres and the rent was Rs. 4, and that there ought to be a total suspension of rent inasmuch as he had been dispossessed of a portion of the lands of the *jama*. The suit was decreed by the District Munsif:

Held, that there was a decision by the District Munsif on the question of the amount of rent annually payable and that his decision was, consequently, appealable under s. 153 of the Bengal Tenancy Act. **C DALILUDDI v. MATAHAR ALI**, A. I. R. 1928 Cal. 254 470

— **s. 155—Breach of covenant against alienation—Suit for ejectment—Notice to tenant, whether necessary—Landlord and tenant—Abandonment of tenancy—Tenant remaining in possession as sub-lessee, effect of.**

Section 155 of the Bengal Tenancy Act applies to all cases of breaches of conditions which create forfeiture of tenancies and render the tenant liable to ejectment, including breaches of conditions restraining alienation.

A tenant does not cease to be a tenant within the meaning of s. 155 of the Bengal Tenancy Act by merely committing an act in breach of the terms of the tenancy.

Bengal Tenancy Act—concl'd.

A landlord is not entitled to treat a holding as abandoned where the tenant alienates his tenancy but remains in possession as a sub-lessee, without repudiating the tenancy. **C ATAHARUDDIN v. MURARI MOHUN DUTT**, 47 C. L. J. 24; A. I. R. 1928 Cal. 193

735

— **ss. 158, 167—Rent-decree—Sale—Failure to serve notice on co-sharer landlord, effect of—Landlord purchasing himself at rent sale—Mortgagee of occupancy holding, rights of, against landlord—Failure to annul mortgage, effect of.**

The failure to serve notice under s. 158 of the Bengal Tenancy Act does not necessarily relegate the purchaser at a sale held in execution of a rent-decree to the position of an ordinary purchaser under a money-decree. The obligation to serve notice upon the co-sharer landlord is enacted to protect his interest and it is open to him at his option, to waive the necessity for such notice.

A mortgagee of an occupancy holding though he has obtained a decree on his mortgage and purchased the property in execution has no right to hold the land as a *raiyat* against the will of the landlord, who has purchased the holding in execution of a rent-decree, and his incumbrance, although never formally annulled under s. 167 of the Act and although still subsisting for what it is worth, is a barren right against the landlord when he seeks to enforce it by taking possession of the property. **Pat BADLU PATHAK v. SIBRAM SINGH**, 9 P. L. T. 241; 7 Pat. 155; A. I. R. 1928 Pat. 234 310

— **s. 163. See BENGAL TENANCY ACT, 1885, s. 148-A** 821

s. 167.

See BENGAL TENANCY ACT, 1885, s. 148-A 821

See BENGAL TENANCY ACT, 1885, s. 158 310

— **s. 170—Patni tenure—Transfer of holding—Attachment of portion of holding under decree for arrears of rent against transferor—Claim by transferee, maintainability of—Transferee, whether representative of transferor—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58.**

Section 170 of the Bengal Tenancy Act does not apply where a portion only of a tenure is attached in execution of a decree for arrears due in respect of the whole tenure.

A person who has purchased the interest of a *patni* tenant prior to a decree for rent obtained by the landlord against the tenant is bound by the decree, and is a representative of the judgment-debtor within the meaning of s. 47 of the Civil Procedure Code. He cannot, therefore, prefer a claim under O. XXI, r. 58 of the Code to an attachment of the tenure in execution of such a decree.

Where a *patni* tenure is transferred, until the transferee's name has been registered, the transfer does not affect the *zemindar's* right and, in spite of the transfer, the landlord may ignore the transferee and may continue to hold the recorded tenant responsible for the rent and other obligations imposed on the tenure. **C KRISHNA CHANDRA DUTTA v. DINA NATH BISWAS**, 54 C. 1064; A. I. R. 1928 Cal. 94 357

Bills of Exchange. See BANKER AND CUSTOMER 225

Birt, meaning of—Execution of birt-deed by joint owner—Validity of deed.

'Birt' generally means an under-proprietary right and a birt-deed executed by one of several joint owners is consequently null and void against those who were no parties to it. **O DUKHI SINGH v. SEKRU DAI**, 4 O. W. N. 1225; A. I. R. 1928 Oudh 113 178

Bombay Hereditary Offices (Amendment) Act (Bom. Act V of 1886), s. 2—Female member of watan family—Exclusion from inheritance—Conditions—Mere descent from common ancestor, whether sufficient.

In order that a female member of a *watan* family may be postponed in the order of succession to the male members of the family under s. 2 of the Bombay Hereditary Offices (Amendment) Act it is not sufficient for the male members to show that they are descended from a common ancestor. It must further be shown that the common ancestor was a holder of the *watan*. **B HUCHANGUDA RUDRAGUDA v. KALLAYA KALLAPPA**, 30 Bom. L. R. 38; 52 B. 132; A. I. R. 1928 Bom. 166 **268**

Bombay Primary Education Act (IV of 1923), s. 45. See CORPORATION CREATED BY STATUTE 446
Bundelkhand Alienation of Land Act (II of 1903), ss. 3, 16-A. See AGRA PRE-EMPTION ACT, 1922, s. 3 570

Burden of proof—Suit to enforce mortgage—Onus of proof of non-receipt of consideration.

In a suit to enforce a registered mortgage-bond, the plaintiff alleged that the defendant executed the mortgage in question after having received the consideration money in cash. The defendant admitted the execution of the mortgage but denied that he had received the consideration alleged and also that he owed any money to or had received any money from the plaintiff:

Held, that the onus lay heavily on the defendant to prove this defence which was admittedly inconsistent with his own admissions in writing.

Held, also, on the evidence, that the defendant had in this case discharged the onus which rested upon him. **P C MAGAN MAL v. DARBARI LAL CHOWDHURY**, A. I. R. 1928 P. O. 39; 51 M. L. J. 203; 30 Bom. L. R. 296; 5 O. W. N. 226; 47 C. L. J. 222; 27 L. W. 523; 1 L. T. 40 Cal. 124; 24 N. L. R. 40 **113.**

Burmese Buddhist Law—Inheritance—Heirs related in same degree—Division per capita.

Under the Burmese Buddhist Law where the heirs are all related in the same degree to the *propositus* they inherit each in his own right and not by representation and, therefore, take *per capita*. **R MAUNG BA GON v. MA PWA THIR**, 5 R. 747; A. I. R. 1928 Rang. 67 **167**

Caste Disabilities Removal Act (XXI of 1850), s. 1, scope and application of—Conversion of Hindu to Muhammadanism—Right of Hindu collaterals to succeed to estate of convert—Applicability of Act to Oudh.

The rule that in questions of succession and inheritance the Hindu Law should be applied to Hindus and the Muhammadan Law to Muhammadans refers to Hindus and Muhammadans, not by birth merely, but by religion also.

The Caste Disabilities Removal Act can be held applicable to the Province of Oudh only from the date of its annexation and it is open to serious doubt whether that enactment will have the effect of restoring rights lost and of divesting persons of their status acquired, before the date of the annexation.

The Caste Disabilities Removal Act does not lay down any Code of inheritance prescribing the line of succession to the estate of a convert, nor does it create new rights. It merely removes obstacles arising by reason of the claimant renouncing his religion or losing his caste. The Act has no application to a case where the claimant of rights has neither renounced nor

Caste Disabilities Removal Act—concl'd.

has been excluded from the communion of any religion or has been deprived of his caste.

A Muhammadan, whose father had become a convert to Muhammadanism from Hinduism, died leaving him surviving only children by a pre-deceased daughter. His father's uncle's great-grandson who was a Hindu claimed title to his estate by right of inheritance as reversioner pleading that, by custom, daughters and their issue had no right to inherit:

Held, that the Caste Disabilities Removal Act had no application to the case and could not confer on the claimant any right to the estate. **O MITAR SEN SINGH v. MAQBUL HASAN**, 4 O. W. N. 1243; A. I. R. 1928 Oudh 138; 3 Luck. 154 **890.**

C. P. Land Revenue Act (II of 1917), s. 159, scope of—Right to recover share of land revenue from co sharers, date of accrual of.

The word 'thereupon' in s. 159 of the C. P. Land Revenue Act does not mean that the right to recover land revenue from co-sharers does come into existence and has effect only as from the date of the Deputy Commissioner's order, from the beginning of the next agricultural year or the like. Such a right arises independently of the provisions of s. 159 of the Act which merely provides the instrument or weapon, by which to recover the land revenue for any of the years which do not fall under the ban of limitation. **N SADASHIO RAO DESHMUKH v. LAXMAN RAO KALAR**, A. I. R. 1928 Nag. 227 **910**

s. 187 (2)—Lambardar—Invalid appointment—Power to file suit till appointment is cancelled.

A person appointed as a *lambardar* must be presumed to have all the ordinary powers of a *lambardar* under s. 188 of the C. P. Land Revenue Act and is, therefore, entitled to sue for the recovery of the rents of the village until the appointment is cancelled. The mere fact that the appointment of a *lambardar* may be found to be invalid when questioned in the Civil or Revenue Court by the real proprietor of the village will not disentitle the appointed *lambardar* from carrying on his duties as such. **N RAOJI v. GANGABAI**, 11 N. L. J. 1; A. I. R. 1928 Nag. 123 **527**

C. P. Municipalities Act (II of 1922), s. 66 (1) (n)—"Circumstances within Municipal limits", meaning of—Haisiyat Tax—Circumstances arising from agricultural property within the District, whether can be considered.

Under s. 66 (1) (n) of the C. P. Municipalities Act "the circumstances within certain limits" mean circumstances within those limits and not property giving rise to them and circumstances arising out of agricultural property situated in the same District (as the limits mentioned or elsewhere) are in that respect not different from circumstances arising out of other kinds of property. **N KASTURCHAND v. SECRETARY MUNICIPAL COMMITTEE, BETUAL**, A. I. R. 1928 Nag. 243 **902**

C. P. Tenancy Act (I of 1920), ss. 12, 13, 89—Tenancy holding—Surrender to unauthorized person—Fraudulent transfer—Suit for possession by landlord, whether triable by Civil Court.

A suit for possession of a tenancy by the sole landlord of a *patti* in a village against one who claims to have taken a lease thereof from a person, who had taken a surrender of the field after he had ceased to be a co-sharer of the *patti* is triable by a Civil Court.

C. P. Tenancy Act—conold.

The venue in a case is determined by the nature of the claim as brought.

If a document of transfer of non-transferable tenancy land, under the guise of surrender has been fraudulently registered as a deed of surrender, a civil suit by the landlord will lie to set aside such a transfer and to get possession of the land. *N JUGAL KISHORE v. NAGO*, A. I. R. 1928 Nag. 221 671

— **s. 37—Lessee of malik makbuza—Acquisition of occupancy right—Omission of entry of such right in Settlement Record, effect of.**

A person holding the land of a *malik makbuza* as a lessee since before the last Settlement, is not entitled to the status of an occupancy tenant under s. 37 of the C. P. Tenancy Act of 1920, unless he is recorded as an occupancy tenant in that Settlement. *N SANDU v. GORIPA BAI* 671

— **s. 89. See C. P. TENANCY ACT, 1920, ss. 12, 13** 671

Chota Nagpur Tenancy Act (VI of 1908 B. C.),

s. 47—Raiyati holding—Exemption from sale—Mortgage decree directing sale, effect of—Executing Court, whether can go behind decree—Public policy.

The right of a *raiya*t in his holding cannot be sold in execution even though the decree under execution is a mortgage-decree directing the sale of the land in question.

Although the general rule is that a Court executing a decree cannot go behind the decree and examine the correctness or legality thereof, yet it is bound to give effect to a provision of law, such as s. 47 of the Chota Nagpur Tenancy Act, which goes clearly to show that even if there is a decree such a decree cannot be executed.

Once it is found that the lands sought to be sold form a *raiya*t holding, whether the judgment-debtor took the objection or not, the sale of such a holding cannot take place in the face of the clear provisions of s. 47 of the Chota Nagpur Tenancy Act.

Per *Macpherson, J.*—The provision prohibiting the sale of the right of a *raiya*t in his holding in execution of a decree or order is eminently one of public policy, and it has consistently been held not only that the objection that land sought to be sold was a *raiya*t holding, or part thereof, could be taken in execution proceedings, but that the provision imposed upon the Executing Court itself the duty of seeing that no sale contravening it takes place. *PAT RUP NATH MANDAL v. JAGANNATH MANDAL*, 9 P. L. T. 228; 7 Pat. 178; A. I. R. 1928 Pat. 227 145

Circumstantial evidence. See EVIDENCE 774

City of Rangoon Municipal Act (VI of 1922),

ss. 25, 26, 113, 192, 203—Erection of urinals—Private person when entitled to injunction—Principles—Torts—Acts authorised by Legislature—Nuisance to private person—Remedies—Local bodies, duties of—Provision for compensation, whether bars suit for injunction—Likelihood of misuse by public, whether gives cause of action

If the Legislature authorises a specific act to be done, and if the performance of that act and of every other subsidiary act necessary for, and incidental to, the performance of the main act, creates nuisance or causes damage, the local body authorised to perform the act cannot be restrained by injunction nor made liable for damage except on the ground of negligence, and not even on that

City of Rangoon Municipal Act—contd.

ground, if the mode of performance is also prescribed and the act is performed in the prescribed manner.

If the act can be performed without creating a nuisance and without causing injury or damage then the local body performing the act would be liable if the act is performed in such a manner as to create nuisance or cause damage.

Where the Legislature in general terms gives powers to a local body to perform certain acts then it is a matter of construction of the Act, whether the Legislature intended (a) merely to confer permissive right on the local body, or (b) to enjoin the performance of an obligatory duty. The local body, when exercising powers in the performance of a permissive act is in no higher position than a private person and must perform the prescribed acts without creating a nuisance or infringing private rights. Different considerations arise in the performance of obligatory duties and it then becomes necessary to see whether the Legislature intended the act to be performed even if it does create nuisance. Where the Legislature is silent on this point, then the nature of the duty imposed must be considered to ascertain whether the inevitable consequence of the performance of the act is to create a nuisance or otherwise affect the rights of private persons. If it is, it may be presumed that the Legislature contemplated the creation of a nuisance or the causing of a certain amount of damage and injury to private persons, as a consequence of the performance of the duty imposed.

Where, in the performance of an act, an option is given to the local body, e. g., in the selection of a site or in the deciding of the necessity for the performance of the act at a particular time, then the choice of the local body of either place or time cannot be questioned unless the choice has not been made *bona fide*.

Under the City of Rangoon Municipal Act a duty is imposed on the Corporation to erect urinals and water closets for public convenience on Municipal lands and the choice of the place where they are to be erected and the time when they become necessary are left to the Corporation.

The erection of structures is not merely a permissive act, and the principles applicable are those which apply to the carrying out of imperative duties imposed on a local body.

If the erection of a latrine does not necessarily give rise to a cause of action, the mere fact that the latrines may give rise to a nuisance on account of misuse by the public will not entitle a plaintiff to a cause of action in anticipation. The remedy of the plaintiff in such a case is to wait till the latrine is actually misused and has become a nuisance when he can ask the Court to grant relief.

Obiter.—Section 192 of the City of Rangoon Municipal Act does not deprive a private person of his Common Law right to an injunction and leave him merely a right to compensation.

It is a cardinal principle of the construction of Statutes that no legislative enactment should be so construed as to take away the Common Law rights of private persons *R SURATEE BAZA BAZAR CO. LTD. v. MUNICIPAL CORPORATION, RANGOON*, 5 R. 722; A. I. R. 1928 Rang. 87 849

— **s. 80—Assessment of bazaar property—Principles.**

In assessing the value of bazaar property under the City of Rangoon Municipal Act on the basis of what

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a hypothetical tenant would pay, it is proper to deduct from the gross rents, license-fees, directors' commission and lighting charges, the proportionate cost of establishment, interest on the capital required by the hypothetical tenant, his reasonable profit and occupiers' taxes amounting to 16½ per cent. of the rental but not the general tax, 7 per cent. payable by the landlord. **R SOORATEE BARA BAZAR Co. LTD. v. MUNICIPAL CORPORATION, RANGOON, 5 R. 715; A. I. R. 1928 Rang. 98** 857

— ss. 113, 192, 203. See CITY OF RANGOON MUNICIPAL ACT, 1922, s. 25 849

Civil Procedure Code (Act V of 1908), ss. 2, 104

—Court Fees Act (VII of 1870), Sch. I, Art. 1, Sch. II, Art. 11—Order filing or refusing to file award, whether decree—Appeal—Court-fee.

An order filing an award or refusing to file an award in an arbitration without the intervention of the Court is neither a decree nor an order having the force of a decree, and an appeal from such an order need not, therefore, bear *ad valorem* Court-fee under Sch. I, Art. 1 of the Court Fees Act but is to be stamped as an appeal from an order not having the force of a decree under Sch. II, Art. 11 of that Act.

In a reference to arbitration of disputes relating to partnership accounts with a view to the dissolution of a partnership, it is open to the arbitrators to decide any disputes that might arise during the course of the investigation into the partnership affairs as to whether or not any particular contract or property belonged to and formed part of the partnership assets. **L AGYA SINGH v. SUNDER SINGH, A. I. R. 1928 Lah. 137** 756

— ss. 2 (2), 105, 115, O. XX, rr. 15 to 18—

Partnership suit—Preliminary decree—Commissioner appointed to take accounts—Subsequent directions to Commissioner, whether further preliminary decree—Appeal or revision, whether lies.

Directions given to a Commissioner appointed to take accounts, subsequent to the passing of the preliminary decree in a partnership suit, do not constitute a preliminary decree against which an appeal lies but are in the nature of an interlocutory order within the meaning of s. 105, Civil Procedure Code, which could be questioned only in an appeal preferred against the final decree. **S UDHAVDAS v. DEVIDAS, A. I. R. 1927 Sind 100** 214

— s. 2 (20)—Civil Rules of Practice (Mad.), r. 4 (11)—“Signed” in reference to vakalats and affidavits, whether includes “stamped.”

By virtue of s. 2 (20) of the Civil Procedure Code and r. 4 (11) of the Civil Rules of Practice (Mad.) in the case of affidavits and vakalats the use of a stamp bearing the name of the party is sufficient even where the party is able to sign. There is no difference in this respect between pleadings and affidavits and vakalats. **M RAMALINGA SETHUPATHI v. SHUNMUGHA NADAN, (1927) M. W. N. 885; 54 M. L. J. 65; A. I. R. 1928 Mad. 175; 27 L. W. 237; 51 M. 212** 804

— s. 11—First suit disposed of on findings on several issues—Necessary and unnecessary findings, doctrine of—Subsequent suit on same cause of action—Res judicata on general principles—Addition of new reliefs in second suit, effect of. A instituted a suit against B for recovery of possession of certain properties which belonged to B's

Civil Procedure Code—1908—contd.

deceased husband alleging that he was the nearest heir of the husband of B. The suit was dismissed by the Court of first instance on the ground that B was not in possession of the properties. On appeal the suit was dismissed on the ground that A had not only failed to show that B was in possession but had also failed to establish that he was the nearest heir of the deceased. A subsequently sued B for the same properties on the same cause of action. He, however, prayed in addition that if B was found to be one of the heirs of the deceased, A might be given possession of his share:

Held, that the suit was barred by *res judicata*.

Per **Walsh, J.**—The issue whether A was the nearest heir was directly and substantially in issue in the former suit and was *res judicata* as it was heard and decided by the Appellate Court.

Per **Mukerji, J.**—Although where only one particular issue is identical in two different suits, one filed after the other, a question would arise whether the decision on the issue arrived at in the former suit would operate or not as *res judicata*, yet, where the two suits are identical, the failure of the first suit must bar the trial of the second suit even if no issues were raised in the former suit, under the general principle that no man can be vexed twice over the same cause of action.

Where the two suits are based on the same cause of action and against the same party, the mere addition of new reliefs in the second suit will not remove the bar of *res judicata*. **A MAJIDAN v. SABIR ALI, A. I. R. 1928 All. 62** 674

— s. 11—Res judicata—Code not exhaustive—Court trying former suit incompetent to try later suit—Doctrine, whether applicable.

Although the principle of *res judicata* is of general application and is not limited by the specific words of the Civil Procedure Code, the doctrine cannot be applied where the Court which decided the earlier proceeding was not competent to try the later proceeding. **PATSHOUKHI SAO v. GAIBI SAO** 149

— s. 11—Want of jurisdiction to decide an issue—Decision of Court on such issue—Res judicata.

Where a Court decides an issue which it is not competent to decide, its decision must be regarded as an *obiter dictum* and cannot operate as *res judicata*. **O ABID HUSAIN KHAN v. SRI THAKURJI, A. I. R. 1928 Oudh 296** 895

— s. 11, Expl. (iv). See FRAUD 110

— s. 11, Expl. VI, O. I, r. 8—Representative suit—Suit without leave but bona fide contested on behalf of community—Decision, whether *res judicata* in subsequent suit under O. I, r. 8.

Order I, r. 8, of the Civil Procedure Code, does not control Explanation VI to s. 11 of the Code, so as to prevent a suit filed with leave under O. I, r. 8, by two or more members of a community who claim a right in common to them and the other members of the community, and seek to enforce it on behalf of themselves and the community, being *res judicata* by reason of a decision given after bona fide contest in a previous suit filed without leave under s. 30, Civil Procedure Code, 1877, by some other members of the community claiming the same right and seeking to enforce it on behalf of the community. **M SONACHALAM PILLAI v. KUMARAVELU CHETTIAR, A. I. R. 1928 Mad. 77; 54 M. L. J. 8; I. L. T. 40 Mad. 23; 27 L. W. 216; 51 M. 128** 625

Civil Procedure Code—1908—contd.

ss. 11, 151, 152—Amendment of clerical or arithmetical errors in decree or judgment—First application disposed of on merits—Subsequent application, competency of—*Res judicata*.

A Court is competent to entertain successive applications for amendment of clerical or arithmetical mistakes in judgments or decrees and a decision of a prior application of this kind does not operate as *res judicata* in subsequent applications, but if an application for amendment has been heard and disposed of on the merits the Court will not, except in exceptional circumstances, entertain a subsequent application for substantially the same relief. *L. ATMA DEVI v. SHIB DEVI*, A. I. R. 1928 Lah. 244 390

s. 11, O. XLI, rr. 20, 33—Suit against two sets of defendants—Dismissal of suit—Appeal—Omission to implead one set—*Res judicata*—Impleading of parties in appeal—Passing decree under O. XLI, r. 33—Discretion—Interference in appeal.

The plaintiff instituted a suit for recovery of possession of certain properties from the first defendant and certain persons who had purchased the properties from the first defendant, alleging that the sale in favour of the first defendant was invalid and that the sale in favour of the purchasers was *benami* for the original owner. The sales were upheld and the suit was dismissed. The plaintiff preferred an appeal against the purchasers alone without impleading the first defendant as a party. The lower Appellate Court refused to implead him as a party under O. XLI, r. 20 and to exercise its powers under O. XLI, r. 33, Civil Procedure Code:

Held, (1) that the plaintiff could not be allowed to question the finding that the sale-deeds were valid in the appeal as he had not made the first defendant a party to the appeal;

(2) the first defendant against whom the suit had been dismissed and as against whom no appeal had been preferred and the right to appeal had become barred, was not in the circumstances interested in the result of the appeal against the other defendants within the meaning of O. XLI, r. 20 of the Civil Procedure Code;

(3) that the discretion exercised by the lower Appellate Court in refusing to exercise its powers under O. XLI, r. 33 of the Civil Procedure Code could not, in the circumstances of the case, be interfered with in appeal. *P. C. V. P. R. V. CHOCKALINGAM CHETTY v. SEETHAI ACHE*, A. I. R. 1927 P. O. 252; 4 O. W. N. 1231; 27 L. W. 1; 54 M. L. J. 88; (1928) M. W. N. 20; 47 C. L. J. 136; 32 C. W. N. 281; 1 L. T. 40 Rang. 18; 30 Bom. 220; 26 A. L. J. 371; 6 R. 29. 237

s. 13 (b)—Foreign judgment—"Decision on merits", meaning of—*Ex parte* judgment on mere proof of service, whether decision on merits—Suit on such judgment, maintainability of—Burden of proof.

An *ex parte* judgment obtained in a Foreign Court in accordance with the rules of procedure of that Court under which where the defendant is *ex parte* the plaintiff is entitled to a decree merely on proving that the defendant has been properly served, is not one obtained on the merits of the case within the meaning of s. 13 (b) of the Civil Procedure Code, and a suit on such foreign judgment cannot be maintained in British India.

In such a case the burden of proving the unsustainability of the suit does not fall on the defend-

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ant. *M. ARUNACHALAM CHETTIAR v. MUHAMMAD SALIHU. MARAKKAYAR*, 26 L. W. 803; A. I. R. 1928 Mad. 133

s. 20. See JURISDICTION 810

s. 22—Transfer of case—Notice to opposite party, necessity of. 218

The words used in s. 22, Civil Procedure Code, are mandatory and, therefore, notice must be given to the other party before an application for transfer is made under that section and if this has not been done the application is incompetent. *L. EDALJI DINSHAW & CO. v. DHANPAT MAL-BHAGWAN DAS* 593

ss. 36, 136, O. XXXIX, r. 2—Appointment of Receiver by Original Side of High Court—Refusal to hand over books to Receiver—Contempt of Court—Jurisdiction of Judge of Original Side to send warrant of arrest for execution to District Judge—Proper procedure—Application for injunction.

An application was made to a Judge on the Original Side of the High Court of Calcutta for an order directing the District Judge of Nadia to execute a warrant of arrest of a person who was guilty of contempt of Court in not having handed over certain articles to a Receiver appointed by the Court. The application was refused and the petitioner appealed:

Held, (dismissing the appeal), that although the High Court in its Appellate Side could make such an order as was asked for, it was extremely doubtful whether it could do so on its Original Side, and that it was eminently desirable that the petitioner should proceed regularly under the Code so far as possible by asking for an injunction in express terms, in which case s. 136 of the Civil Procedure Code could be applied and the High Court would have statutory power to make the kind of order sought for. *G. SALAM CHAND KANAYRAM v. JOOGUL KISHORE RAMDEO*, 32 C. W. N. 114 65

s. 38—Mortgage suit—Final decree for sale—Transfer of village in which mortgaged property is situate to another Revenue District—Court passing decree, whether has jurisdiction to execute it.

A Court which passes a final mortgage-decree for sale does not lose its jurisdiction to execute it by the mere fact of the portion of the District in which the property mortgaged is situate being transferred to another Revenue District. *N. POKHARDAS v. GANPAT RAO* 195

s. 47. See BENGAL TENANCY ACT, 1885, s. 170 357

ss. 47, 92—Public trust—Scheme decree—Directions to defendant to perform particular acts, whether executable—Appealability of decree—Conversion of execution application into suit.

It cannot be laid down as a general rule that all scheme decrees under s. 92 of the Civil Procedure Code are always declaratory and can never be executable. The question whether a decree framing a scheme is executable or not depends on the language and on the scope of the decree or of that particular part of the decree in respect of which the question arises. Such a decree may in part be declaratory and in part directory.

Directions in such a decree to the defendant to perform some duty, such as the payment of money, either at a point of time or periodically, or to present a proper budget at specified times and make

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particular payments of money to the treasurer are matters intended to be enforced in execution.

Where an application for enforcing the duties imposed by a scheme decree was disposed of by the trial Court in execution proceedings and one of the parties preferred an appeal from the order of the trial Court:

Held, that even assuming that the matter could not be disposed of on an application for execution, it was open to the High Court to treat the application as a suit under s. 47 (2), Civil Procedure Code, subject to any question of jurisdiction or limitation and to entertain the appeal as an appeal from a decree in such a suit. *M BOARD OF CONTROL, TIRUVALUR v. BALAJEE AMMAL*, 39 M. L. T. 579; A. I. R. 1928 Mad. 61; 27 L. W. 32

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— ss. 47, 104, O. XXI, r. 90, O. XLIII, r. 1 (j)

— *Order dismissing application to set aside sale on ground of irregularity—Appeal—Second appeal.*

An order under O. XXI, r. 90 refusing to set aside a sale in execution of a decree on the ground of irregularity in publishing or conducting it is appealable under O. XLIII, r. 1 (j) and not under s. 47, Civil Procedure Code, and is, therefore, not open to second appeal. *L BHAGELA SHAH v. SITA RAM*, A. I. R. 1928 Lah. 444

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— s. 47, O. XXI, r. 2—*Agreement before decree not to execute decree, validity of.*

An agreement entered into by a party to a suit before the passing of the decree, that he will not take any steps to enforce the decree to be passed against the other party cannot be entertained by an executing Court. *R M. E. MOOLLA v. CHARTERED BANK OF INDIA*, 5 R. 685; A. I. R. 1928 Rang. 36

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— s. 47, O. XXI, r. 58—*Decree against legal representative—Attachment of property—Claim by judgment-debtor on his own account, whether falls within s. 47—Appeal.*

An objection by a judgment-debtor against whom a decree has been passed as the legal representative of another, to an attachment of the property of the deceased on the ground that the property was not liable to attachment inasmuch as it belonged to him by virtue of a gift made to him by the deceased prior to the suit or decree, falls within the purview of s. 47 of the Civil Procedure Code and not within O. XXI, r. 58 of the Code.

A wide and liberal construction has always been placed on s. 47 in order that all questions which can possibly be determined in execution proceedings should be so determined. *R MA SHWE MRA PRU. v. MAUNG BA ON*, 5 R. 659; A. I. R. 1928 Rang. 29

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— s. 47, O. XXI, r. 90—*Death of defendant before decree—Objection to validity of decree in execution, whether maintainable—Prayers under s. 47 and O. XXI, r. 90, whether can be joined together.*

In execution proceedings the objection that the decree was a nullity since one of the judgment-debtors had died before the decree was passed, can be put forward.

A prayer under s. 47, Civil Procedure Code, can be joined with a prayer under O. XXI, r. 90 in one application. It is only reasonable that the Executing Court should deal with every objection which the judgment-debtors put forward to an execution sale in one and the same proceeding.

Per Macpherson, J.—Even if it is necessary for the

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objectors to make an election in the first Court, that Court should put them to their election and should not itself choose at a late stage which of the two objections it should consider and which it should not consider. *PAT JAMILA KHATOON v. DAYANAND THAKUR*, 7 Pat. 331; A. I. R. 1928 Pat. 272

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— s. 48, O. XXI, rr. 90, 91—*Execution sale—Auction-purchaser's right to recover sale amount from decree-holder on sale being set aside—Cause of action, when arises.*

Where a sale in execution of a decree is set aside or becomes infructuous, the decree-holder is liable to re-pay the purchase-money if called upon by the purchaser to do so but not otherwise and the cause of action for the decree-holder to proceed against his judgment-debtor does not, therefore, arise till he is compelled to pay the money to the auction-purchaser. *M BOROJO CHARCHI v. ODHAKARI BASUDEBB DAS*, I. L. T. 40 Mad. 11; (1928) M. W. N. 83; A. I. R. 1928 Mad. 152

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— ss. 65, 66—*Benami purchase in execution sale—Sale held before passing of new Code but confirmed after new Code—Suit by real owner against transferee of benamidar, whether maintainable—Difference between old and new Codes.*

A benami purchase in a Court sale held before the passing of the Civil Procedure Code of 1908 but confirmed after the passing of that Code is governed by the provisions of s. 66 of the Code of 1908 and not by those of s. 317 of the Code of 1882, notwithstanding the provisions of s. 65 of the Code of 1908 under which, on confirmation of a sale, the title of the auction-purchaser vests back with retrospective effect from the date of sale.

The chief difference between s. 66 of the Civil Procedure Code of 1908 and s. 317 of the Code of 1882 is that whereas under the old Code a suit would lie against the heirs or assignees of a benamidar though not against the benamidar, under s. 66 of the new Code no suit would lie against anyone claiming a title under the certificated purchaser. *C FAZLUR RAHAMAN v. SADAR ALI*, 32 C. W. N. 112; A. I. R. 1928 Cal. 338

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— s. 73—*'Same judgment-debtor', meaning of—Decrees against several persons—Decree-holders with common judgment-debtors, whether entitled to share—Application for execution to Court holding assets, necessity of—Mere forwarding of application for execution by Court passing decree, effect of.*

Where property belonging to several persons has been sold in execution of a decree against all of them, persons holding decrees against some of them alone are entitled to participate rateably in the distribution of the assets according to the interest of their respective judgment-debtors in the property sold provided they have otherwise complied with the provisions of s. 73 of the Civil Procedure Code.

The words 'same judgment-debtor' in s. 73 of the Code do not mean, in the case of decrees against several persons, that all the judgment-debtors of all the decrees should be the same.

A decree-holder who has not obtained a transfer of his decree to the Court holding the assets and applied to that Court for execution of his decree but whose application for execution to the Court which passed his decree has merely been forwarded for rateable distribution to the Court holding the assets is not

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entitled to rateable distribution under s. 73 of the Civil Procedure Code. **R C. R. M. A. CHETTYAR FIRM v. K. R. S. V. CHETTYAR FIRM**, 5 R. 757; A. I. R. 1928 Rang. 96 169

— **s. 73, O. XXI, r. 11—Rateable distribution—'Application for execution', requisites of—Application for attachment of fund in Court to credit of judgment-debtor, whether one in execution or merely interlocutory—Informal applications, effect of.**

All that s. 73 requires in order to enable a person to get rateable distribution is that he should make an application for the execution of the decree before the receipt of the assets by the Court.

An application purporting to be under O. XXI, r. 11, Civil Procedure Code, contained the names of parties and prayed that the amount belonging to the defendant and in deposit in the Court in another suit may be attached immediately on condition of producing the copy of the decree, later on. But the petition contained neither verification, the date of the decree, nor the particulars required by the subcls. (d), (e), (f), (g) and (h) of the Rule. The Court, however, acted upon the petition and ordered an attachment of the fund:

Held, Per Jackson, (Devadoss, J., dissenting), that the application was merely an interlocutory one and not an application for execution within the meaning of s. 73, Civil Procedure Code.

Per Devadoss, J.—Where a Court overlooks certain small informalities and grants the relief asked for, it is not open to the party against whom the relief is granted to question the correctness or the legality of the Court's order on the ground that the application on which the relief is granted is not in the proper form.

Per Jackson, J.—A Court cannot take up a mere application for rateable distribution and fill in the particulars necessary in order to make it a regular application for execution. Nor can it do so with a mere application for attachment. **M ABDUL SALAM SAHEB v. BATCHU VEERABHADRA RAJU**, A. I. R. 1928 Mad. 129 490

— **s. 75. See C. P. C., 1908, s. 100**

— **s. 80—Notice to Secretary of State—Contents—"Cause of action"—Notice as to future cause of action, validity of.**

Although the object of s. 80 of the Civil Procedure Code is merely to inform the defendant substantially of the ground of complaint and the words 'cause of action' in the said section should not be construed in a narrow sense, yet it is necessary to state the cause of action with some precision.

Where a notice under s. 80, Civil Procedure Code, in respect of a contract for sale of goods alleged to have been entered into by a Government servant stated that no instructions had been given for the delivery of the goods and that unless the requisite orders for delivery were given legal proceedings would be adopted:

Held, that the notice was invalid inasmuch as it was in respect of a cause of action which had not already arisen. **C KESSORAM PODDAR & Co. v. SECRETARY OF STATE FOR INDIA**, 64 C. 969; A. I. R. 1926 Cal. 74 360

— **s. 92. See C. P. C., 1908, ss. 47, 92** 136

— **s. 93—Sanction order signed by sheristadar for Collector, whether valid—Omission to pray for relief sanctioned, effect of.**

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Where an order granting sanction to institute a suit under s. 93, Civil Procedure Code, purporting to be passed by a Collector was signed by the *sheristadar* for the Collector and above the signature of the *sheristadar* the words "by order" appeared:

Held, that there was nothing illegal in the Collector delegating his power to sign to his *sheristadar*, that the official act of the *sheristadar* must be presumed to have been done properly until the contrary was proved, and that the order granting sanction was not invalid.

In dealing with cases where there is an omission as regards certain reliefs which are sanctioned by the Collector or Advocate-General the test is whether such omission is a material omission, one from which it can be said that it so alters the scope or character of the suit that if this matter was before the Collector or Advocate-General when the sanction was given, he would in all probability not have sanctioned the suit in the form in which it is ultimately brought. An omission which is immaterial and which would not affect the interests of the trust is not sufficient to vitiate the proceedings and the plaint filed in pursuance of the sanction.

The addition of a claim must be treated as a claim made without sanction and as such it is liable to be dismissed.

But the mere addition of a claim will not render the whole suit liable to be dismissed. **M PARUCHURU SUDARASANACHARYULU v. KOLLIMARLA SURYANARAYANA**, 33 M. L. T. 628; 27 L. W. 42; A. I. R. 1928 Mad. 130 522

— **s. 100. See CUSTOMARY RIGHT**

— **s. 100—Construction of documents, whether question of law—"Construction", meaning of.**

The expression 'construction' as applied to a document includes two things: first, the meaning of the words, and secondly, their legal effect or the effect which is to be given to them. The meaning of the words is a question of fact in all cases and the effect of the words is a question of law. **O RAMPAL SINGH v. JAI RAM SINGH**, 4 O. W. N. 1229; A. I. R. 1928 Oudh 121 560

— **s. 100—Provincial Insolvency Act (V of 1920), ss. 54, 75—Second appeal—Fraudulent preference, whether question of fact.**

The question whether a transaction is a fraudulent preference is one of fact and not of law. **L BEHARI LAL v. CHUNI LAL** 480

— **s. 102—Suit triable as Small Cause—Trial as ordinary suit—Second appeal, whether lies.**

A decree in a suit triable by a Small Cause Court but actually tried by an ordinary Civil Court is not open to second appeal under s. 102 of the Civil Procedure Code. **N BAPU SURYABHAN v. KISAN**, A. I. R. 1928 Nag. 136 193

— **s. 104.**

See C. P. C., 1908, s. 2 756

See C. P. C., 1908, s. 47 488

— **s. 105. See C. P. C., 1908, ss. 2 (2), 105, 115** 214

— **s. 109 (a), (c)—Appeal to Privy Council—Order setting aside decree based on alleged compromise, whether 'final order'—Tests of finality of orders—Powers under cl. (c) to be sparingly used.**

An order setting aside a decree passed in terms of a compromise alleged to have been made between the parties to the suit and directing the suit to be

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restored to the file and continued from the stage at which the compromise was filed, is not a final order within the meaning of s. 109 (a) of the Code of Civil Procedure.

Per *Dawson Miller, C. J.*—The real test for determining whether an order is final or not is whether the order, as made, finally disposes of the rights of the parties. If it does it is a final order, but if it does not, then, it is an interlocutory order.

The powers granted under s. 109 (c) of the Code of Civil Procedure should be sparingly used. *Pat F. A. SAVI v. SABITRI THAKURAIN*, 6 Pat. 282; 8 P. L. T. 615; A. I. R. 1927 Pat. 363 313

— s. 110—*Appeal to Privy Council*—‘Substantial question of law,’ meaning of.

The application of well-defined legal principles to a particular set of facts does not raise a question of law which can fairly be described as ‘substantial’ within the meaning of s. 110 of the Code of Civil Procedure. *A MATHURA KUMAR v. JAGDEO SINGH*, 25 A. L. J. 970; A. I. R. 1928 All. 61; 25 A. 208 33

— s. 110—*Appeal to Privy Council*—Valuation of suit—Future mesne profits, whether can be taken into account.

In arriving at the value of a suit for the purposes of s. 110 of the Code of Civil Procedure the Court is entitled to take into account not merely the mesne profits claimed up to the date of the suit but also the future mesne profits, and, in any case, up to the date of the decree of the trial Court. *Pat SHAMA KANT LAL v. RAMDHAN PURI* 828

— s. 110—‘Substantial question of law,’ meaning of—Point of law decisive of case, whether substantial.

Every point of law arising in a case which is decisive of it is not a substantial question of law within the meaning of s. 110 of the Civil Procedure Code. *M AMERCHAND NAGIN DOSS & Co. v. RAOJI BHAI MOTI BHAI PATEL*, 39 M. L. T. 655; A. I. R. 1928 Mad. 233 643

— s. 115.
See O. P. C., 1908, ss. 2 (2) 214
See LETTERS PATENT (MAP), cl. 15 813
See OUDH RENT ACT, 1886, AS AMENDED BY ACTS OF 1901 AND 1923, ss. 109, 119 (b) 877

— s. 115—*Divorce suit*—Interlocutory order—Revision—Interference—Divorce Act (IV of 1869), s. 11.

The High Court will not ordinarily interfere in revision with an order made by a lower Court in an interlocutory matter in a divorce suit. *C MATILAL LYALL v. PREMI LYALL*, 54 O. 1038; A. I. R. 1928 Cal. 114 475

— s. 115—Order allowing claim petition—Failure to determine question of possession—Revision—Interference.

Where the lower Court whose order is impugned has entirely misconceived the question before it or committed an obvious irregularity, there is no reason why the High Court should not interfere in revision under s. 115 of the Civil Procedure Code. *M MEENAKSHI AMMAL v. ISWARAM IYER*, 39 M. L. T. 590; 53 M. L. J. 903; A. I. R. 1928 Mad. 124; 27 L. W. 238; (1928) M. W. N. 50 301

— s. 115—*Punjab Courts Act (VI of 1913)*, s. 14—Revision—Error of law—Wrong interpretation of document, whether ground for revision.

Where there are two possible views of the meaning

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of the words used in a document and the lower Courts have accepted one, it is not open to the High Court to interfere in revision whether it agrees with that view or not.

A wrong decision on a point of law is no ground for interference in revision. *L MATWAL DAS v. NAND LAL*, A. I. R. 1928 Lah. 284 273

— s. 115, O. IX, r. 13—Order restoring suit dismissed in default—Revision.

An order restoring a suit dismissed in default is not an interlocutory order and is open to revision. *L ABDUL AZIZ v. PUNJAB NATIONAL BANK, LTD* 395

— s. 115—Error on question of limitation, whether ground for revision.

An error on a question of limitation is not necessarily such an error as would bring the case within the purview of s. 115 of the Civil Procedure Code. *C SATISH CHANDRA DE SARKAR v. RAKHAL CHANDRA SAHA*, 47 O. L. J. 62; A. I. R. 1928 Cal. 189 733

— s. 115, O. XXXIX, r. 1—Temporary injunction, order refusing—Revision, whether lies—Practice—Interference with interlocutory orders, when justifiable.

No revision lies against an interlocutory order refusing to grant a temporary injunction pending a civil suit.

A High Court will not interfere in revision with interlocutory orders unless its non-interference will cause an irreparable injury or lead to a failure of justice. *N NARSINGH DAS v. DOMDOLAL*, A. I. R. 1928 Nag. 222 908

— s. 115, O. XLIII, r. (1) (w), O. XLVII, r. 7—Order granting review—Appeal—Grounds for appeal—Interference in revision.

An appeal from an order granting a review is governed in the Bombay Presidency by the provisions of O. XLVII, r. 7 of the Code of Civil Procedure and not by O. XLIII, r. (1) (w) of the Code, inasmuch as the latter provision has been deleted from the Code by the Bombay High Court in exercise of its powers under s. 122 of the Code.

It is inexpedient to interfere with an order which is not appealable by having recourse to the exceptional powers under s. 115 of the Civil Procedure Code. *B KUNVERSI RATANSI PATEL v. PITAMBERDAS RAMDAS*, 26 Bom. L. R. 1355; A. I. R. 1927 Bom. 599 50

— s. 115, Sch. I, para. 15—Order setting aside award, appealability of—Interference with such order in appeal—Revision.

An order setting aside an award, is not open to appeal and where a Court interferes with such an order in appeal it acts without jurisdiction and its decision is liable to be set aside in revision. *L YUSUF v. MUSA* 109

— s. 136. See O. P. C., 1903, ss. 36, 136, O. XXXIX, r. 2 65

— s. 144. See COURT FEES ACT, 1870, Sch. II, Art. 11 491

— s. 146, O. XXI, r. 16—Assignment of part of decree—Assignee's right to execute decree.

A transferee of a part of a decree is competent to apply for execution thereof. *L JASWANT RAI DATTA CHOWDHEY v. LAJWANTI*, A. I. R. 1924 Lah. 70 603

— s. 149, Sch. II, paras. 3, 17, 20—Court Fees Act (VII of 1870), ss. 6, 19, Sch. II, Art. 1 (b)—Limitation Act (IX of 1908), Sch. I, Art. 158—Rules of the Court of the Judicial Commissioner of Sind, Chap. VI, r. 5—Reference in pending suit—Award—Objection in writing—Court-fee—Expiry

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of ten days prescribed by Limitation Act—Court-fee, whether can be received thereafter.

Written objections to an award passed on a reference made through the Court in a pending suit must bear the Court-fee prescribed under Art. 1 (b) of Sch. II of the Court Fees Act.

(The practice to the contrary prevalent in the Court of the Judicial Commissioner of Sind disapproved).

Under the provisions of s. 149 of the Civil Procedure Code, the Court can receive Court-fee stamp required to be affixed to an application to set aside an award, even after the expiry of the ten days prescribed by Art. 158 of Sch. I of the Limitation Act. **S ADAMALI v. ABDULALI**, A. I. R. 1928 Sind 87

s. 151.

See C. P. C., 1908, s. 11

See COURT FEES ACT, 1870, s. 7, cl. (iv), sub-cl. (c) and (d)

s. 151—Court-fee—Levy of excess Court-fee

—Appellate Court's power to order refund—Inherent powers.

An Appellate Court has inherent power to order refund of Court-fee illegally levied by the lower Court. **PAT SASIBUSHAN MAZUMDAR v. MANIK LAL CHANDRA**

s. 151—Injunction, principles governing grant of—Order under inherent powers, appealability of.

When the jurisdiction of a Court under s. 151, Civil Procedure Code, is invoked for granting an injunction and it is called upon to act *ex debito justitiæ*, it is necessary for the plaintiff to establish a strong *prima facie* case and to show that if the injunction asked for is not granted, irreparable injury or inconvenience would result.

An order passed under s. 151, Civil Procedure Code, is not appealable: **L KUNJ BEHARI LAL v. MUBARIK BEGUM**, 9 Lah. L. J. 536; 29 P. L. R. 273; A. I. R. 1927 Lah. 833

s. 151, O. IX, r. 9—Suit dismissed in default

—Application for restoration filed later than thirty days—Court, whether has inherent jurisdiction to restore—Limitation Act (IX of 1908), s. 5, applicability of.

When a definite period of limitation is prescribed by law within which action must be taken, a Court is not entitled to extend it by purporting to act under s. 151 of the Civil Procedure Code.

Section 5 of the Limitation Act is not applicable to an application under O. IX, r. 9 of the Civil Procedure Code for the restoration of a suit dismissed in default. **N SABA v. DAYARAM**, 23 N. L. R. 183; A. I. R. 1928 Nag. 91

s. 151, O. IX, O. XXI, rr. 100, 103—

Application under O. XXI, r. 100—Ex parte order—Restoration under inherent powers, legality of—Inherent powers, exercise of—O. IX, Civil Procedure Code, whether applies to execution proceedings.

Where there is no provision in the Civil Procedure Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which it exists, the provisions of s. 151 may and should be resorted to.

A suit contemplated by O. XXI, r. 103, Civil Pro-

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cedure Code, is one which may be instituted after a due and proper investigation of the matter in accordance with O. XXI, r. 100 of the Code and where the matter has not been so investigated but has been disposed of on default on the part of one or other of the parties, the remedy by way of suit is hardly a remedy for the dismissal for default, and does not, therefore, stand in the way of restoring the application under the provisions of s. 151 of the Code.

Order IX of the Civil Procedure Code is not applicable to applications arising out of execution proceedings. **C NABU SAHU v. KAMDEV MAITY**, 47 O. L. J. 87; A. I. R. 1928 Cal. 179

s. 151, O. XLI, r. 10—Security for costs of

appeal—Security bond not properly executed—Authority of appellant's representative to sign bond—Appellate Court's duty to afford proper opportunity to appellant to cure defect—Adherence to mere technicalities—Defeat of substantial justice.

An Appellate Court made an order on the appellant for furnishing security for costs of the appeal within a specified time, and the appellant in compliance therewith gave security and executed the necessary bond, which was duly accepted by the Registrar of the Court. After various intermediate proceedings, the case finally came on for hearing before the Appellate Court, when the respondent took the preliminary objection that the security furnished by the appellant was not in strict compliance with the order of the Court, inasmuch as it had not been proved that the party executing the security bond on behalf of the appellant had authority so to do. The Appellate Court gave effect to this contention and forthwith dismissed the appeal without going into the merits of the case:

Held, that the refusal to hear the appeal merely on the ground of what might have been a mere technicality about the bond led to a failure of justice and that the Appellate Court should have afforded a proper opportunity to the appellant, by adjourning the appeal, if necessary, to remedy the defect, if any, in the security bond.

Where it appeared that the security bond was signed, not by the appellant himself, but by a person purporting to act as his representative, and the question arose whether such person had the requisite authority on behalf of the appellant to execute the bond:

Held, that the appellant was entitled to an opportunity to prove by affidavit or otherwise that the bond was properly executed and that the party executing it had authority in that behalf. **P G KOJO PON v. ATTA FUA**, 47 O. L. J. 328; A. I. R. 1927 P. O. 264

s. 151, O. XLI, r. 23—Remand order

purporting to be under O. XLI, r. 23, but really under inherent powers—Appeal.

Right of appeal is determined by what the Court purports to do and not by what the Court should have done. Therefore, where the Court purports to remand under O. XLI, r. 23, Civil Procedure Code, an appeal is competent from the remand order, even though the order is really one passed under s. 151 of the Civil Procedure Code. **L GOPAL SINGH v. MANGAL SINGH**, A. I. R. 1928 Lah. 341

s. 152. See C. P. C., 1908, s. 11

O. I, r. 8. See C. P. C., 1908, s. 11, Expl. VI

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— O. I, rr. 8, 11—*Representative suit on behalf of community—Application for leave—Defendant, right of, to object to leave on the ground that plaintiffs do not possess confidence of community—“Numerous,” meaning of—Consultation of other members of community, whether necessary.*

On an application for leave to sue in a representative capacity on behalf of a community under O. I, r. 8, Civil Procedure Code, it is not competent to the defendants to raise the contention that the plaintiffs do not possess the confidence of the community as regards the conduct of the suit. In a proper case, if necessary, the Court may under O. I, r. 11, give the conduct of the suit to such persons as it deems proper, and the Court could also add as parties any persons who wish to be on the record *eo nomine*, if proper grounds are made out for the course being taken.

Where the number of persons interested in a suit is 100, they are sufficiently “numerous” within the meaning of O. I, r. 8.

It is not necessary that in a representative suit the plaintiffs should prove that they consulted the community or obtained the opinion of the majority in support of the suit. *M. ABDUL GHANI v. SUBRAMANIAN CHETTIAR*, 27 L. W. 212; I. L. T. 40 Mad. 89 789

— O. I, r. 10, cl. (2)—*Addition of party—Rent suit against recorded tenants—Purchasers of holding, whether can be added as parties against plaintiff's will.*

In a suit for rent against the recorded tenants, purchasers of the holding should not be added as parties against the will of the plaintiff inasmuch as the addition of such parties would involve the determination of a complicated question of recognition which is not appropriate for decision in a rent suit. A Court has no power to add such parties in a rent suit under O. I, r. 10, Civil Procedure Code. *PAT KULDIP MAHTON v. PATIA*, 9 P. L. T. 437; A. I. R. 1928 Pat. 281 539

— O. I, r. 11. See C. P. C., 1908, O. I, r. 8 789

— O. II, r. 2—*Mortgage-bond—Suit for interest alone—Subsequent suit for principal, whether barred—Provision postponing right to sue for principal, effect of—Construction of deed.*

A mortgage-deed provided that on the failure of the mortgagors to pay the interest the mortgagee “should be competent at all times to recover the mortgage-money and the interest referred to above”. There was a postscript that the mortgagee cannot, however, bring a claim for refund of the mortgage-money till two years. Interest was not paid and the mortgagee brought a suit within two years for interest alone. In a subsequent suit for principal and the balance of interest it was contended that the suit was barred inasmuch as he had not sued for principal also in the prior suit:

Held, that, upon a proper construction of the deed, the mortgagee was not entitled to sue for principal within two years even though there was default in the payment of interest and that, consequently, the subsequent suit for principal was not barred. *A. RAM CHANDRA SAHAI v. RAMA MAL*, 26 A. L. J. 57 591

— O. V, r. 17, O. IX, r. 13—*Ex parte decree—Application to set aside decree—Proper service—Burden of proof—Summons affixed to house—Names and addresses of witnesses not given in report—Service, whether proper—Burden, whether shifts—Agent, whether can refuse to accept service,*

Civil Procedure Code—1908—contd.

In proceedings to set aside an *ex parte* decree on the ground that the defendant was not served, the burden of proof of non-service lies on the defendant, if the report of the process-server is according to law. But, under O. V, r. 17 of the Civil Procedure Code it is compulsory that names and addresses of persons, if any, in whose presence the copy of the summons is affixed must be given and if the report of the process-server does not give such names, it is not in accordance with law and does not furnish *prima facie* proof of due service, and it is for the plaintiff to prove that the defendant was duly served.

An agent is not invariably entitled to refuse summons. *N. BALKISANDAS v. JAINARAYAN*, 23 N. L. R. 166; A. I. R. 1928 Nag. 80 666

— O. V, r. 20—*Substituted service—Plaintiff, giving several different addresses of defendant—Inference—Service by proclamation.*

Before substituted service can validly be effected all reasonable efforts must be made to find out the whereabouts of the defendant in order to effect personal service.

Where the plaintiff gives several addresses of the defendant and every time a different one it may be inferred that the defendant's address is not correctly known to the plaintiff and an order for substituted service should not be made.

Where the defendant is not in his village service by proclamation of the date of hearing is of no avail. *L. WALI MUHAMMAD v. FAZL DAD* 282

— O. VI, r. 17—*Suit for dissolution of partnership—Prayer for amendment of plaint by including business not originally included—Cause of action whether changed.*

In an action by a partner for dissolution of partnership if the plaintiff comes to know that there is a business carried on for the partnership in some place of which he was not aware at the time of the filing of the plaint, he is entitled to include a prayer by way of amendment for dissolution of that business also. Such an amendment does not introduce any new cause of action. *M. NARAYANAN CHETTIAR v. SUPPIAH CHETTIAR*, I. L. T. 40 Mad. 65; A. I. R. 1928 Mad. 402 637

— O. IX. See C. P. C., 1908, s. 151 729

— O. IX, rr. 2, 8—*Dismissal of application for insolvency for non-payment of process-fees—Fresh application, maintainability of—Dismissal under O. IX, r. 8, legality of.*

The dismissal of an application for insolvency, under O. IX, r. 2 of the Civil Procedure Code does not prevent the applicant or another creditor from presenting a fresh application.

In order to bring a case under O. IX, r. 8, Civil Procedure Code, it has to be established that the defendant did appear on the date on which the application was dismissed. *PAT CHAUGHMAL BHAGIRATH v. KHEM KARAN DAS*, A. I. R. 1928 Pat. 116 843

— O. IX, r. 8. See C. P. C., 1908, O. IX, r. 2 842

— O. IX, r. 9. See C. P. C., 1908, s. 151 193

— O. IX, r. 13. 395

See C. P. C., 1908, s. 115 395

See C. P. C., 1908, O. V, r. 17 666

— O. IX, r. 13—*Ex parte decree—Pleader reporting no instructions—Application to set aside decree, maintainability of.*

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Where a Pleader reported that he had no instructions and an *ex parte* decree was passed, and the Pleader subsequently applied with a fresh *vakalat* to set aside the *ex parte* decree:

Held, that the decree, though one on the merits, was nevertheless under the circumstances an *ex parte* decree and was liable to be set aside under O. IX, r. 13, Civil Procedure Code. *M R. B. PODDAR & Co. v. D. D. TATACHARIAR*, (1927) M. W. N. 897; A. I. R. 1928 Mad. 234 815

— O. IX, r. 13 — Preliminary decree—Contemplating appeal from preliminary decree, whether sufficient cause for non-appearance in proceedings for passing of final decree—Appeal from preliminary decree, after passing of final decree, effect of.

The mere fact that a party is contemplating an appeal from a preliminary decree is not a sufficient cause for his non-appearance in proceedings relating to the passing of the final decree.

The filing of an appeal from a preliminary decree subsequent to the passing of the final decree cannot have the effect of nullifying the final decree. *A CHHANGA v. TIRHI*, 26 A. L. J. 37; A. I. R. 1928 All. 192 581

— O. XVII, rr. 2, 3, applicability of—Failure to appear on adjourned date—Hearing not commenced—Procedure—Rule 3 not applicable.

It is settled law that O. XVII, r. 3 of the Civil Procedure Code applies only where the hearing of a suit has commenced and an application for an adjournment is then made by one of the parties. When before the hearing of a suit is commenced the plaintiff fails to appear on an adjourned date, the Court has to proceed under r. 2 and not r. 3. *PAT MAHABIE PRASAD DUBEY v. SHRODAYAL PATHAK*, A. I. R. 1928 Pat. 167; 7 Pat. 236 824

— O. XX, rr. 15 to 18. See C. P. C., 1908, ss. 2 (2), 105, 115 214

— O. XXI. See PROVINCIAL INSOLVENCY ACT, 1920, ss. 5 (1), 59 (a), 68 172

— O. XXI, r. 2. See C. P. C., 1908, s. 47 860

See LIMITATION ACT, 1908, s. 20 40

— O. XXI, r. 11. See C. P. C., 1908, s. 73 298

— O. XXI, rr. 11, 17 (1) and (2)—Application for execution—Deceased judgment-debtor's name entered as legal representative—Defect not noticed by Court—Subsequent amendment after period of limitation—Application, whether in accordance with law.

Parties should not be made to suffer by reason of the failure of the Court to check the correctness of the entries in their execution petition.

An application for execution was presented against the legal representative of a deceased judgment-debtor. A subsequent application was presented against the deceased judgment-debtor by oversight. The Court failed to detect the mistake and notice was issued in the name of the dead man. The attention of the Court was drawn to the defect later on by an application for amendment which was, however, granted after the expiry of the period of limitation:

Held, that the amendment fell within the scope of O. XXI, r. 17, sub-r. (1) of the Civil Procedure Code and that, therefore, by virtue of sub-r. (2) the application as amended must be deemed to have been one in accordance with law presented on the date when

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it was first presented. *M EDAVALATH POTAYUR v. THIRUVAZHIYOT VALAPPA*, 39 M. L. T. 371; A. I. R. 1928 Mad. 24; 54 M. L. J. 154; 27 L. W. 796 303

— O. XXI, r. 16. See C. P. C., 1908, s. 146 603

— O. XXI, r. 25—Order of remand—Reasons expressed, whether binding on Court hearing appeal finally.

An order of remand made under O. XLI, r. 25, Code of Civil Procedure, decides nothing, and the reasons that the Court gives for its support are given merely for its own convenience for the purpose of the determination of the appeal under O. XLI, r. 26, Code of Civil Procedure, and for helping the lower Court to proceed rightly in carrying out the order. The Court, either the same or differently constituted, when determining the appeal finally, has ample jurisdiction to go back on the views as expressed in the order of remand passed under O. XLI, r. 25 of the Code, and it would fail in its duty if, in deference to those views, which, no doubt, are entitled to the highest respect, it persists in them, although it is satisfied that they are erroneous. *C UPENDRA LAL GUPTA v. JOGESH CHANDRA ROY*, 47 O. L. J. 112; A. I. R. 1928 Cal. 186 730

— O. XXI, r. 29—Order for stay of execution, operation of—'Until the pending suit has been decided'—'Suit', whether includes 'appeal'.

The words 'until the pending suit has been decided' in O. XXI, r. 29 of the Civil Procedure Code mean until the claim in the pending suit has been finally decided, that is to say, after all rights of appeal have been exhausted. *C MAHESH CHANDRA SARDHU v. JOGENDRA LAL SARKAR*, 32 O. W. N. 181; A. I. R. 1928 Cal. 222; 55 O. 512 79

— O. XXI, r. 46—Attachment of money—Order by Judge having no jurisdiction over place of attachment, whether legal—Railway contractor, payments to be made to, whether attachable—Prohibitory order to Station Master, legality of.

No prohibitory order for attachment of money can be made under O. XXI, r. 46 of the Civil Procedure Code unless the Judge issuing such order has jurisdiction over the place where the attachment is to be made.

Payments to be made to a Railway contractor for work done by him are not attachable under the rule as it is neither the salary nor the allowance of a servant of the Railway Company. Nor is the Station Master of the place where the contract work was done, the proper person to whom such an order can be issued. *N NAZARALI v. BALA*, A. I. R. 1928 Nag. 210 663

— O. XXI, r. 46—Prohibitory order addressed to Secretary—Acceptance by Managing Director—Validity of attachment.

A prohibitory order issued to a Company without a Secretary can be validly accepted by its Managing Director even though the order is wrongly addressed to the Secretary. *R M. E. MOOLLA v. CHARTERED BANK*, 5 R. 685; A. I. R. 1928 Rang. 36 860

— O. XXI, r. 57—'Striking off' execution petition—Attachment, whether ceases.

Where execution proceedings are not dismissed on account of default of the decree-holder, but the matter is merely shelved for the time being, the proceedings must be deemed to be still pending.

A attached certain properties in execution of a decree against B. B's sons instituted a suit for a declaration that the decree was not binding on the

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family and that the properties, which belonged to the joint family, could not be attached. The application for execution was 'struck off' pending the decision of this suit. *B* then mortgaged the properties to *C*. The properties were thereafter sold in execution of *A*'s decree and purchased by *A*. In a suit by *C* to enforce his mortgage against *B* and *A*'s heirs:

Held, that the order striking off the execution case did not terminate the attachment and that the mortgage-deed was ineffective as it was executed during the pendency of the attachment. *A KHAZAN SINGH v. BIKRAM SINGH* 574

O. XXI, r. 58.

See BENGAL TENANCY ACT, 1885, s. 170 357
See C. P. C., 1908, s. 47 856

O. XXI, r. 58—Execution of decree—Attachment—Application after sale to remove attachment, maintainability of—Execution sale, effect of.

A Court has no jurisdiction to entertain an application under O. XXI, r. 58 of the Civil Procedure Code, after the properties attached are sold in execution. A sale in execution *ipso facto* determines the attachment. *R MAUNG PO PE v. MAUNG KWA*, 5 R. 751; *A. I. R. 1928 Rang. 80* 161

O. XXI, r. 63—Execution of decree—Attachment—Objection disallowed—Suit by objector—Burden of proof.

Where an unsuccessful objector to attachment of property in execution of a decree institutes a suit under O. XXI, r. 63, Civil Procedure Code, the onus is upon him to prove that the order of the Executing Court is wrong, and that the property belongs to him. *L RALLA RAM v. MUHAMMAD AYUB KHAN*, 10 Lah. L. J. 42; *I. L. T. 40 Lah. 63* 782

O. XXI, rr. 69, 84—Sale outside Court precincts—Power of officer conducting sale to adjourn sale—Bidder withdrawing from sale, liability of—Subsequent sale conducted after fresh proclamation, effect of—Order refusing to hold defaulting purchaser liable—Appeal.

Where an execution sale is not being conducted in or within the precincts of the Court house, the officer conducting the sale has a discretion to adjourn the sale to the following day.

Where a bidder at a sale refuses to deposit the one-fourth amount of the bid, and a re-sale is effected after a fresh proclamation, the bidder cannot be held liable for any deficiency in the purchase-money inasmuch as the second sale cannot be said to be held 'forthwith' within the meaning of O. XXI, r. 84, Civil Procedure Code.

An order refusing to hold a defaulting bidder liable for the deficiency of price in such a case is open to appeal. *L BABU SINGH v. GURBAKSH SINGH*, A. I. R. 1925 Lah. 249 274

O. XXI, r. 90.

See BENGAL TENANCY ACT, 1885, s. 153 471
See C. P. C., 1908, s. 47 488, 848

O. XXI, r. 90—Application for setting aside sale—Auction-purchaser impleaded after limitation—Maintainability of application—Auction-purchaser, whether necessary party.

Obiter.—An application under O. XXI, r. 90, Civil Procedure Code, is not incompetent merely because the auction-purchaser is not made a party therein

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till long after the prescribed period of limitation for such an application has expired. All that is required by the law is that before the sale can be set aside or confirmed, notice of the application has to be served upon the auction-purchaser. *C SATISH CHANDRA DE SARKAR v. RAKHAL CHANDRA SAHA*, 47 C. L. J. 62; *A. I. R. 1928 Cal. 189* 733

O. XXI, r. 90—Court sale—Property consisting of numerous plots in various villages—Sale in one lot, whether proper—Gross inadequacy of price, meaning of—Sale subject to prior mortgage—Order fixing upset price for decree-holder in reference to value of both mortgages, effect of—Sale, whether void.

The fact that property consisting of various parcels of land situated in several villages was sold in one lot does not by itself constitute a gross irregularity in conducting the sale.

A Court sale cannot be set aside under O. XXI, r. 90, Civil Procedure Code, where it is not possible to infer that the price which was realised by the sale was substantially less than the real market value or that such inadequacy of price, if any, was the result of an irregularity.

In execution of a decree on a puisne mortgage, the mortgaged properties were proclaimed for sale subject to the first mortgage. The Court subsequently gave permission to the decree-holder "to bid for Rs. 3,20,000 which will be the upset price so far as he is concerned." At the sale the only bid by an outsider was for a sum which if added to the amount of the first mortgage was less than the decree-holder's bid of Rs. 3,20,500. The sale was concluded in favour of the decree-holder. On an application being made to set aside the sale:

Held, that the order giving permission to bid did not amount to an order to sell free of the encumbrance in variation of the sale proclamation but only directed that the decree-holder could bid only for such a sum which if added to the first mortgage amount would come up to Rs. 3,20,000 and that what was sold was not, therefore, different from what was advertised for sale, so as to make the sale a nullity. *M RAMASWAMI AYYANGAR v. RAMA NATHAN CHETTIAR*, A. I. R. 1928 Mad. 684 295

O. XXI, rr. 90, 91. See C. P. C., 1908, s. 48. 653

O. XXI, rr. 90, 92—Application to set aside sale—Auction-purchaser, whether necessary party—Notice to auction-purchaser before setting aside sale, necessity of—Addition of auction-purchaser after limitation, effect of.

The auction-purchaser is not a necessary party to an application for setting aside a sale under O. XXI, r. 90, Civil Procedure Code, although under O. XXI, r. 92 of the Code no final order affecting the auction-purchaser can be passed unless notice of the application to set aside the sale is given to him. The proviso to the said rule does not fix any period for giving such notice to the auction-purchaser and there is no period of limitation for issuing such notice. *L KIRPA RAM v. NAND LAL*, A. I. R. 1928 Lah. 418 494

O. XXI, r. 91. See EXECUTION OF DECREE 42

O. XXI, rr. 92, 93—Application for setting aside sale—Omission to serve notice on party affected, effect of—Order setting aside sale, whether

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void—Order for refund of purchase money, legality of.

An order setting aside a Court sale cannot be treated as a nullity merely because notice on the application for setting aside the sale was not issued to a party who was affected by the order. The party to whom notice was not issued on the application cannot, therefore, be allowed to impugn the validity of the order in an application which is not directed against that order, but against a subsequent order which has been passed directing him to refund the purchase-money withdrawn by him. **C UMESH OHANDRA v. SAPIYATANNESHA KHATUN**, A. I. R. 1928 Cal. 267 476

O. XXI, rr. 100, 103. See **C. P. C.**, 1908, s. 151 729

O. XXII, r. 3, O. XXXIV, r. 1—Suit on mortgage—Death of mortgagee—Some of several legal representatives not brought on record—Suit, whether abates in part—Decree for entire amount, legality of—Questions inter se between legal representatives of deceased mortgagee, whether can be gone into.

Where on the death of a plaintiff, no legal representative is brought on the record, the suit would abate; but where some only of several legal representatives come on the record and they contend that some other persons are not legal representatives, even though their contention may be found to be untrue, that would not make the whole or any portion of the suit abate in favour of the defendants.

Where a mortgagee brings a suit on the mortgage for the whole amount due, the mere fact that on the death of the mortgagee, one of the legal representatives of the mortgagee is not brought on the record within the time prescribed, would not entitle the mortgagors, to contend that the suit abates as regards his share. The legal representatives who are on record would represent all who are entitled to share in the estate of the deceased and are entitled to a decree for the whole amount.

In a mortgage suit it is unnecessary to go into the question which may arise between the legal representatives of a deceased mortgagee as to whether some of them or all of them are entitled to the whole of the interest of the deceased mortgagee. **M GOVINDASWAMI v. ANNAMALAI**, A. I. R. 1927 Mad. 1071 805

O. XXII, r. 3, O. XLI, r. 4—Suit by tenant for correction of Record of Rights—Appeal by landlords—Abatement of suit as against one appellant—Appeal, competency of—Reversal of decree by Appellate Court in favour of dead person, legality of.

Order XLI, r. 4 of the Civil Procedure Code cannot be applied to the case of an appellant whose appeal has abated by his death.

An order of abatement operates as a judgment to the same extent as a judgment on the merits.

Per **Mallik, J.**—For the determination of the question whether an appeal is competent after partial abatement, the true test is whether the appeal can be heard in the absence of the appellant who is dead and the question whether the appeal can be heard in his absence will depend upon the nature of the suit and the decree made.

The tenants of a holding brought a suit for correction of an entry in the Record of Rights relating to the amount of rent and obtained a decree in

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their favour. The landlords appealed but one of them died during the pendency of the appeal and the appeal abated as against him as his legal representatives were not brought on record:

Held, that it was not open to the Court to apply the provisions of **O. XLI, r. 4**, Civil Procedure Code, and that the appeal could not be heard. **C NAIMUDDIN BISWAS v. MANIRUDDIN LASHKAR**, 47 C. L. J. 82; 32 O. W. N. 299; A. I. R. 1928 Cal. 184 726

O. XXII, r. 4—Appeal by creditors against adjudication of insolvency—Death of insolvent—Abatement of appeal.

An appeal preferred by the creditors against an order adjudicating a debtor as an insolvent abates on the death of the insolvent and cannot be continued against his sons. **L NARAIN SINGH v. GURBAKSH SINGH**, A. I. R. 1928 Lah. 119; 29 P. L. R. 399; 9 Lah. 306 281

O. XXIII, r. 1—“Other sufficient grounds,” meaning of—Ejusdem generis—Absence of formal, defect or ground ejusdem generis—Permission to withdraw suit with liberty to bring fresh suit—Material irregularity—Revision—Omission to produce material document, whether “sufficient ground”.

“Other sufficient grounds” referred to in cl. (b) of **O. XXIII, r. 1 (2)**, Civil Procedure Code, must be grounds *ejusdem generis* with the ground mentioned in cl. (a).

Where the trial Court allows withdrawal of a suit with liberty to bring a fresh suit under **O. XXIII, r. 1**, when there is no formal defect nor any other grounds *ejusdem generis*, it commits a material irregularity in the exercise of its jurisdiction by utilizing its jurisdiction so as to give it authority which the law does not give, and its order is open to revision under s. 115, Civil Procedure Code.

Failure of the plaintiff to produce some of his important documents in time is not a ground for permitting the plaintiff to withdraw from the suit with liberty to bring a fresh suit. **O TIKAI CHOPRA v. SHEO DAYAL-RAMJI DAS**, 5 O. W. N. 61 887

O. XXIII, r. 1 (4), O. XXXII, r. 4—Suit by adult and minor sons to set aside alienation by father—Compromise between adult son and defendant, whether binding on minor son—Splitting of compromise, legality of—Co-plaintiffs—Withdrawal of suit by one without consent of others, validity of.

During the course of a suit by two brothers, one an adult, and the other a minor represented by the adult as next friend, to set aside an alienation by their father, the defendant set up a compromise between the adult plaintiff and himself under which it was agreed between them that the suit should be dismissed on the defendant paying Rs. 100 to the plaintiff:

Held, (1) that the compromise was not binding on the minor plaintiff;

(2) that no portion of the joint estate was bound by it inasmuch as the compromise could not be split up into two different compromises.

Under **O. XXIII, r. 1, cl. (4)**, Civil Procedure Code, one plaintiff cannot withdraw from a suit without the consent of his co-plaintiff especially in a case where such other plaintiff is a minor represented by the adult plaintiff as next friend. **M UPPUTURI PUNNAYYA v. POLAVARAFU LINGAYYA**, A. I. R. 1928 Mad. 498 481

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O. XXIII, r. 3—*Application for withdrawal of suit with liberty to bring fresh suit—Order for withdrawal without liberty, legality of—Proper procedure.*

The proper course to be adopted where an application is made for withdrawal of a suit with liberty to bring a fresh suit, and the Court considers that such an application should not be granted, is to dismiss the application altogether and proceed with the case. The Court has no power to make a declaration that the plaintiff is permitted to withdraw without liberty to bring a fresh suit. **C JOTIRMOY GOSWAMI v. GURU GOBINDA GOSWAMI, A. I. R. 1928 Cal. 273 469**

O. XXIII, r. 3—*Compromise pending suit including extraneous matters—Procedure—Form of decree.*

Where an agreement or compromise entered into pending a suit comprises matters relating to the suit as well as other matters, the proper method of carrying out of the terms of O. XXIII, r. 3 of the Civil Procedure Code would be for the decree to recite the whole of the agreement and then to conclude with an order relating to that part that was the subject of the suit. The decree taken as a whole should include the agreement but the operative part of the decree should be confined to the subject-matter of the pending litigation. **R U PO NYUN v. MA PAN ME, 5 R. 662; A. I. R. 1928 Rang. 43 163**

O. XXIII, r. 3, Sch. II, para. 20—*Arbitration without intervention of Court during pendency of suit—Award—Adjustment of suit—Declaratory suit—Award embodying executable orders—Decree in terms of such award, legality of.*

Where a reference to arbitration is made during the pendency of a suit without the intervention of the Court the award made by the arbitrators can be given effect to as if it was an adjustment, by common consent, of the matter in dispute in the pending suit. Paragraph 20 of Sch. II of the Civil Procedure Code cannot override the general power given to parties under O. XXIII, r. 3, Civil Procedure Code, to adjust their dispute by a lawful compromise at any time after the institution of the suit.

In a suit for a mere declaration it is open to the parties by adjustment or compromise to go beyond the scope of the suit and the Court is competent to pass a decree in terms of the award even though it requires one of the parties to pay a sum of money to the other and to embody such a direction in the operative portion of the decree. **N NARAIN DAS BHAGWANDAS & Co. v. KALYANJI MAWALI & Co., A. I. R. 1928 Nag. 173; 24 N. L. R. 55 525**

O. XXX. See PROVINCIAL INSOLVENCY ACT, 1920, s. 72 442

O. XXXII, r. 4. See C. P. C., 1908, O. XXIII, r. 1 (4) 431

O. XXXII, r. 7—*Suit on behalf of minor—Compromise by guardian—Leave of Court—Application by guardian to withdraw from compromise before granting of leave—Power of Court to enforce compromise.*

A Court is not bound to refuse to pass a decree in terms of a compromise entered into by a guardian on behalf of a minor merely because, before the compromise has been sanctioned, the guardian has applied for withdrawing from the compromise. **C SAMBHUDHATH BASAK v. ABDUL KADAR, A. I. R. 1928 Cal. 247 477**

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O. XXXIV, r. 1. See C. P. C., 1908, O. XXII, r. 2 805

O. XXXIV, r. 6—*Mortgage suit—Application for personal decree—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 66.*

The amount due on a mortgage was payable in 1910. The mortgagee instituted a suit for sale in 1922. A compromise decree was passed which directed that the mortgagor should pay the amount by the end of June, 1923, and that, on default the half of the properties should be sold. A final decree was passed on 2nd February, 1924, and the mortgagee applied for a personal decree on the 31st May, 1926:

Held, that the application was barred by limitation. **O RAM PRASAD v. GURPATRI, 4 O. W. N. 1049; A. I. R. 1927 Oudh 567 559**

O. XXXIV, r. 7—*Suit for redemption—Court's duty to award interest up to date fixed for redemption.*

The provisions of O. XXXIV, r. 7, Civil Procedure Code, are mandatory and a Court is bound to direct a mortgagor on redemption of the mortgaged property to pay interest to the mortgagee up to the date fixed for redemption by the Court. **L BISHEN CHAND v. BISHEN DEVI, A. I. R. 1928 Lah. 96 393**

O. XXXVII. See JURISDICTION 218

O. XXXVIII, rr. 5, 6, O. XLIII, r. 1 (q)—*Attachment before judgment, unconditional order of, when justified—Appeal.*

An order for attachment before judgment which is unconditional must be deemed to be an order under O. XXXVIII, r. 6 of the Civil Procedure Code even though it is stated to be passed under r. 5, and is appealable under O. XLIII, r. 1 (q).

An unconditional attachment before judgment can only be ordered under r. 6 of O. XXXVIII, Civil Procedure Code, when the defendant has failed to comply with an order made under r. 5 of the said Order. **L JAI DEV SINGH v. JAI SINGH, A. I. R. 1928 Lah. 445 276**

O. XXXIX, r. 1. See C. P. C., 1908, s. 115 908

O. XXXIX, r. 2. See C. P. C., 1908, ss. 36, 136 65

O. XLI, r. 4. See C. P. C., 1908, O. XXII, r. 3 726

O. XLI, r. 5—*Appeal—Stay of execution—Decree-holder not possessed of property, whether ground for stay of execution.*

The bare fact that the decree-holder is a woman possessed of no property is no ground for staying execution of the decree during the pendency of an appeal. Appellant's interest can be sufficiently safeguarded by the respondent furnishing security for restitution. **L JOHNSTONE, NOTARY PUBLIC OF LAHORE v. JAN BIBI, A. I. R. 1928 Lah. 329 780**

O. XLI, r. 10. See C. P. C., 1908 349

O. XLI, rr. 20, 33. See C. P. C., 1908, s. 11 237

O. XLI, r. 22 (3)—*Appeal—Cross-objections against pro forma co-respondent, maintainability of—Respondent, meaning of.*

Ordinarily in cases where the person against whom cross-objections are filed is not interested in the appeal and is a mere pro forma respondent, no cross-objections can be validly filed against him.

Sub-cl. (3) of O. XLI, r. 22 of the Civil Pro-

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cedure Code as amended does not confer an absolute right on a respondent to file a cross-objection against a co-respondent even where such co-respondent is not an interested party at all and no relief has been claimed against him in the appeal.

Per *Ashworth, J.*—A party to a case cannot be regarded as a respondent in an appeal, the success or failure of which wholly or in part, can in no way affect him. *A BANKEY LAL v. NATHA RAM* 569

— O. XLI, r. 23. See C. P. C., 1908, s. 151

— O. XLI, r. 23, O. XLIII, r. (1) (u)—*Order of remand under inherent powers, appealability of.* 284

An order of remand in the exercise of the inherent powers of a Court for the ends of justice is not appealable. *C RAMA NATH NASKAR v. TARAK NATH BANERJEE*, A. I. R. 1928 Cal. 305 746

— O. XLIII, r. 1, O. XLVII, r. 7, *construction of—Appeal from order granting review, limits of.*

The right of appeal against an order granting a review is limited to the three cases mentioned in O. XLVII, r. 7 of the Civil Procedure Code. Order XLIII, r. 1 and O. XLVII, r. 7 are not mutually inconsistent but are really complementary of each other, one giving the right to appeal and the other defining the extent to which that right can be exercised. *L SIKANDAR KHAN v. BALAND KHAN*, A. I. R. 1927 Lah. 435; 8 Lah. 617; 29 P. L. R. 81 596

— O. XLIII, r. 1 (j). See C. P. C., 1908, s. 47 488

— O. XLIII, r. 1 (q). See C. P. C., 1908, O. XXXVIII, rr. 5, 6 276

— O. XLIII, r. 1 (w). See C. P. C., 1908, s. 115 50

— O. XLVI, r. 1—*Reference in matter subject to appeal, whether lies,*

Under O. XLVI, r. 1, Civil Procedure Code, a reference can be made to the High Court by a Subordinate Court only in suits or appeals in which the decrees are not subject to an appeal. *M BHADRI NARAYANA v. NAGALDINNE SRINIVASA RAO*, 39 M. L. T. 657; 54 M. L. J. 66; 27 L. W. 632; A. I. R. 1927 Mad. 1179 649

— O. XLVII, r. 1—*'Any other sufficient reason', interpretation of—Reason, whether should be ejusdem generis—'Ejusdem generis', meaning of.*

Although the words 'any other sufficient reason' in O. XLVII, r. 1 of the Civil Procedure Code mean a reason sufficient on grounds at least analogous to those specified immediately previously, it is not necessary that the reason should be *ejusdem generis* with those previously specified. The phrase *ejusdem generis* is more restricted in its meaning than the word 'analogous'.

The summons to a witness in a case was returned unserved as the witness could not be found. The Court with a view to avoid the case pending idly declined to adjourn the case for giving a further opportunity to the party concerned to secure his attendance and decided the suit. The witness was subsequently found out and the party applied for review of the case, and the application was granted by the trial Court:

Held, that there was a sufficient ground for review, and the order of the trial Court granting the application was not illegal. *R K. K. S. A. R. FIRM v. MAUNG KYA NYUN*, 5 R. 675; A. I. R. 1928 Rang. 31 161

— O. XLVII, r. 1—*Review—Erroneous view of law, whether ground for review.*

CIVIL Procedure Code—1908—contd.

The mere fact that a judgment contains a wrong exposition of law is no ground under O. XLVII, r. 1 of the Civil Procedure Code, for allowing a review. *N ONKAR LALA v. YADO PRASAD* 908

— O. XLVII, r. 1—*Review—Revised decree confirming original decree without modification—Appeal from revised decree, competency of.*

The effect of allowing an application for review is to vacate the decree originally passed, and the decree that is subsequently made on the review, even if it does not modify the decree originally passed, is a new decree superseding the original one; and it is, therefore, open to a party to prefer an appeal from the decree passed on review even if it does not in any way modify the decree originally passed. *C NIBARAN CHANDRA SIKDAR v. ABDUL HAKIM*, A. I. R. 1928 Cal. 418. 751

— O. XLVII, r. 7. See C. P. C., 1908, s. 115 50

— O. XLVII, r. 7. See C. P. C., 1908, O. XLIII, r. 1 596

— Sch. II, paras. 3, 17, 20. See C. P. C., 1908, s. 149 223

— para. 10—*Award—Signature of all arbitrators, necessity of.*

An award which is not signed by all the arbitrators is invalid and cannot be accepted by the Court.

The writing of the award is not a mere ministerial act. *PAT RAMDAS SAHU v. JUDAGI LOHAR*, A. I. R. 1928 Pat. 231; I. L. T. 40 Pat. 87 532

— para. 15. See ARBITRATION 707

— para. 16 (2). See AWARD 545

— para. 20. See C. P. C., 1908, O. 525

XXIII, R. 3

— para. 20—*Reference to arbitration*

by next friend of minor—Procedure to be adopted on attaining majority—Award filed by arbitrator—Duty of Court to give notice to parties—Depositions and documents to be filed with award—Want of notice, effect of—Parties not allowed to adduce evidence in support of objection—Decree, whether vitiated—Appeal, competency of—Award on plain paper—Decree, whether can be passed—Stamp Act (II of 1899), s. 27 (g)—Arbitrator's power to call upon parties to furnish stamp paper.

If a reference to arbitration is made by the next friend of a minor during his minority, it is open to the minor on attaining majority to make his own election either to go on with the suit and accept the award, or to repudiate the same wholly or partially.

On such election being made, the title of the suit has to be corrected and thereafter, the proceedings for filing the award and passing a decree in terms thereof or for superseding the reference or remitting the award, etc., has to be commenced. The Court is not entitled to call upon the major plaintiff to file objection to the award unless he is examined to show his willingness to carry on the litigation to a termination in his name.

A Judge is bound to give notice to the parties of the fact of the filing of the award by the arbitrator. He is also bound to see that with the award is filed the depositions and documents, which have been taken and proved before him. Want of such notice is a material irregularity, which makes the judgment and decree liable to be set aside.

Failure to give an opportunity to any of the parties to adduce evidence in support of his objections to the

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award invalidates a decree and entitles the party to appeal from it.

Until the notice prescribed by para. 10 of Sch. II of the Civil Procedure Code, is given, there is no obligation on the parties to file objections.

Unless and until an award is engrossed on a stamp paper, it has no validity and cannot operate as an award, as the Court will not be justified in looking at it and acting upon it.

The executant of an award being the arbitrator, it is his duty primarily under s. 29 (g) of the Stamp Act, to direct any of the parties to provide him with the necessary stamp and see that he does not deliver or publish his award on a plain paper. **N RAMKUMAR v. KHUSHALCHAND GANESHIDAS**, A. I. R. 1928 Nag. 166 668

Civil Rules of Practice (Mad.), r. 4 (11). See C. P. C., 1908, s. 2 (20) 804

Companies—Application for shares subject to condition precedent—Condition not fulfilled—Liability of applicant as contributory.

If an application for shares in a Company is made subject to a condition precedent, the applicant incurs no liability as a share-holder if the condition remains unfulfilled. **L INDIAN MERCHANTS BANK, LTD. v. ANUP CHAND**, A. I. R. 1928 Lah. 236 492

Appointment of liquidator—Discretion of trial Court—Interference in appeal.

The appointment of a liquidator is a matter purely in the discretion of the trial Court and the decision of the trial Court should not be interfered with except under very special circumstances. **R M. E. MOOLLA v. CHARTERED BANK**, 5 R. 685; A. I. R. 1928 Rang. 36 860

Companies Act (VII of 1913), s. 156—Surrender of shares, legality of—Shareholder surrendering shares, liability of, as contributory.

A shareholder who surrenders his share does not cease to be a member within the meaning of s. 156 of the Companies Act.

It is not open to a shareholder to surrender at will his share, especially when he has to meet future calls, and it is not open to a Company to accept surrender of shares unless the act of the Company can be brought within the rules relating to forfeiture of shares even if the Articles empower the Directors to accept surrenders of shares. **L MANGAL SAIN v. INDIAN MERCHANTS BANK LTD.**, 29 P. L. R. 119; A. I. R. 1928 Lah. 240 594

Compound Interest—Interpretation of words "interest on interest" in mortgage-deed.

The phrase 'he shall pay interest on interest' occurring in a mortgage-deed is ambiguous, and does not necessarily connote a liability to pay compound interest. These words may fairly enough refer to interest to be borne by a sum in arrear, if that sum was payable as interest. **PC P. C. MUTHU CHETTIAR v. K. V. MEENAKHISUNDARAM AYYAR**, 54 M. L. J. 82; (1928) M. W. N. 91; I. L. T. 40 Mad. 47; 5 O. W. N. 166; A. I. R. 1928 P. C. 35; 30 Bom. L. R. 261; 47 C. L. J. 183; 27 L. W. 395; 32 C. W. N. 589; 26 A. L. J. 488 1

Compromise decree—Construction—Provision for payment of damages no bar to specific enforcement—Specific Relief Act (I of 1877), s. 20.

A compromise decree provided (by cl. 2) that the judgment-debtors would be restrained from selling or otherwise alienating manganese ore from their

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mines to any third party until they had delivered certain quantities of the ore to the decree-holders, the deliveries being spread over a period of 8 years. Clause 10 of the compromise made provision for non-delivery in any particular year and imposed a liability on the judgment-debtors to pay damages to the decree-holders at a rate therein specified:

Held, reading the contract (i. e., the compromise decree) as a whole and taking all its terms together, that the judgment-debtors could not repudiate their obligations under the contract by merely paying to the decree-holders the penalty calculated in accordance with cl. 10 aforesaid, that the compromise agreement was one for the non-performance of which mere payment of the specified sum of money would not be an adequate relief and, that in spite of cl. 10, the contract could be specifically enforced. **PC BISSESSAR DAS DAGA v. EMMANUEL VAS**, 47 C. L. J. 162; 54 M. L. J. 122; A. I. R. 1928 P. C. 27; I. L. T. 40 Cal. 45; 30 Bom. L. R. 243; 32 C. W. N. 509; 27 L. W. 655; 24 N. L. R. 17; 55 O. 238; 26 A. L. J. 667 25

Confession—Retracted confession as basis for conviction of maker and co-accused.

Even though it is not illegal to base a conviction on the retracted confession of an accused person, in the absence of corroboration in material particulars, it is not safe to convict on a confession, unless from the peculiar circumstances in which it was made and judging from the reasons alleged or apparent of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine.

A retracted confession of a co-accused, even if genuine, is not a safe basis for conviction. **L PALA SINGH v. EMPEROR**, 29 Cr. L. J. 267; A. I. R. 1928 Lah. 329; 9 A. I. Cr. R. 527 614

Construction of decree—Ambiguity—Reference to pleadings, permissibility of—Construction in accordance with law.

It is legitimate to refer to the pleadings in a case in order to construe the decree that has been passed in the suit more especially when the wordings of the decree are not very clear.

If the wordings of a decree be ambiguous, such construction should be put on the same as would make the decree in accordance with law rather than in conflict with it and when a decree is silent on a point, it could be supplemented by the law applicable to the case. **M PATTATHIL SANKUNNI MANNADIAR v. KRISHNA MANNADIAR**, 27 L. W. 93; I. L. T. 40 Mad. 70; A. I. R. 1928 Mad. 465; 51 M. 320; 54 M. L. J. 682 499

Construction of deeds—'Santhathi', whether includes adopted son.

The word 'santhathi' used generally includes an adopted son as well as a natural born son.

Per *Curgenven, J.*—In ordinary Hindu usage expressions signifying 'offspring, progeny, issue', though in English they are ordinarily restricted to natural children, include children by adoption. **M MUPPIDATHI AMMAL v. MUTHUSWAMI PILLAI**, A. I. R. 1928 Mad. 126 289

Construction of document—Cardinal principle—Documents must be read as a whole.

It is one of the cardinal principles of construction of written documents that they must be construed as a whole; each provision they contain must receive attention; and from their several provisions the true intention of the parties to them is to be

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ascertained. **P C P. O. MUTHU CHETTIAR v. K. V. MBENAKSHISUNDARAM AYYAR**, 54 M. L. J. 82; (1928) M. W. N. 91; I. L. T. 40 Mad. 47; 5 O. W. N. 166; A. I. R. 1928 P. C. 35; 30 Bom. L. R. 261; 47 C. L. J. 183; 27 L. W. 395; 32 C. W. N. 569; 26 A. L. J. 488 1

Meaning of expression used in several parts.

In construing the provisions of an agreement there is no rigid rule that the same meaning ought to be given to an expression in every part of the document in which it appears. A difficulty or ambiguity may be solved by resorting to such a device, but it is only in such cases that it is necessary or permissible so to do. **P C JOHN LACHLAN MCGILLIVRAY v. BERTHA ELINOR LILLIAN HAGGITT**, 47 C. L. J. 295; A. I. R. 1928 P. C. 115 459

Sale or conditional mortgage—Test—Intention**Question of fact.**

The test to be applied in determining whether a transaction is a sale subject to an option of re-purchase or a mortgage by conditional sale, is the intention of the parties at the date of the transaction, and such intention is a matter of fact and not of law. **A MATHURA KURMI v. JAGDEO SINGH**, 25 A. L. J. 970; A. I. R. 1928 All. 61; 50 A. 208 33

Construction of Instruments—Principles.

The principles on which the Courts of Law act in construing an instrument in writing (and an Act of the Legislature is such an instrument), specially where its language is ambiguous, are these: In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used. **P C ROYAL BANK CANADA v. JOSEPH SALVATORI**, 47 C. L. J. 300; A. I. R. 1927 P. C. 272; 30 Bom. L. R. 760 346

Construction of Statutes. See PROBATE AND ADMINISTRATION ACT 14**Construction of repugnant sections—Permissive provisions, construction of—Construction against superfluity of language.**

It is a well-established rule of construction that where two co-ordinate provisions in an enactment are apparently inconsistent an effort must be made to reconcile them.

Where two sections of a Statute are repugnant the last must prevail and override the earlier.

It is a settled canon of construction that a Statute ought to be so construed that if it can be prevented no clause, sentence or word shall be superfluous, void or insignificant. **L SIKANDAR KHAN v. BALAND KHAN**, A. I. R. 1927 Lah. 435; 8 Lah. 617; 29 P. L. R. 81 596

Contract—Construction of agreements—Principles.

Where the question at issue is entirely one of construction of a particular agreement, it can only be properly answered after a consideration of all the surrounding circumstances, the position of the parties to the agreement, its subject-matter, and the apparent purpose and object thereof, and, in particular, of the provisions to be construed. **P C GEORGE RICHARDS LAFFER v. FRANCOIS ARNOLD GILLEN**, 47 C. L. J. 327; A. I. R. 1927 P. C. 275 347

Construction of printed contracts.

It is settled law that the effect of deleting words in a printed form of mercantile contract is the same as if the words had never formed part of the print at all. **P C M. A. SASSOON v. INTERNATIONAL BANKING**

Contract—contd.

CORPORATION, 53 M. L. J. 42; A. I. R. 1927 P. C. 195; 1 Luck. Cas. 241; 25 A. L. J. 665; 29 Bom. L. R. 1181; 46 C. L. J. 61; (1927) M. W. N. 648; 32 C. W. N. 30; 39 M. L. T. 659; 54 I. A. 317; 27 L. W. 582; 55 C. 1 225

Repudiation before time of performance not accepted by other party—Contract kept alive—Anticipatory breach—Contract on 'Office Dhara' or usual terms in Karachi—Miti khari, importance of—Mention of wrong steamer therein, whether mere irregularity or vitiates contract.

A repudiation of a contract before the time for performance arrives which is not accepted by the other party, the contract being kept alive, cannot be treated as an anticipatory breach of the contract.

In a contract on "Office Dhara" or "usual terms" in Karachi the making of *miti khari* by the seller is an essential act towards the completion of the contract, and the mention in the *miti khari* notice of a steamer which has not in fact brought goods of the shipment contracted for is not a mere irregularity but constitutes a breach of the contract on the part of the seller. **S RAHIMBUX-KADERBUX v. TOPANDAS-HARBHAGWANDAS**, A. I. R. 1928 Sind 103 440

for sale of goods—Refusal to take delivery—Suit for damages—Limitation.

A contract for sale of goods was alleged to have been made by a Government servant on the 26th August, 1918. His superior officer issued a Circular on the 2nd February, 1919, stopping all further deliveries. A suit for damages for breach of the contract was filed in June, 1922:

Held, that in the absence of anything in the contract to show that the delivery was postponed to a later date, the breach of the contract must be held to have occurred in February, 1919, when the Circular stopping deliveries was issued, and that the suit was, therefore, barred by limitation. **C KESSORAM PODDAR & Co. v. SECRETARY OF STATE FOR INDIA**, 54 C. 969; A. I. R. 1928 Cal. 74 360

Sale of goods by shipments—Condition for informing purchaser of date of arrival of goods and for removal of goods on that date—Time for performance—Damages.

Where a contract for sale of goods by shipments provided that as soon as goods were received the defendants were to inform the plaintiffs, who were to remove the goods on payment of the money to the Bank, that if the plaintiffs were to remove the goods after "due date" they would be liable for interest and godown rent, and that the plaintiffs were to pay the godown rent from the time when the goods arrived:

Held, that the time for performance was the time when the goods actually arrived, that the due date mentioned in the contract could only mean the date of arrival and that, consequently, damages had to be calculated with reference to the market price on the date of the arrival of the goods and not the date on which the goods might reasonably have arrived. **L GANESH DAS-ISHEAR DAS v. BASHESHAH LAL-BANSI DEAR**, A. I. R. 1927 Lah. 697 278

Sale of goods by shipments—Construction of contract—Damages for breach, measure of—Time for performance, whether date of actual arrival of goods or date on which they ought to have arrived. The defendants agreed to sell to the plaintiffs goods of certain shipments. The contract stipulated that patterns and invoices were to be delivered whe

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they arrived, that the defendants were to give intimation to the plaintiffs of the arrival of the goods, that when the goods arrived the plaintiffs were to take delivery on payment to the Bank, and that they would be liable for godown rent if they did not take delivery at once. In a suit for damages for breach of contract:

Held, that, upon a proper construction of the contract, the time for performance was the time of the actual arrival of the goods, and that damages must accordingly be calculated with regard to the rates prevailing on the actual dates of the arrival of the goods and not those prevailing on the dates on which the goods might reasonably have been expected to arrive. **L. DURGA DATT-JAGAN NATH v. GANESH DAS-ISHAR DAS**, A. I. R. 1927 Lah. 648 **276**

Contract Act (IX of 1872), s. 23—Contract opposed to public policy—Burden of proof—Pleader lending money on interest, legality of—Rules of Judicial Commissioner, 1880, whether have retrospective effect. If a contracting party alleges that an agreement entered into by him is opposed to public policy, it is for him to set out and prove the special circumstances which invalidate the contract.

Rules framed by the Judicial Commissioner of Central Provinces about the Enrolment of Pleaders and published in 1880 are not applicable to Pleaders who were enrolled before the date of their publication.

A money-lending transaction entered into by a Pleader cannot be held to be invalid or unenforceable in the absence of any statutory bar positively prohibiting a legal practitioner from being engaged in trade or business. **N GOPAL RAO v. BABU** **903**

s. 23—Creditor obtaining guarantee from third party by stifling prosecution—Validity of guarantee.

[The question whether a creditor can by stifling a prosecution for a non-compoundable offence obtain a valid guarantee for his debt from a third party, was left open by the Judicial Committee.] **P. C. MAGANMAL v. DARBARILAL OHOWDHURY**, A. I. R. 1928 P. O. 39; 54 M. L. J. 208; 30 Bom. L. R. 293; 5 O. W. N. 226; 47 O. L. J. 222; 27 L. W. 523; I. L. T. 40 Cal. 124; 24 N. L. R. 40 **113**

s. 23—Stifling prosecution—Agreement respecting pre-existing liability pending criminal prosecution, validity of.

It is well-settled that an agreement the consideration for which is a pre-existing liability on the part of the executant is not void even though the motive for the execution of the bond is to stifle a criminal prosecution pending in respect of the same liability. **L. BADAR-UD-DIN v. MEHR DIN** **605**

s. 28, Excep. 1—Time-barred claim, when can form subject matter of reference to arbitration. See **ARBITRATION ACT, 1899**, ss. 8, 9 **435**

s. 30—Wagering contract—Contract for sale and purchase of goods—Speculation not equivalent to wagering—Contract contemplating payment of differences only—'Patta patti.'

The mere fact that a contract for sale and purchase of goods is of a highly speculative character, cannot alone vitiate the transaction as a wagering contract within the meaning of s. 30 of the Contract Act, 1872. To produce that result there must be proof that the contract was entered into upon the terms that performance of the contract should not be demanded, but that differences only should become payable.

Contract Act—contd.

[Where no such definite agreement or understanding was proved, and it appeared that delivery of the goods might always have been insisted on, the Judicial Committee held (differing from the Court of Appeal in India) that the contract was not bad on the ground of wagering, notwithstanding that it would have been considered bad form, among the parties (merchants of Madras), to have made such a demand for delivery.]

[The incidents of *patta patti* considered.] **P. C. SUDDEVDOSS RAMPESAD v. GOVINDOSS CHATHURBHUJADOSS**, 47 C. L. J. 144; 54 M. L. J. 130; A. I. R. 1928 P. O. 30; 30 Bom. L. R. 238; 5 O. W. N. 195; 27 L. W. 453; I. L. T. 40 Mad. 138; 51 M. 96; 26 A. L. J. 484 **29**
s. 69. See TRANSFER OF PROPERTY ACT, 1882, s. 55 412

s. 73—Contract for sale of goods—Payment of advance—Breach by buyer—Buyer's right to refund of advance less damages caused to seller.

The plaintiff sued the defendant for recovery of Rs. 100 paid by him to the latter on a contract to sell cotton. It was found that the plaintiff and not the defendant broke the contract, and that the defendant was put to a loss of Rs. 40. The plaintiff's suit was, however, dismissed:

Held, that the plaintiff was entitled to a decree for Rs. 60. **N RAMPRATAP KHANDEWAL v. GOVIND BARI** **524**

s. 74—Provision to pay high rate of interest on default of instalment—Penalty.

Where there is no liability to pay interest till default is made, but a high rate of interest is stipulated to become payable on default of payment of an instalment, the stipulation is in the nature of a penalty within the meaning of s. 74 of the Contract Act. **A. NAJAB ALI KHAN v. MUHAMMAD FAZAL ALI KHAN**, A. I. R. 1928 All. 255 **249**

s. 134—Suretyship—Allowing remedy against principal debtor to become time-barred—Discharge of surety.

A surety will be discharged where the remedy against the principal debtor is allowed to become barred by time. **A. SALIG RAM MISIR v. LACHMAN DAS**, 25 A. L. J. 937; A. I. R. 1928 All. 46; 50 A. 211 **42**

s. 239. See PARTNERSHIP 221

ss. 247, 251—Minor partner's liability for obligations of firm—Partnership property, what constitutes—Managing partner's power to mortgage.

In accordance with s. 247 of the Contract Decree, applicable in Zanzibar (corresponding to s. 247 of the Indian Contract Act, 1872), where a minor is admitted to the benefit of the partnership, the result of that admission is, that, while he cannot, before he comes of age, be made personally liable for the obligations of the firm, yet his share in the partnership property is liable to the obligations of the firm.

Where partners are jointly entitled to property, and the question arises whether that property has been thrown into the assets of a partnership, that is a pure question of fact.

By virtue of the provisions of s. 251 of the Contract Decree, applicable in Zanzibar (corresponding to s. 251 of the Indian Contract Act, 1872), the managing partner of a trading firm has power to mortgage the partnership property, so as to bind the firm. **P. C. JAFFARALI BHALOO LAKHA v. STANDARD BANK OF SOUTH AFRICA, LTD.**, 47 C. L. J. 292; A. I. R. 1928 P. C. 135; 30 Bom. L. R. 762 **453**

Contract Act—consolid.

—s. 251—*Partnership for trading purposes—Dubash agreement with arbitration clause by one partner without consent of others, whether binding on firm.*

A partner in an ordinary trading concern has no power in the absence of authority to bind the firm by a Dubash agreement containing a clause for submission to arbitration. *M ARUNACHALA IYAH v. LOUISDREYFUS & Co.*, 39 M. L. T. 563; A. I. R. 1928 Mad. 107; (1928) M. W. N. 132; 27 L. W. 267 **793**

—ss. 253, 256—*Partnership business continued after expiry of term agreed upon—Partnership at will—Presumption of continuance of old terms—Share of nett annual profits payable to the executors of deceased partner—Ascertainment of profits—Surviving partner's claim for salary.*

Where a partnership is entered into for a fixed term, and the term expires but the partners continue the business as partners at will without fresh articles, the business is deemed to be continued upon the old terms so far as they are applicable to a partnership at will.

Where under partnership articles it was provided that in the event of a partner dying or becoming insane, and during the term of the partnership, the surviving or remaining partner would pay to the representatives of the partner so dying etc, a share of the "nett annual profits" of the partnership business:

Held, that the nett annual profits, by which the amount of the sum to be paid by the surviving partner was to be measured, should be ascertained by deducting from the receipts and earnings of the business such outgoings and ordinary business expenses as were under the partnership articles or by the practice of the partners so deducted during the partnership, the business being for this purpose treated as a continuation of the partnership business. A payment, however, which under the partnership articles ceased with the dissolution of the partnership could not be properly deducted.

Where a partnership is dissolved by death of a partner the business, if carried on by the surviving partner, is so carried on by him on his own sole account and for his own benefit, the annual sum payable (under the partnership articles) to his deceased partner's executors being, in substance, purchase-money for his interest in the assets of the business.

Upon the construction of the partnership articles in this case, their Lordships held that, without an express provision to that effect, the surviving partner was not entitled to a salary. *P C JOHN LACHLAN MC GILLIVRAY v. BERTHA BLINER LILIAN HAGGITT*, 47 C. L. J. 235; A. I. R. 1928 P. C. 115 **459**

—s. 254—*Partnership—Dissolution—Suspension of business, whether amounts to dissolution.*

Though the mere suspension of business of partnership does not necessarily lead to the conclusion that there has been a dissolution of that partnership, yet the cessation of the business coupled with other circumstances may legitimately lead to the inference that the partnership had been dissolved. There is no general proposition of universal application that a partnership cannot be deemed to have been dissolved till all its outstanding have been realised. *A BAIJNATH v. CHHOTI LAL*, A. I. R. 1928 All. 58; 26 A. L. J. 243 **673**

Co-operative Societies Act (II of 1912), s. 52—U. P. Co-operative Societies (Amendment) Act (III of 1919), s. 2—U. P. Land Revenue Act (III of 1901), s. 148—Liquidation of Society—Heir of deceased member, liability of, to be arrested.

A Liquidator of a Co-operative Society can arrest the heir of a deceased member of the Society for an arrear due from his deceased father. *A GULAB v. EMPEROR*, L. R. 8 A. 173 Cr.; 26 A. L. J. 95; 9 A. I. Cr. R. 16; A. I. R. 1928 All. 128; 29 Cr. L. J. 244 **243**

Co-owners—Adverse possession—Mere exclusive possession, effect of.

In the case of tenants-in-common the possession of one owner, even though exclusive, is possession of all, and acts of ownership, even though exclusive, are not evidence of de-seizin. A tenant-in-common cannot claim adverse possession unless it is clear that he has repudiated the co-tenant's rights by acts of ouster or disclaimer or by putting forward an adverse title. *S MAHOMED KASSIM v. NATHO BHANO* **211**

—*Adverse possession—Ouster, what constitutes.*
Every case between co-owners with regard to the question of adverse possession must be decided on the particular facts of that case.

Exclusive possession in assertion of a title inconsistent with the existence of co-ownership is enough to entitle a Court to deduce ouster.

A person cannot be a tenant-in-common with a person whom he never recognised as a co-tenant and whose existence he was not aware of. *C MAHENDRA NATH BISWAS v. CHARU CHANDRA BOSE*, A. I. R. 1928 Cal. 396 **741**

—*Partition—Presumption of partition of entire property.*

Where co-owners are proved to have effected a partition the presumption is that the entire joint property has been partitioned. *L PLUNGUN v. JASODHAN* **275**

Coroners' Act (IV of 1871), s. 20—Statement of accused on oath before Coroner, admissibility of.

A statement made by an accused before a Coroner in the course of inquest proceedings, after due warning that he is not bound to make any statement and that if he did so, it may be used against him in his trial, can be admitted in evidence against him at his trial and the mere fact that the statement was made on oath does not render it inadmissible. *B EMPEROR v. MAHOMED HASAN GHANCHI*, 30 Bom. L. R. 86; 29 Cr. L. J. 234; 9 A. I. Cr. R. 494 **272**

Corporations created by Statute—Corporate acts and meetings—Quorum—Common law rule—Majority of members—Election of Chairman—Corporate act—Bombay Primary Education Act (IV of 1923), s. 4 (5).

When a Statute grants powers on any definite number of persons in respect to a public, as opposed to a private, trust and contains no indication to the contrary, it is necessary that a majority of that number should act together and should attend every meeting when any corporate act is done or purported to be done.

The election of a Chairman of corporate body is a corporate act which has to be performed as a preliminary to further corporate acts being performed by the corporation. *S LALOCHAND v. ISSERSINGH*, A. I. R. 1928 Sind 126 **446**

Co-sharers—Acquisition by tenant of share in proprietary interest—Tenancy, whether extinguished—Merger—Liability of tenant to pay rent to other co-sharers.

There is nothing in law to prevent a co-sharer in

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a co-parcenary *mahal* from having tenant rights of any kind and being liable to the payment of rent to another co-sharer or the general body of the co-sharers. The acquisition by a tenant, of a share in the proprietary rights in a *mahal* does not, therefore, automatically put an end to the tenancy in its entirety and exempt the tenant from his liability to pay rent to the other co-sharers.

There cannot be complete merger of two rights unless the two are co-extensive. *A KESAR KUER v. KALLU RAM*, L. R. 9 A. 33 Rev.; 26 A. L. J. 383; A. I. R. 1928 All. 164; 12 R. D. 79

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— *Exclusive possession of one co-sharer—Other co-sharers, whether entitled to joint possession—Equitable consideration.*

Although as a general proposition one co-sharer has no right to take exclusive possession of a joint property, yet the question whether such exclusive possession amounts to an ouster or not depends on the circumstances of each case, and where the Court is unable to hold that there was an ouster, it would not be right to refuse defendant who is in possession the benefit of the equitable principle that the mere fact of sole occupation by one co-sharer does not necessarily constitute an ouster of the other co-sharers, and does not entitle the latter to a decree for joint possession. *G ATMANA KHATUN v. SABURANNESA BIBI*, 32 O. W. N. 449

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— *Lessee purchasing share in-whole property—Defendant purchasing remaining shares—Suit for profits by lessee-co sharer—Rate of profits to be calculated at market value and not rent paid by lessee-co-sharer.*

A was a lessee of 3 shops out of 25 shops at a rent of Rs. 14-8 per month. He purchased more than one-eighth share in all the shops and the remainder was purchased by B. B brought a suit against A to eject him from the shops though unsuccessfully. A then sued for his share of the profits of the whole property as a co-sharer:

Held, that the profits of the 3 shops could not be calculated at the rate of Rs. 14-8 per month which A no longer paid but at their proper market value. *O MURLIDHAR v. FAKIR BAKSH*

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— *Partition, proof of—Question of fact.*

The proof of whether there has been a partition or not between co-owners in a village is a very different matter from the question of whether there has or has not been a disruption of a joint family. *N RAOJI v. GANGABAI*, 11 N. L. J. 1; A. I. R. 1928 Nag. 123

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— *Suit for profits—Calculation of rent of khudkasht land, basis of.*

In a suit by a co-sharer for profits, the rent of *khudkasht* land in the possession of the defendants should not be calculated on the basis of actual collections or the circle rate but should be calculated on the basis of the boundary rate of lands of the village in which the land in dispute is situate. *O LAKSHMI DHAR v. DHOKHE LAL*, A. I. R. 1928 Oudh

300

Costs. See ALLAHABAD HIGH COURT RULES, CHAP. XVI, R. 2

34

— *Order as to costs—Appeal and second appeal—Principles.*

A Court has full discretion in the matter of awarding costs, but that discretion must be exercised on judicial principles. If that discretion has been so exercised an Appellate Court is not entitled to

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interfere and if an Appellate Court interferes where it has no right to do so, a second appeal will lie. If, on the other hand, the order of the trial Court is not based on judicial principles, the Appellate Court can interfere and a second appeal will not lie if the Appellate Court has exercised its discretion judicially.

The question whether an appeal or second appeal lies from an order as to costs is largely academic as it is always necessary to examine the merits before the question is decided. *O BISHUN NARAIN v. MAZHARUL HAQ*, 5 O. W. N. 35; A. I. R. 1928 Oudh 224

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Counsel—Affidavit by Counsel, propriety of.

According to the well-recognised practice which prevails wherever members of the English Bar practise, a Counsel should never file an affidavit in a case in which he is appearing professionally. It not only hampers his freedom of action as an Advocate but he thereby gives up his dignified position of detachment as an Advocate and lowers himself to the level of either a *pairokar* or a witness who has to support the case of a particular party by giving evidence on his behalf. *L MASHAR KHAN v. EMPEROR*, 29 Or. L. J. 220; A. I. R. 1928 Lah. 276; 9 A. I. Cr. R. 514

108

Court-fee—Levy of excess Court-fee—Appellate Court's power to order refund. See C. P. C., 1908, s. 151

825

— *Payment in excess under bona fide mistake—Power of Court to order refund.*

Where an excess amount of Court-fee has been paid under a *bona fide* mistake the Court has power to issue a certificate to enable the party concerned to apply to the Revenue Authorities to obtain a refund of the excess amount. *PAT MUHAMMAD REZA v. RAJBALLABHNATH SINGH*, 9 P. L. T. 240

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Court Fees Act (VII of 1870), s. 6. See C. P. C., 1908, s. 149

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— **s. 7, I, II** See HINDU LAW

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— **s. 7 IV (c)—Suit for declaration that a Will is a forgery and for injunction—Plaintiff's right to fix valuation—Jurisdictional value follows value for Court-fee—Suits Valuation Act (VII of 1887), s. 8—Wrong valuation—Power of Court to allow amendment.**

A suit for a declaration that a Will set up by the defendant is a forgery and that the plaintiff is the legal heir of the deceased and for injunction restraining the defendant from interfering with the property of the deceased is a suit for declaration with consequential relief within the meaning of s. 7 (iv) (c) of the Court Fees Act.

In a suit falling under s. 7 (iv) (c) of the Court Fees Act the plaintiff is entitled to give any value he chooses to the relief sought for and the Courts cannot question the propriety of his valuation.

Where a suit falling within s. 7 (iv) (c) of the Court Fees Act has been erroneously valued for purposes of jurisdiction at the actual value of the property which is subject-matter of dispute under the impression that the suit falls under Art. 17, Sch. II of the Court Fees Act, the plaintiff may be allowed to amend the plaint and value properly the relief which he seeks for purposes of Court-fee; and the jurisdictional value will be the same as the value for purposes of Court-fee. *L BURA MALL v. TULSI RAM*, 9 Lah. L. J. 579; 24 P. L. R. 27; I. L. T. 40 Lah. 29; A. I. R. 1927 Lah. 890

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Court Fees Act—contd.

— s. 7, IV, (c) and (d)—*Declaratory suit—Valuation—Gross over-valuation by plaintiff—Court's power to interfere under s. 151, Civil Procedure Code.*

Where a plaintiff seeks to obtain a declaratory decree with consequential relief under s. 7, cl. iv, sub-cl. (c) or to obtain an injunction under sub-cl. (d) of the Court Fees Act, the suit must be valued according to the amount for which the relief sought is valued in the plaint, and there is no direct authority for the Court to interfere with the valuation set up by a plaintiff who seeks a relief under s. 7, cl. iv, sub-cl. (c) or (d) of the Court Fees Act, unless the Court can take advantage of s. 151 of the Civil Procedure Code.

Obiter.—If a plaintiff makes an absurd and outrageous misrepresentation as to the value of his suit in order to have it tried by a higher Court, the Court can interfere with the valuation set up by a plaintiff by invoking its powers under s. 151, Civil Procedure Code. *O RAJENDRA BAKSHI SINGH v. BAHU RANI, A. I. R. 1928 Oudh 260* 330

— s. 7, IX, Sch. I, Art. 1—*Suit for foreclosure—Appeal against final decree—Court-fees.*

There is no difference in principle between a final decree for sale under O. XXXIV, r. 4, Civil Procedure Code, and one for foreclosure under r. 3 of the Order and anybody desiring to appeal against a final decree for foreclosure must pay *ad valorem* Court-fees as in any other appeal from a final decree. *N BALAJI v. BALLABHIDAS, A. I. R. 1928 Nag. 146* 671

— s. 19. See O. P. C., 1908, s. 149 223

— Sch. I, Art. 1. See COURT FEES ACT, 1870, 671

— s. 7 671

— Sch. I, Art. 1, Sch. II, Art. 11. See O. P. C., 1908, s. 2 756

— Sch. II, Art. 1 (b). See O. P. C., 1908, s. 149 223

— Sch. II, Art. 11—*Civil Procedure Code (Act V of 1908), s. 144—Appeal from order on application for restitution—Court-fees.*

An appeal from an order on an application under s. 144, Civil Procedure Code, for restitution of property taken in execution of a decree need not bear *ad valorem* Court-fees. It is liable to be stamped only as a miscellaneous appeal under Art. 11 of Sch. II of the Court Fees Act. *L RAHMAT ALI SHAH v. RIKHI KESH, A. I. R. 1928 Lah. 143* 491

Creation of under-proprietary rights—Declaration of Court, necessity of—Oudh Rent Act (XXII of 1885), s. 107-H.

Under-proprietary rights come into existence under s. 107-H of the Oudh Rent Act only when a declaration is made by the Revenue Court. *O KUSHAR DAS v. BALBHADDAR SINGH, 4 O. W. N. 1269; A. I. R. 1928 Oudh 153; 12 R. D. 84* 872

Criminal Procedure Code (Act V of 1898), ss. 4

(1) (r), 435, 439—*Mukhtyar—Right to appear in Criminal Courts—General order prohibiting Mukhtyars from practising, legality of—Pleader, meaning of—Revision—Interference.*

A District Magistrate has no power, in view of s. 4 (1) (r) of the Criminal Procedure Code, to pass a general order prohibiting Mukhtyars from practising in the Criminal Courts.

There is no reason why a Mukhtyar, though he has no general power to appear in any Court, should be debarred from appearing in any proceeding in a Criminal Court with the permission of the Court.

Criminal Procedure Code—contd.

An order prohibiting Mukhtyars from practising can be revised by the High Court under ss. 435 and 439 of the Criminal Procedure Code. *B In re RAJIRAO ABAJI KULKARNI, 29 Bom. L. R. 1587; A. I. R. 1928 Bom. 33; 29 Cr. L. J. 226; 9 A. I. Cr. R. 403* 56

— ss. 15, 350 (a)—*Bench of Magistrates—Some Magistrates not sitting throughout trial—Validity of trial.*

A Bench of Magistrates consisted of A, B and C. A and B began the trial and recorded a portion of the evidence. B and C sat at the next two hearings and all the three sat at the subsequent hearings and signed the judgment:

Held, that the trial was bad and liable to be set aside as it contravened the provisions of s. 350 (a) of the Criminal Procedure Code, even though the quorum required was only two. *O SURAJ BALI v. EMPEROR, 4 O. W. N. 1240; A. I. R. 1928 Oudh 212; 29 Cr. L. J. 310; 9 A. I. Cr. R. 414* 875

— ss. 29-A, 528-A, 529-A—*European British subject—Claim to be tried as such, when to be made—Duty of Magistrate.*

A claim to be dealt with as a European British subject under ss. 29-A, 528-A and 529-B of the Criminal Procedure Code must be made before the trial or enquiry has actually commenced, and if it is not then made, it cannot be made at any subsequent stage.

Per Cuming, J.—A Magistrate is not bound to ask an accused who is apparently a European British subject whether he claims to be tried as such, so far as cases coming within Chap. XLIV-A of the Criminal Procedure Code are concerned. *C CARMEN v. O'BRIEN, 54 O. 1041; A. I. R. 1928 Cal. 97; 29 Cr. L. J. 245; 9 A. I. Cr. R. 471* 353

— s. 69 (1). See PENAL CODE, 1860, s. 173 563

— ss. 107, 146. See TORTS 479

— ss. 107, 202—*Security proceedings—Preliminary enquiry by zaildar—Dismissal of case upon zaildar's report, legality of.*

A Magistrate should not dismiss a case under s. 107, Criminal Procedure Code, upon the report of a zaildar, but must himself decide the case on the merits after hearing the evidence of both the parties. *L MUSA v. MAM KAUER, 9 Lah. L. J. 548; A. I. R. 1928 Lah. 119; 29 Cr. L. J. 267; 29 P. L. R. 271; 9 A. I. Cr. R. 453* 603

— ss. 118, 123 (2)—*Security not furnished—Reference to Sessions Judge—Magistrate's power to accept security pending reference—Effect of accepting security.*

Where an accused fails to furnish security under s. 118, Criminal Procedure Code, and a reference is made to the Sessions Judge under s. 123 (2) of the Code the Magistrate does not become *functus officio*. Notwithstanding such a reference he can accept security if one is offered before the decision of the reference by the Sessions Judge and when security is accepted by the Magistrate the reference to the Sessions Judge automatically comes to an end, and the right of the accused to appeal which was in abeyance revives. *L EMPEROR v. MUMAMMAD AKBAR, A. I. R. 1928 Lah. 64; 29 Cr. L. J. 236; 9 A. I. Cr. R. 490* 286

— s. 133—*Construction of latrine on one's own land—Magistrate's power to order removal of latrine.*

The mere construction of a latrine on one's own land cannot be considered a nuisance within the meaning of s. 133 of the Criminal Procedure Code,

Criminal Procedure Code—contd.

A Magistrate has, therefore, no power to make an order under s. 133 of the Criminal Procedure Code directing a person to remove a latrine built by him on his own land, though he can direct him not to use it in such a way as to cause a nuisance to the neighbours. *A GAURI-SHANKAR v. SRI KRISHNA*, L. R. 8 A. 172 Cr.; 26 A. L. J. 86; 9 A. I. Cr. R. 12; A. I. R. 1928 All. 128; 29 Cr. L. J. 233 242

— ss. 133, 139-A—Bona fide dispute as to public right—Jurisdiction of Criminal Court—Duty of Court—'Reliable evidence,' meaning of. The existence of a bona fide dispute about the right of the public to pass over a certain path does not oust the jurisdiction of a Magistrate to proceed under s. 133, Criminal Procedure Code.

Under s. 139-A, Criminal Procedure Code, the Magistrate, in an enquiry under s. 133 of the same Code, has to find if there is any reliable evidence in support of the denial of the party alleged to cause obstruction. By reliable evidence is not meant that the Magistrate should weigh the evidence produced by both sides and then come to the conclusion which he believes or which he prefers, but the Magistrate should take the evidence as it stands and see whether, on the face of it, if there was no evidence to the contrary, he should come to the conclusion that the evidence was false and was, therefore, unreliable. *L. HARI KISHAN v. KANSHI RAM*, 29 Cr. L. J. 254; 9 A. I. Cr. R. 540 485

— ss. 133, 139-A. (2)—Public nuisance—Denial of public right—Duty of Magistrate to stay proceedings—Dismissal of application, legality of. The proper procedure to be adopted by a Magistrate where he finds in proceedings under s. 133 of the Criminal Procedure Code that there is reliable evidence to show that the place from which the alleged unlawful obstruction or nuisance is sought to be removed is not a public place, is not to dismiss the application and refer the parties to the Civil Court but to stay the proceedings before him under s. 139-A (2) of the Code until the matter of the existence of the alleged public right is decided by a competent Civil Court. *O DEBI DAYAL v. MANAO*, 5 O. W. N. 78; 29 Cr. L. J. 244; A. I. R. 1927 Oudh 632 333

— s. 139-A. See CR. P. C., 1898, s. 133 485

— s. 145—Evidence not discussed—Reasons for decision not given—Order, legality of. An order under s. 145 of the Criminal Procedure Code, which only contains a very brief statement of some of the facts of the case, does not discuss the evidence adduced by the parties and states no reasons: is not a decision as required by law. *N. EMPEROR v. RAGHUNATH*, 29 Cr. L. J. 312; A. I. R. 1928 Nag. 255 907

— s. 146. See CR. P. C., 1898, s. 107 479

— ss. 156, 165—Investigation by Police—Entry into house of stranger to verify truth of statements received during investigation, legality of. The only authority which a Police Officer making an investigation has to enter a house without a search warrant is when he has reasonable grounds for believing that anything necessary for purposes of an investigation into any offence which he is authorised to investigate, may be found in any place within the limits of the Police Station of which he is in charge. He has no power to make promiscuous entries into houses simply to satisfy

Criminal Procedure Code—contd.

himself as to the truth of an allegation made by a complainant, or an accused or a witness during investigation. *A JAGANNATH v. EMPEROR*, L. R. 9 A. 13 Cr.; 9 A. I. Cr. R. 102; 29 Cr. L. J. 272; A. I. R. 1928 All. 185; 26 A. L. J. 410 688

— s. 162 as amended by Act XVIII of 1923—Accused's right to copies of statement recorded by Police—Time for making application—'Called,' meaning of—Accused, whether bound to wait till opening of cross-examination.

Under the provisions of s. 162 of the Criminal Procedure Code, when a witness for the prosecution is produced in Court the accused is entitled to apply for a copy of his statement recorded by Police, and if he makes an application at that stage, the Court is bound to refer to the writing and to direct that the accused be furnished with a copy thereof, subject to the proviso that if the Court is of opinion that any part of such statement is not relevant to the subject-matter of the enquiry or trial, or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, then the Court shall record such opinion and exclude such part from the copy furnished to the accused.

The Court has no power to refuse the granting of the copy until the cross-examination has been opened and the accused has by his questions laid a foundation for holding that there is contradiction between the statements made in Court and those made before the Police.

Per Jwala Prasad, J.—The words "the Court shall refer to such writing" in s. 162 of the Criminal Procedure Code are obviously for the purpose of enabling the Court to exercise discretion under the second proviso, and not for the purpose of restricting the right of the accused to obtain a copy, the discretion wherein was expressly taken away by the Legislature. *PAT RAMGULAM TELI v. EMPEROR*, 9 P. L. T. 92; 7 Pat. 205; 29 Cr. L. J. 297; A. I. R. 1928 Pat. 215 817

— s. 162 as amended by Act XVIII of 1923—Application for copy of statement of prosecution witness—Proper time for making such application—Proof of statement, mode of.

An accused is not entitled under s. 162 of the Criminal Procedure Code to a copy of the statement made by a prosecution witness before the witness on behalf of the prosecution, who is sought to be cross-examined by such statement is in the witness-box. The request has to be made to the Court when the witness on behalf of the prosecution is under cross-examination.

The statement by which it is sought to contradict the prosecution witness under s. 162, Criminal Procedure Code, must be either proved by the investigating officer, or must be admitted by the witness in his cross-examination, or must be proved in some other way before it is put to the witness under s. 145 of the Evidence Act, 1872. *B. EMPEROR v. SHAIKH USMAN*, 29 Bom. L. R. 1581; A. I. R. 1928 Bom. 23; 29 Cr. L. J. 221; 52 B. 195; 9 A. I. Cr. R. 476 57

— s. 162 as amended by Act (XVIII of 1923)—Statements before Police, proper use of.

Statements made by prosecution witnesses before the Investigating Police Officers cannot be used except for the limited purpose specified in s. 162 of the Criminal Procedure Code. *L. HAYAT v. EMPEROR*, 29 Cr. L. J. 282; A. I. R. 1928 Lah. 380 766

Criminal Procedure Code—contd.

— s. 165. See CR. P. C., 1898, s. 156 688

— s. 195 (1) (b)—*Complaint to Police—Subsequent complaint to Magistrate on same facts—merger—Prosecution for false charge—Complaint by Magistrate, whether necessary—Committal before filing of complaint to Magistrate, validity of.*

The accused made a complaint to the Police which was found to be false and he was committed for trial to the Sessions Court for an offence under s. 211 of the Penal Code. Subsequently he made a similar complaint to a Magistrate and contended that the committal proceedings should be quashed as there was no complaint in writing by the Magistrate within the meaning of s. 195 of the Criminal Procedure Code :

Held, that the principle that where a complainant makes a complaint to the Police and subsequently makes a similar complaint to the Magistrate, the complaint to the Police merges in the complaint to the Magistrate and the complainant cannot be prosecuted for having made a false accusation without a complaint by the Magistrate, was not applicable to the case inasmuch as there was no complaint to the Magistrate at the time of the committal order, and that the committal order was, therefore, perfectly valid. *B. EMPEROR v. UKHA MAHADU BARASE*, 29 Bom. L. R. 1590; A. I. R. 1928 Bom. 22; 29 Cr. L. J. 223; 9 A. I. Cr. K. 481 54

— s. 202. See CR. P. C., 1898, s. 107 603

— s. 204—*Summoning accused piecemeal, legality of.*

There is nothing either irregular or improper in a Magistrate first issuing process for one of the accused and then changing his mind and issuing process for all the accused before taking further evidence. *L. ALAM v. EMPEROR*, 29 Cr. L. J. 293; A. I. R. 1928 Lah. 543; 10 A. I. Cr. K. 10 778

— s. 234—*Offences of same kind, within one year—Joint trial, whether regular.*

An accused can be tried for three offences in one trial if the offences are of the same kind within the meaning of s. 234 of the Criminal Procedure Code and if they were committed within the space of one year. *PAT JAMNA PRASAD v. EMPEROR*, 29 Cr. L. J. 287; 9 A. I. Cr. K. 483 826

— ss. 234, 236, 238—*Penal Code (Act XLV of 1860), ss. 411, 413—Charge under s. 413—Conviction for three offences under s. 411—Legality of conviction—Misjoinder of charges—Conviction for minor offence on charge for major offence.*

The accused was charged under s. 413 of the Penal Code of being a habitual receiver of stolen property. Some ten or eleven instances of receipt of stolen property were put forward by the prosecution. At the trial the Sessions Judge thought it proper to add charges of three separate offences under s. 411. The three incidents which formed the subject of these charges were three of the incidents relied on by the prosecution to establish the habit of receiving stolen property. The charges under s. 411, though proved, were found by the Judge not a sufficient basis for the finding of habit necessary to a conviction under s. 413, and the accused was convicted of the offences under s. 411 :—

Held, that the convictions were not illegal inasmuch as the offences under s. 411 were merely minor offences forming ingredients of the main charge under s. 413, for which the accused could be convicted under s. 238 of the Criminal Procedure

Criminal Procedure Code—contd.

Code even if separate charges had not been framed, and that ss. 234 and 236, Criminal Procedure Code, had no application to the case. *A HAR PRASAD v. EMPEROR*, L. R. 8 A. 170 Cr.; 9 A. I. Cr. R. 4; A. I. R. 1928 All. 139; 29 Cr. L. J. 232 241

— s. 247—*Summons case—Death of complainant pending inquiry—Accused, right of, to acquittal.*

Where the complainant in a summons case dies pending the inquiry before the Magistrate, the Magistrate should acquit the accused and should not proceed further with the inquiry.

The clause beginning with the words "unless for some reason he thinks" in s. 247, Criminal Procedure Code, does not apply to the case of a complainant who is dead. *M. In re BONTU APPALA NAIDU*, 27 L. W. 85, A. I. R. 1928 Mad. 167; 29 Cr. L. J. 257; 51 M. 339; 9 A. I. Cr. K. 503; 54 M. L. J. 714 512

— ss. 250, 439—*Criminal revision—Jurisdiction of High Court to award compensation.*

Quære.—Whether it is open to the High Court in criminal revision to award compensation to the accused under s. 250 of the Criminal Procedure Code. *A AMINULLAH v. EMPEROR*, A. I. R. 1928 All. 95; L. R. 9 A. 28 Cr.; 26 A. L. J. 328; 9 A. I. Cr. K. 197; 29 Cr. L. J. 274; L. L. T. 40 All. 100 690

— s. 257—*Re-calling of prosecution witnesses—Accused's right to cross-examine them—Applicability of s. 257 to summons cases.*

The only object of re-calling a prosecution witness as a defence witness under s. 257, Criminal Procedure Code, is to secure an opportunity to the accused for further cross-examination.

Once a summons has been issued to a prosecution witness under s. 257 of the Criminal Procedure Code and the witness is before the Court, there is no jurisdiction in the Court to dictate to the accused the terms upon which the examination of the witness shall be conducted. If the accused wishes to put questions in cross-examination the Magistrate is bound to allow it.

The principle of s. 257 applies to summons cases also. *PAT KAMESHWAR SAHU v. EMPEROR*, 29 Cr. L. J. 308; A. I. R. 1928 Pat. 253 846

— ss. 263, cls. (g) and (h)—*Summary trial—Failure to give reasons for conviction—Accused's plea and examination not recorded—Conviction, legality of.*

Omission by a Magistrate, in a summary trial, to record the plea of the accused and his examination as required by cl. (g) of s. 263, Criminal Procedure Code, and failure to give a brief statement of the reasons for the findings as required by cl. (h) of the said section, vitiates the trial. *A MURAT SINGH v. EMPEROR*, L. R. 9 A. 10 Cr.; 26 A. L. J. 109; 9 A. I. Cr. K. 98, 29 Cr. L. J. 265; A. I. R. 1928 All. 266 592

— ss. 297, 307—*Jury trial—Verdict of 'guilty'—Judge preparing reference to High Court in anticipation of first verdict—Second charge—Verdict of 'not guilty'—Procedure, illegality of.*

Where a Jury returned a unanimous verdict of 'guilty', but the Sessions Judge charged them again and they returned a unanimous verdict of 'not guilty' and it also appeared from the record that the Sessions Judge had before his second charge anticipated the Jury bringing in a verdict of 'guilty' in the first instance, and written out a letter of reference to the High Court disagreeing with the Jury :

Criminal Procedure Code—contd.

Held, that the procedure followed by the Sessions Judge was entirely illegal and unwarranted by law and that the accused should be re-tried. **C LEGAL REMEMBRANCE v. JAHEY SHAIKH**, 32 C. W. N. 144; 29 Or. L. J. 228; A. I. R. 1928 Cal. 228; 9 A. I. Cr. R. 451 90

— **s. 342 (2)—Examination of accused—Defamatory statement—Prosecution for defamation, legality of—Privilege.**

An accused person cannot be prosecuted for defamation in respect of a statement made by him in his examination under s. 342 of the Criminal Procedure Code. **A MURLI PATHAK v. EMPEROR**, L. R. 8 A. 128 Or.. 8 A. I. Cr. R. 211; A. I. R. 1927 All. 707; 25 A. L. J. 855; 29 Or. L. J. 262; 50 A. 169 561

— **s. 350 (a).** See **CR. P. C.**, 1898, s. 15 875

— **ss. 350, 526—Transfer—Reasonable apprehension, whether sufficient—Accused's right to fresh examination of witnesses.**

It is enough for the transfer of a case that the applicant for transfer has reasonable grounds for apprehension that he will not receive proper justice at the hands of the trying Magistrate. It is not for the Court to decide whether the apprehensions of the accused are true or not.

An accused has, under s. 350 of the Code of Criminal Procedure, a right to demand that the witnesses or any of them be summoned and re-examined when the case is tried by the Magistrate to whom it is transferred for trial. He can, however, waive his right. **PAT OHHANU PRASAD SINGH v. EMPEROR**, 29 Or. L. J. 229; 9 A. I. Cr. R. 486 160

— **ss. 353, 537—Failure to examine witnesses in accused's presence—Illegality—Waiver, effect of.**

Failure to examine the witnesses in the presence of the accused vitiates a trial except in cases mentioned in s. 353 of the Criminal Procedure Code. It is not a mere irregularity which can be cured under s. 537 of the Code or by waiver on the part of the accused's Pleader. **PAT BIGAN SINGH v. EMPEROR**, 6 Pat. 691; A. I. R. 1928 Pat. 143; 29 Or. L. J. 200; 9 P. L. T. 327; 9 A. I. Cr. R. 450 530

— **ss. 367, 424—Appellate Court—Judgment not giving points for determination or reasons, legality of.**

A judgment of an Appellate Court which does not discuss the points urged in the memorandum of appeal and without giving any reasons, holds that a conviction is correct, is not a legal judgment under s. 424 read with s. 367 of the Criminal Procedure Code. **N KALIKRAM v. EMPEROR**, 29 Or. L. J. 270 665

— **s. 403—Acquittal—Conviction on same facts for another offence, legality of.**

1. Where an accused has once been acquitted he cannot be convicted on the same set of facts for an offence different from the one with which he was charged and acquitted. **L SOBHA MAL v. EMPEROR**, 29 Or. L. J. 282; A. I. R. 1928 Lah. 332 766

— **s. 403 (1)—Rash driving resulting in hurt—Conviction under Motor Vehicles Act (VIII of 1914), s. 5—Fresh prosecution under ss. 279, 338, Penal Code, whether barred.**

A motor driver, who drove recklessly and thereby caused grievous hurt to a person, was convicted under s. 5 of the Motor Vehicles Act. He was subsequently prosecuted under s. 279 of the Penal Code. It was contended on behalf of the accused that the second

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prosecution was barred under s. 403 of the Criminal Procedure Code:

Held, that though the accused could not be prosecuted for an offence under s. 279 of the Penal Code or for any offence circumscribed by the rash driving, yet his conviction for rash driving could not protect him from prosecution for the consequences of such rash driving under s. 338 of the Penal Code. **A GUR NARAIN v. EMPEROR**, L. R. 9 A. 11 Or.; 9 A. I. Cr. R. 99; 26 A. L. J. 160; 29 Or. L. J. 271; A. I. R. 1928 All. 191 687

— **s. 424.** See **CR. P. C.**, 1898, s. 367 665

— **ss. 435, 439.** See **CR. P. C.**, 1898, ss. 4 (1) (r), 435, 439 56

— **s. 439—Application for enhancement of sentence, when to be made—Expiry of sentence, whether ground for refusing interference.**

In all cases where the sentence is considered by the prosecution to be inadequate, the District Magistrate or the Sessions Judge, as the case may be, should be moved by the Police at the earliest possible moment after the trial and where possible, before the accused has served his sentence, although the fact that the sentence has expired before such action is taken is, in itself, no reason for refusing to interfere. **PAT EMPEROR v. PRABHU UPADHAYA**, 29 Or. L. J. 261; A. I. R. 1928 Pat. 201; 9 A. I. Cr. R. 523 536

— **s. 439—Reference—Enhancement of sentence—Reference by District Magistrate for enhancement, legality of—Proper procedure.**

A reference for enhancement of sentence by a District Magistrate direct to the High Court is irregular and unwarranted by law. The proper course for a District Magistrate to adopt is to instruct the law officers of the Crown in the High Court to file an application for revision asking for the enhancement of sentence. **L GULAB v. EMPEROR**, 29 Or. L. J. 235 285

— **ss. 439, 562—Embezzlement—Sentence—Letting off accused on probation of good conduct—Revision—Interference.**

Although in a case of embezzlement usually a sentence of imprisonment should be passed, where the trying Magistrate has given the accused the benefit of s. 562, Criminal Procedure Code, the High Court will not interfere with his order in revision especially after the lapse of a long time. **L EMPEROR v. KHAIRATI LAL**, 29 Or. L. J. 291; 10 A. I. Cr. R. 27 775

— **s. 526.** See **CR. P. C.**, 1898, ss. 350, 526 160

— **s. 526—Apprehension that Magistrate would not give effect to certain legal objections—Transfer.**

A case cannot be transferred on the sole ground that it is apprehended that in the ultimate judgment which the Magistrate would deliver in the case he would not give effect to certain legal objections which might be taken at the trial. **L MUHAMMAD AZIM v. NIAZ MUHAMMAD**, 29 Or. L. J. 289; A. I. R. 1928 Lah. 317; 10 A. I. Cr. R. 8 773

— **s. 526—Grounds for transfer.**

Applications for transfer cannot be lightly granted where they are based on fanciful and sentimental grounds or are supported by false affidavits. **L MASHAR KHAN v. EMPEROR**, 29 Or. L. J. 220; A. I. R. 1928 Lah. 246; 9 A. I. Cr. R. 514 108

— **s. 526—Transfer, policy of law relating to—Expression of opinion on same facts in previous case, whether ground for transfer.**

Criminal Procedure Code—concl'd.

The policy of law relating to transfer of criminal cases is to inspire confidence in the minds of accused persons in the administration of justice and in the integrity of the Magistracy. The superior Courts are expected to have due regard to the susceptibilities of the accused persons and if they are satisfied that there are reasonable grounds, that is, grounds which a reasonable person placed in the position of an accused person considers to be sufficient, for entertaining an apprehension that the accused will not have a fair and impartial trial in the Court of a Magistrate then an order for transfer should be made.

The mere fact that in a previous case against other accused under the same section and almost on identical facts the Magistrate convicted the accused then before him is no ground for transferring a case. *L. AMAR NATH v. EMPEROR*, 29 Cr. L. J. 295; A. I. R. 1928 Lah. 460 **783**

ss. 528-A, 529-A. See Cr. P. C., 1898, s. 29-A **353**

s. 537. See Cr. P. C., 1898, ss. 353, 537 **530**

s. 561—Sentence, enhancement of—High Court, powers of, how to be exercised—Order expunging remarks—Notice to lower Court, whether necessary:

A High Court will not ordinarily exercise its power of enhancing a sentence except on the motion of the Local Government.

A High Court has inherent jurisdiction under s. 561 of the Criminal Procedure Code to act *suo motu* and order expunging of objectionable remarks in the judgment of a subordinate Court without issuing the notice to the District Magistrate or to the trying Magistrate to show cause as to why the deletion should not be made. *N. GUNWANT PARASHRAM NAIK v. GOVIND BHAI*, 29 Cr. L. J. 313; A. I. R. 1928 Nag. 242 **912**

s. 562. See Cr. P. C., 1898, s. 439, 562 **775**

s. 562—Release of accused on probation in perjury case, propriety of.

It is not desirable to apply the provisions of s. 562 of the Criminal Procedure Code to a person found guilty of deliberately committing perjury to screen an offender. *S. EMPEROR v. AKBAR*, 29 P. L. R. 219; A. I. R. 1928 Lah. 296; 9 A. I. Cr. R. 496 **107**

Criminal trial—Appeal from acquittal—Presumptions in favour of accused.

In an appeal by Government against an acquittal the accused starts with a double presumption in his favour. Firstly, there is the rule that it is for the prosecution to make out their case and that until they do so beyond all reasonable doubt the accused must be presumed to be innocent and, secondly, that the accused having succeeded in securing an acquittal from a Court, a Superior Court will not interfere until the Crown show conclusively that the inference of guilt is irresistible. *PAT EMPEROR v. GHULAM NABI*, 6 Pat. 768; A. I. R. 1928 Pat. 146; 29 Cr. L. J. 301; 9 A. I. Cr. R. 385 **835**

Burden of proof—Duty of prosecution—Criminal Procedure Code (Act V of 1898) s. 439—Acquittal of persons not before High Court, legality of.

An area of 1100 bighas of land was attached and the petitioners along with certain boys were charged with having cut *ghalasi* within that area. It was established in evidence that prior to the date of the

Criminal trial—cont'd.

occurrence the petitioners had obtained delivery of possession, of a portion of the attached area extending to 345 bighas. The Courts below assumed that unless the accused proved that they cut from within the area of the 345 bighas they must be held to have committed theft and convicted the accused. The boys were released after admonition under s. 562A of the Criminal Procedure Code:

Held, (1) that the conviction was wrong inasmuch as the burden of proving that the area from which the *ghalasi* was cut was not within the area of 345 bighas in the possession of the petitioners was on the prosecution and the prosecution had failed to discharge that burden;

(2) that the High Court had jurisdiction, in the circumstances, to set aside the conviction of the boys also even though they were not before the High Court. *PAT TULSI MAHTO v. EMPEROR*, 29 Cr. L. J. 259; A. I. R. 1928 Pat. 249 **529**

Charge for substantive offence—Conviction for abetment—Legality of conviction.

An accused can be convicted for abetment on a charge for the substantive offence. *PAT EMPEROR v. GHULAM NABI*, 6 Pat. 768; A. I. R. 1928 Pat. 146; 28 Cr. L. J. 301; 9 A. I. Cr. R. 385 **835**

Cross-cases—Use of evidence in one case as evidence in the other, illegality of.

It is illegal to use as evidence in a case evidence led in another case which was not recorded in the presence of the accused. *L. HAYAT v. EMPEROR*, 29 Cr. L. J. 282; A. I. R. 1928 Lah. 380 **766**

Duty of Magistrates—Private conference with Prosecuting Officer—Invoking intervention of superior Executive Officers—Putting accused to inconvenience—Improper conduct.

It is an elementary principle of justice that a person cannot simultaneously perform the functions of a prosecutor and those of a Judge in a criminal case. A Magistrate ceases to be an Executive Officer when he is sitting in a Court to try a criminal case.

A District Magistrate as such is directly subordinate to the High Court and he cannot be allowed to invoke the intervention of his superior Executive Officers in a matter concerning the discharge of his judicial duties for which he owes responsibility only to the High Court.

It is improper on the part of a Judicial Officer to hold private conferences with the Prosecuting Officers in respect of a criminal case upon which he has to adjudicate.

One of the most important duties of a Court of Law is to create and maintain confidence in the administration of justice and to conduct itself in such a manner as to produce in the minds of the parties an impression that nothing but absolute justice would be done to them. *L. TAJ MOHMUD v. EMPEROR*, 29 P. L. R. 14; I. L. T. 40 Lah. 36; 29 Cr. L. J. 212; A. I. R. 1928 Lah. 125; 9 A. I. Cr. R. 505 **100**

Duty of prosecution and defence respectively—Defence merely relying on defects in prosecution evidence, propriety of.

Although the prosecution must prove their case in the first instance before the accused can be called upon to make their defence, yet when evidence has once been given on oath by witnesses who profess to have seen the occurrence and who directly implicate the accused and ascribe particular acts to them, it will not avail the accused merely to rely upon dis-

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crepancies here and there or upon the absence of adequate motive or on indications that there may be exaggerations in the prosecution story. **PAT GHANSHYAM SINGH v. EMPEROR**, 6 Pat. 627; A. I. R. 1928 Pat. 100; 9 A. I. Cr. R. 460; 29 Cr. L. J. 239 **305**

— *Magistrate having knowledge of case during investigation—Trial, propriety of.*

A Magistrate who has some knowledge of the case while it is under investigation should not try the case. But a conviction cannot be set aside or re-trial ordered on this ground where the accused is not shown to have been prejudiced. **PAT EMPEROR v. GHULAM NABI**, 6 Pat. 768; A. I. R. 1928 Pat. 146; 29 Cr. L. J. 301; 9 A. I. Cr. R. 385 **835**

— *Prosecution coming to Court with incomplete case—Re-trial, legality of.*

The prosecution is not entitled to ask for a re-trial where it comes to Court with an incomplete case which so far as it goes confirms the defence of the accused. **PAT P. K. SEN v. EMPEROR**, 29 Cr. L. J. 258; A. I. R. 1928 Pat. 293 **529**

— *Sentence—Enhancement of sentence in revision, grounds for.*

The mere fact that the High Court as a Court of first instance would have passed a heavier sentence is not by itself a sufficient ground for enhancing a sentence in revision especially when the sentence passed by the trial Magistrate is a substantial one. **L KHANA v. EMPEROR**, 29 Cr. L. J. 276; 9 A. I. Cr. R. 504 **759**

— *Warrant case—Accused reserving right of cross-examination—Charge framed for offence triable as summons case—Procedure relating to summons case, legality of adopting—Accused's right to re-cross-examine prosecution witnesses.*

Where a case is tried as a warrant case and the accused reserves his right of cross-examination, he is entitled to have the prosecution witnesses summoned for cross-examination after the framing of the charge even if the charge is framed for an offence triable as a summons case. **L DEVI DIAL v. RATTAN DEVI**, 29 Cr. L. J. 235; A. I. R. 1928 Lah. 294 **285**

Custom—Alienation—Female heir—Right of alienation—Succession—Daughters exclude collaterals—Special custom excluding daughters—Burden of proof.

Under the general Customary Law of the Punjab collaterals in the sixth degree of the deceased male holder are not entitled to inherit his estate in preference to his daughters especially when the estate has not been proved to be ancestral. The onus of proving a special custom in favour of their right of succession to the exclusion of daughters rests on the collaterals.

The rule of Customary Law is firmly established that a female inheriting landed estate from a male holds the property on life-tenure and it is immaterial whether the female is a widow, a daughter or a mother.

A female is not competent to alienate property inherited by her except for necessity and the reversionary heirs of the last male holder are entitled to contest an alienation made by her even if the property is not proved to be ancestral. **L AHMAD DIN v. FATIMA BIBI**, A. I. R. 1928 Lah. 290 **489**

— *Ancestral land—Ancestor not owning but simply possessing land—Land, whether ancestral.*

To establish the ancestral nature of land it is necessary to prove that the ancestor owned it; mere

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proof of possession by such ancestor in any capacity is not enough. **L HIRA v. TEK CHAND**, 10 Lah. L. J. 21 **487**

— *Succession—Self-acquired property—*

Daughters, whether exclude collaterals.

The general rule of Customary Law of Amritsar District and, in fact, that of the Punjab is that daughters exclude collaterals in succession to self-acquired property. **L PIR BAKHSI v. GHULAM BIBI**, A. I. R. 1928 Lah. 305; 9 Lah. 352 **280**

Customary easement. See CUSTOMARY RIGHT 522
Customary right and customary easement,

distinction between—Customary right, proof of—Continued use for 20 years—Presumption of acquisition by grant—Sufficiency of user, whether question of law—Civil Procedure Code (Act V of 1908), s. 100—Custom resulting in loss of right of enjoyment of property, validity of—License to excavate earth for making pots, whether irrevocable.

There is a distinction between a customary right and a customary easement; for the acquisition of the former no particular period of enjoyment need be proved.

In order to establish a customary right to do on the land of another acts, which, in the absence of any custom, would be acts of trespass, the enjoyment must have been so acquiesced in, by the owner, as to give rise to the inference, that originally by agreement or otherwise, the usage had become a Customary Law of the place in respect of the persons and things which it concerned.

Whether from the proved or continued user over 20 years, such an acquiescence on the part of the owner, as would give rise to a presumed grant, could be inferred is a question of law on which a second appeal would lie.

A user for a period of 20 years is sufficiently long to enable the Court, in the absence of a protest from the person concerned, to draw the legal inference that the exercise of the right must have had a lawful origin in a grant.

A custom may be good even though its exercise may have the effect of depriving the owner of the soil, of the whole use and enjoyment of his property.

The right to excavate the earth and carry it away for the purpose of making pots is a license coupled with a grant and is in the nature of a benefit to arise out of land or an interest in land, and as such is irrevocable at the option of the owner of the land. **N RUSHI v. RUSHI**, 23 N. L. R. 192; A. I. R. 1928 Nag. 522 **87**

Damdupat. See INTEREST

199, 205

Decree—Forfeiture clause, whether can be relieved against in decrees which are not by consent.

A provision for forfeiture for non-payment in a decree cannot be relieved against unless the decree is a consent decree.

Where a decree in favour of a landlord directed the defendants-tenants to pay the arrears of rent within a particular time and in default the defendants were to be evicted and the plaintiff put in possession, and the defendants defaulted to pay:

Held, that the plaintiff was entitled to enforce the clause for possession and the forfeiture could not be relieved against. **M GRIDHARDOSS Co. v. PARA APPADURAI**, 27 L. W. 135; (1925) M. W. N. 70; A. I. R. 1928 Mad. 193; 54 M. L. J. 316; 51 M. 157 **792**

Deed—Material alteration—Decree for admitted amount, whether can be given.

Plaintiff sued on a promissory note for Rs. 10. The defendant pleaded that the promissory note was for Rs. 5 only and that the amount had been paid off. It was found that the document was altered by the plaintiff but that the discharge pleaded by the defendant was untrue:

Held, that inasmuch as the deed had been materially altered it was entirely void and the plaintiff could not be given a decree even for the amount of Rs. 5. **C DILJAN v. MAKBUL KHAN** 475

Defence of India Act (IV of 1915), s. 5—Duty of Commissioner to read over deposition of witness.

The fact that Commissioners trying a case under the Defence of India Act are authorised to make a memorandum only of the evidence of witnesses examined by them, does not relieve them from their duty to have the depositions read over to the witnesses as required by s. 360, Criminal Procedure Code. **L. TAJ MOHAMMAD v. EMPEROR**, 29 P. L. R. 14; I. L. T. 40 Lah. 36; 29 Cr. L. J. 212; A. I. R. 1928 Lah. 125; 9 A. I. Cr. R. 505 100

Divorce—Grounds for divorce—'Cruelty'—Isolated acts of violence, whether sufficient—Adultery of wife—Condonation—Revival—Mere familiarity with co-respondent, effect of—Dissolution of marriage—Policy of law.

In order to establish a case of cruelty against her husband, a wife must prove more than mere isolated acts of violence. The degree of violence necessary varies in accordance with the status of the parties.

The law as regards revival of a condoned offence is that if such a subsequent offence should arise, the forgiveness is cancelled and the old cause of complaint is revived even if the offence is not *ejusdem generis* with the original offence.

But there is no authority for the view that an offence by a wife less than adultery with another person revives an adultery committed by her previously and which has been condoned by her husband. At least the second offence, if it is not adultery, must be one of which a Court can take cognisance.

Mere familiarity with another person, does not revive a condoned offence of adultery so as to justify a decree for divorce.

A decree for dissolution of marriage should not be granted merely because the husband has shown himself to be suspicious, jealous or even occasionally violent. It is not the object of the law to make such separations easy. **O FOSTER v. FOSTER**, 1 Luck. Cas. 685; A. I. R. 1928 Oudh 114 184

Petition for dissolution of marriage on ground of adultery—Unreasonable delay, effect of.

A petition for dissolution of marriage on the ground of adultery is liable to be dismissed if the applicant is guilty of unreasonable delay in presenting the petition. **L. ALLAN ROBERT SHAW v. EMILY MAY SHAW**, A. I. R. 1928 Lah. 320 273

Divorce Act (IV of 1869), ss. 7, 55—Order for payment of alimony pendente lite—Mode of enforcement—Proceedings for contempt of Court, whether can be taken.

An order for payment of alimony pendente lite made in a suit under the Divorce Act has to be enforced in accordance with the provisions of the Civil Procedure Code relating to execution of decrees and cannot be enforced by sending the person against whom the order is made to Jail for contempt of Court.

Divorce Act—could.

Although non-compliance with an order made by a Divorce Court in England is contempt of Court, an order for payment will not be enforced by attachment. **C WHITE v. WHITE**, 32 O. W. N. 179 68

s. 11. See C. P. C., 1908, s. 115 475

s. 11 (2)—Proceedings for dissolution of marriage—Dispensing with name of co-respondent, grounds for—Discretion of Courts in India—Unwilling to take the risk, whether sufficient ground.

The Indian Courts do not have the same discretion in divorce proceedings to dispense with the naming of a co-respondent as the English Courts have. The three grounds mentioned in s. 11 of the Divorce Act are the only ones on which leave can be so granted to proceed with a petition for dissolution of marriage.

The mere fact that the petitioner has suspicions against two persons and, in spite of efforts and inquiry, has been unable to obtain substantial proof against either of them and that he is, therefore, reluctant to take the risk of making them co-respondents is not a sufficient ground for dispensing with the naming of the co-respondents under s. 11 (2) of the Divorce Act. **N CHARLES HENRY v. OLIVE MURIEL**, 11 N. L. J. 4; A. I. R. 1928 Nag. 117 667

s. 55. See DIVORCE ACT, 1869, ss. 7, 55 68

Easement—Easement to bury the dead, acquisition of.

An easement to bury the dead is not known to law and cannot, therefore, be acquired by prescription. **L. NATHU LAL v. NUR MUHAMMAD** 769

Right of owner to make use of surface water—Adjoining owner, whether entitled to flow of surplus water.

Every land owner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and to put it to such use as he may desire, and although he has a right to discharge the surplus water on to an adjoining owner's land, the latter cannot compel him to do so unless he has acquired a right to such surplus water by contract or by prescription. **PAT ABDUL BAQI v. SHEO PRAKASH SINGH**, I. L. T. 40 Pat. 84; A. I. R. 1928 Pat. 279 542

Easements Act (V of 1882), s. 7 (j)—Natural right of drainage, scope of—Right, whether extends to artificial discharge of water.

The natural right of drainage covers only the right to allow water naturally rising in or falling on land of a naturally higher level to drain off by surface flow along whatever lines the water may find its way to the neighbouring land, but does not include a right to pass the water which has come artificially thereon.

Natural rights in water do not come into existence so long as the water does not flow in defined channels, whether on the surface or under-ground.

There is no obligation, therefore, upon an adjoining land-owner to submit to an artificial discharge of water from his neighbour's land, unless he is bound by an easement to do so. **N RAMCHANDRA NAGORA v. RETIRAM**, A. I. R. 1928 Nag. 184 203

Election. See CORPORATIONS CREATED BY STATUTE 446

English Bankruptcy Act, 1914 (4 & 5 Geo. V, Ch. 59), s. 155. See PROVINCIAL INSOLVENCY ACT, 1920, s. 72 442

Evidence—Appreciation of evidence—Probabilities.

Inferences drawn from probabilities must give way to sworn testimony unless the inferences are irresistible and show that the sworn testimony must be false. *Pat EMPEROR v. GHULAM NABI*, 6 Pat. 768; A. I. R. 1928 Pat. 146; 29 Cr. L. J. 301; 9 A. I. Cr. R. 385 **835**

— *Circumstantial evidence as basis for conviction—Deceased last seen alive with accused—Guilt, whether established—Penal Code (Act XLV of 1860), s. 302.*

In order to justify the inference of guilt, the circumstantial evidence, where there is no direct evidence, must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

The circumstance that the deceased was last seen alive in the company of the accused, though it raises a strong suspicion against the accused is not sufficient to establish his guilt beyond doubt. *L. GHULAM RASUL v. EMPEROR*, 29 Cr. L. J. 289; 10 A. I. Cr. R. 5 **774**

— *Court witness—Apprehension that witness will be hostile—Party, whether entitled to compel Court to cite him.*

A Court cannot be forced to call a witness as a Court witness merely because the party who wishes to examine him apprehends that the witness will be hostile. *Pat GULAI JHA v. EMPEROR*, 29 Cr. L. J. 299; 9 P. L. T. 344; A. I. R. 1928 Pat. 277 **827**

— *Inadmissible evidence—Hearsay—Counsel not objecting.*

Hearsay evidence which ought to have been rejected as irrelevant does not become admissible as against a party merely because his Counsel erroneously failed to take the objection when the evidence was being given. *P. C. LIM YAM HONG v. LIAM CHOON & Co.*, 47 C. L. J. 288; A. I. R. 1928 P. C. 127; 30 Bom. L. R. 757 **457**

— *Non-production of accounts—Adverse inference.*

It is open to the Court to make an adverse inference against a party who wilfully suppresses accounts of a vital character and in his possession. *M. BALAMUDARA OHARI v. KANNIAPPA OHARI*, 39 M. L. T. 443; A. I. R. 1927 Mad. 1165 **132**

— *“Opinions” in official reports, value of.*

Although official reports are valuable and in many cases the best evidence of the facts stated therein, opinions therein expressed should not be treated as conclusive in respect of matters requiring judicial determination, however eminent the authors of such reports may be. *P. G. MARTAND RAO v. MALHAR RAO*, A. I. R. 1928 P. C. 10; 47 C. L. J. 150; 30 Bom. L. R. 251; 27 L. W. 350; 54 M. L. J. 397; 32 C. W. N. 621; 24 N. L. R. 25; 11 N. L. J. 26; 55 C. 403 **7**

— *Party failing to produce his principal witness—Presumption.*

Where a party failed to call as his witness the principal person involved in the transaction, who was in a position to give a first hand account of the matters in controversy and to throw light on them, and who could have refuted on oath the allegations of the other side, and the Appellate Court drew an inference adverse to the party who thus intentionally kept back his principal witness, their Lordships of the Privy Council considered that it was, under the circumstances, a legitimate inference to draw. *P. G.*

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MAGANMAL v. DARBARILAL CHOWDHURY, A. I. R. 1928 P. C. 39; 54 M. L. J. 208; 30 Bom. L. R. 296; 5 O. W. N. 226; 47 C. L. J. 222; 27 L. W. 523; I. L. T. 40 Cal. 124; 24 N. L. R. 40 **113**

— *Roznamcha reports, whether evidence of facts mentioned.*

Roznamcha reports are not evidence of the facts mentioned in the reports which must be proved like other facts. *N. EMPEROR v. RAGHUNATH*, 29 Cr. L. J. 312; A. I. R. 1928 Nag. 255 **907**

Evidence Act (1 of 1872), ss. 3, 67—Proof of documents—Proof of handwriting of executant, necessity of—“Proved”, meaning of.

A document cannot be held to be proved as required by the Evidence Act where there is no evidence that the signature purporting to be that of the executant is in the handwriting of the executant, even if the Court considers the execution so probable that a prudent man ought, under the circumstances of the case, act upon the supposition that there had been execution.

The definition of the word “proved” in s. 3 of the Evidence Act must, when applied to documents, be read along with s. 67 of the Act. *A. SALAIK CHAND v. TAMIZ BANO*, A. I. R. 1928 All. 303 **564**

— **s. 13, cl. (a).** See **EVIDENCE ACT, 1872, s. 32 (3) (7)** **293**

— **ss. 32 (3) (7), 13, cl. (a)—“Statement against proprietary interest”—Statement of boundaries, admissibility of—Assertion of title—Mere statement or mention, whether amounts to assertion.**

Under s. 32 (3) of the Evidence Act it is the statement, not the document containing the statement, which must be against the proprietary interest of the person making it.

A mere “mention” of a right not amounting to an “assertion” of it is not admissible in evidence under cl. (7), s. 32.

Where the question in issue was whether certain property was the joint property of the plaintiffs and the defendants and certain old documents executed by the defendants’ ancestors which contained a recital in a statement of boundaries that the said property was common property were sought to be adduced in evidence:

Held, that the documents could not be admitted in evidence either under s. 32, cl. (3) or s. 32, cl. (7) of the Evidence Act. *M. KARUPANNA KONAR v. RANGASWAMI KONAR*, A. I. R. 1923 Mad. 105 **293**

— **s. 32 (5)—Statement post litem motam, admissibility of—Question in issue raised in previous litigation, whether admissible—Limitation Act (IX of 1908), Sch. I, Art. 141—Starting point of limitation—Subsequent disability, effect of.**

The words “before the question in issue was raised, in s. 32 (5) of the Evidence Act do not necessarily mean before it was raised in the particular litigation in which such statement is sought to be adduced in evidence. A statement which was made after the question had been raised in a previous litigation is inadmissible in evidence in a subsequent suit even though it was made before the question was raised in the latter suit.

The cause of action for a suit by a Hindu reversioner for possession of an estate on the death of a Hindu female arises under Art. 141 of the Limitation Act on the death of the widow and once

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limitation has begun to run under the section no subsequent disability can stop it. **A RUP KISHOR v. PATRANI**, 25 A. L. J. 861; 50 A. 152; A. I. R. 1927 All. 818 45

— **s. 33**—*Witness dying before cross-examination—Evidence in examination-in-chief whether admissible.*

The incomplete deposition of a witness who dies before he is cross-examined is not admissible in evidence under s. 33 of the Evidence Act. **A NARSINGH DAS v. GOKUL PRASAD**, 25 A. L. J. 775; A. I. R. 1928 All. 140; 50 A. 113 243

— **s. 49.** See EVIDENCE ACT, 1872, s. 92 808

— **ss. 57, 78**—*Government Notifications, whether can be taken judicial notice of—Copy of Gazette, evidentiary value of.*

Per Sulaiman, J.—A Government Notification does not come under s. 57 of the Evidence Act, and the Court is not bound to take judicial notice of it. But the production of the Gazette published under the authority of the Government would be sufficient proof of the Notification under s. 78 of that Act. **A COLLECTOR OF CAWNPORE v. JUGAL KISHORE**, A. I. R. 1928 All. 355 578

— **s. 67.** See EVIDENCE ACT, 1872, ss. 3, 67 564

— **s. 74**—*'Public document,' meaning of.*

A document cannot be said to be a public document within the meaning of s. 74 of the Evidence Act unless it is shown to have been prepared by a public servant in the discharge of his official duty. The mere fact that it is kept in a public office does not lead to the inference that it is a public document. **L MAHTAB DIN v. KASAR SINGH**, A. I. R. 1928 Lah. 640 618

— **s. 92**—*Negotiable Instruments Act (XXVI of 1881), s. 46—Suit on pro-note—Plea that pro-note was executed and delivered merely as security, maintainability of.*

In a suit on a promissory note executed by a subscriber to a chit fund to the stakeholder, it is open to the defendant under proviso (3) to s. 92 of the Evidence Act and s. 46 of the Negotiable Instruments Act to prove that the promissory note was executed and delivered only as security for the payment of future instalments to the chit fund. **M PANCHAPAKESA AYYAR v. AYYASWAMI AYYAR** 510

— **s. 92**—*Registration Act (XVI of 1908), ss. 17, 49—Mortgage-deed—Provision for cash payments to be endorsed—Lease by mortgagor to mortgagee—Varthamanam by mortgagee providing for appropriation of lease amount in partial discharge of mortgage—Varthamanam, admissibility of, in evidence, without registration—Variation of terms of mortgage-deed.*

Properties held by a lessee were hypothecated by the lessor to the lessee under a deed which contained the following recital:—"Unless credit entry is made herein in respect of payments of amounts which may be made on account of this bond, a statement (plea) that they have been made otherwise is not sustainable." On the same day the lessee executed a varthamanam by which he undertook to pay out of the rents Rs. 200 to charity and to credit the balance towards the hypothecation bond. In a suit by the mortgagor for accounts:

Held, (1) that since the varthamanam was in writing and did not vary the terms of the bond it was

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not inadmissible in evidence under s. 92, Evidence Act;

(2) that the document only provided for the discharge of the mortgage-debt and did not require registration. **M RAMANATHAN CHETTIAR v. SETHURAM MADIGE RAO**, 27 L. W. 47; I. L. T. 40 Mad. 85; A. I. R. 1928 Mad. 382 808

— **s. 92**—*Transfer of Property Act (IV of 1882), ss. 55, 107—Simple mortgage—Subsequent oral agreement by mortgagor to re-pay mortgage-debt from usufruct of land, admissibility of.*

An oral agreement by the mortgagor, subsequent to the execution of a simple mortgage, providing for payment of the mortgage-debt from the usufruct of the land is only a means of discharging the debt by putting the simple mortgagee in possession and does not amount either to a lease or a usufructuary mortgage, and is consequently admissible in evidence. **M BALAM NOOKAMMA v. SADIREDDI**, 53 M. L. J. 863; A. I. R. 1928 Mad. 233 417

— **s. 92**—*Written document—Surrounding circumstances, admissibility of, to arrive at true meaning.*

Section 92 of the Evidence Act does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances by going behind a written instrument.

Oral evidence is admissible to prove that although a document is executed in favour of two persons one of them is solely entitled to the amount due under the document and is, therefore, competent to give a valid discharge. **N MUNNA SINGH v. NARAIN SINGH** 658

— **s. 92, prov. 6**—*Oral evidence—Construction of document—Evidence as to intention of parties—Admissibility of oral evidence to prove sale to be mortgage.*

Under s. 92 of the Evidence Act extraneous evidence as to the negotiations which led up to a contract is not admissible to vary the true construction of a document. Nor is oral evidence admissible for the purpose of ascertaining the intention of the parties.

Under proviso 6 to s. 92 of the Evidence Act, evidence of circumstances surrounding a document is admissible only for the purpose of throwing light on its meaning and it is not permissible to consider such surrounding circumstances with a view of holding that a document is different in its nature from what it actually purports to be, e. g., for holding that a document, which on the face of it was a sale-deed, was intended to operate as a mortgage. **N KALURAM v. GAJASA**, A. I. R. 1928 Nag. 182 201

— **ss. 114, illus. (b), 133**—*Approver—Conviction based on uncorroborated testimony of approver, legality of—Corroboration required, nature of.*

It is not an inflexible proposition of law that a conviction cannot be based upon the uncorroborated testimony of an accomplice, but it is the usual practice of the Courts to require corroboration of the story of the approver before declaring an accused person to be guilty of a crime. The amount or kind of corroboration required in a particular case must, however, depend upon the peculiar circumstances of that case. **L NARAINA v. EMPEROR**, 29 P. L. R. 209; 9 A. I. Cr. R. 497 97

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—**ss. 145, 157—First Information Report, evidentiary value of.**

The statement of a person recorded by the Police as a First Information Report can be proved only to corroborate that person's evidence in Court under the provisions of s. 157, Evidence Act, or to impeach his credit by cross-examination under s. 145 of the Act. It cannot be used as substantive evidence against the maker who is subsequently charged with the offence. *L. THAKAR SINGH v. EMPEROR*, 29 Cr. L. J. 277; 9 A. I. R. R. 516 761

—**s. 159—Document not produced within proper time, whether available for refreshing memory of witness.**

For purposes of s. 159, Evidence Act, 1872, it is not requisite that the writing used to refresh the memory of a witness should have been admitted in evidence. Accordingly, a document not produced in Court within the proper time and, in consequence, rejected as evidence under the provisions of O. XIII, r. 2, Civil Procedure Code, 1908, may nevertheless be referred to by the party producing it or his witness to refresh his memory if the document is otherwise within the purview of s. 159 of the Evidence Act. "The weight of the evidence, the objection to the document upon the ground that its not having been produced at the proper time renders its authenticity the subject of suspicion, and all other grounds upon which a document can be successfully impeached still remain open, but refusal to permit a man to refresh his memory by proper relevant contemporaneous documents might lead to a grave injustice." *P. C. JEWAN LAL DAGA v. NILMANI CHAUDHURI*, 26 A. L. J. 124; 30 Bom. L. R. 305; (1928) M. W. N. 154; 54 M. L. J. 325; 47 C. L. J. 302; A. I. R. 1928 P. C. 80; 32 C. W. N. 565; 27 L. W. 740; 7 Pat. 305 337

Executing Court, whether can go behind decree. See CHOTA NAGPUR TENANCY ACT, 1908, s. 47 145

Execution of decree—Sale set aside—Application for fresh execution—Limitation—Cause of action.

Once it is declared by a Court that a judgment-debtor had no interest in the properties sold, the cause of action for making a fresh application for execution arises in favour of the decree-holder-purchaser and the mere fact that an appeal has been preferred from the decree would not prevent time from running against the decree-holder.

Obiter.—Where no application has been made by an auction-purchaser, under O. XXI, r. 91, Civil Procedure Code, for setting aside an auction sale on the ground that the judgment-debtor had no saleable interest, he has no further remedy to claim a refund of the amount by a separate suit. *A. SALIG RAM MISIR v. LACHMAN DASS*, 25 A. L. J. 937; A. I. R. 1928 All. 46; 50 A. 211 42

Executor—Acceptance of office—What constitutes acceptance—Effect of acceptance.

It is not open to a person who has been appointed as an executor to refuse the office or renounce it after he has once elected to act as executor.

An executor may determine such election by acts which amount to an administration. The acts which amount to an administration, so that the party cannot afterwards refuse, are (1) anything done by the executor with relation to the effects of the testator

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which shows an intention in him to take upon him the executorship, and (2) whatever acts will make a man not named executor in the Will, liable as executor *de son tort*. *G. JNANENDRA NATH v. JITENDRA NATH*, 32 C. W. N. 108; A. I. R. 1928 Cal. 275 70

Extension of time. See PATNA HIGH COURT RULES, CH. VII, r. 2 537

Family arrangement—Existence of claims believed to be true, whether necessary—'Bona fide dispute,' meaning of.

The only requisite required to make a family arrangement valid is that it should be a transaction between members of the same family which is for the benefit of the family generally, as, for example, one which tends to the preservation of the family property, to the peace or security of the family and the avoiding of family disputes and litigation, or to the saving of the honour of the family.

It is not necessary that the claim by each party to the settlement must be a claim which that party believes to be justified upon facts and law.

The expression 'bona fide dispute' used in this connection means nothing more than that each party must intend to press his claim to the property by litigation or otherwise. *A. SIDH GOPAL v. BHARI LAL*, 25 A. L. J. 978; A. I. R. 1928 All. 65; 50 A. 284 247

Foreign judgments—Judgments in rem, conclusive effect of.

Generally speaking, it would be improper for a British Indian Court to review the judgment of a competent Foreign Tribunal. The broad principle applicable in such cases is that where the subject-matter is a *res* so situated as to be within the lawful control of the State under the authority of which a Court sits, and that authority has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within that jurisdiction, that decision is conclusive, whether, according to the law of another country, it might seem right or wrong. *P. C. CARL FRANZ ADOLF OTTO v. WING ON & Co, LTD.*, 47 C. L. J. 263; A. I. R. 1928 P. C. 83; 30 Bom. L. R. 753 352

Fraud—Party to fraud, competency of, to plead fraud—Civil Procedure Code (Act V of 1908), s. 11, Expl. (iv)—Res judicata—Matter which ought to have been set up as ground of attack, meaning of.

A defendant is not precluded from pleading the joint fraud of himself and the plaintiff and showing the real nature of a transaction though the object of fraud has been accomplished.

It cannot be said of any matter that it ought to have been set up as a ground of attack in a former suit, if its introduction would have been incongruous.

A executed a mortgage to B to defraud his creditor C. B instituted a suit against A and C under O. XXI, r. 63, Civil Procedure Code, in which it was held that B's mortgage was for consideration and valid. B then sued to enforce the mortgage against A. The latter pleaded that the mortgage was fraudulent and not supported by consideration.

Held, (1) that A could set up the plea that the mortgage was fraudulent even though the fraud had been accomplished;

(2) that the decision in the prior suit that the mortgage was valid and supported by consideration did

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not operate as *res judicata*. **L. WAZIR CHAND v. KARAM CHAND** 110

Fund, liability of, to be assessed to income-tax. *See* INCOME TAX ACT, 1922, s. 4 291

General Clauses Act (X of 1897), s. 13 (2). *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 72 442

Ghat—Long user—Presumption—Persons in use, when liable to be ejected.

The existence and regular use of a "ghat" for a very long time is conclusive proof of the fact that it had its origin in an express grant and the persons in regular use must be held to be at least licensees of the land covered by the ghat, and cannot be ejected by the *malguzar*, unless it be for using it for any other purpose than as a ghat. **N. MANSARAM v. LUNGRAJI** 660

Government of India Acts, 1915, (5 & 6 Geo. V, c. 61); 1916 (6 & 7 Geo. V, c. 37); 1919 (9 & 10 Geo. V, c. 101), ss. 20 (2), 29 (5), 32—*Defence of India (Consolidation) Rules, 1915, R. 11A—Contract by Government servant—Liability of Secretary of State—Principles—Verbal contracts, validity of—Commandeering order—Act of State.*

A contract on behalf of the Secretary of State for India must be in writing and must be signed by a person upon the permanent establishment of the Secretary of State who has been specially empowered in this behalf. Verbal contracts and contracts other than those specified in s. 29 (5) of the Government of India Act even, if established, have no effect.

The Secretary of State can be sued as a body corporate as provided in s. 32 (1) of the Government of India Act.

The Secretary of State is liable for damages occasioned by the negligence of servants in the service of Government, if the negligence is such as would render an ordinary employer liable. The test really is whether the contract was a Sovereign act or was one which a private individual could have entered upon in his ordinary business pursuits. If it is the former, the Secretary of State is not liable, but if it is the latter he can be sued in the same way that the East India Company could have been sued for acts done in their capacity as traders and not as the Sovereign power.

A commandeering order is one which no one but Government can make, and being an act of the Sovereign power, the Secretary of State cannot be sued in respect of it. **C. KESSORAM PODDAR & Co. v. SECRETARY OF STATE FOR INDIA**, 54 C. 969; A. I. R. 1928 Cal. 74 360

Guardians and Wards Act (VIII of 1890)—*Proceedings under the Act, nature of—Enquiry into right and fitness of applicants for guardianship, necessity of—Residence of applicant within Court's jurisdiction, necessity of.*

Proceedings under the Guardians and Wards Act are not summary and the Court should give an opportunity to the parties to produce evidence to show which of them is better entitled and qualified to act as guardian of the minor. It is also necessary for the Court to determine which of them is better entitled under the personal law of the minor.

The Guardians and Wards Act contemplates that an applicant for guardianship should reside within the jurisdiction of the Court to which he makes the application. **L. LACHHMI v. NANAK CHAND** 606

s. 7—Court's power to appoint as guardian person who has not applied.

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It is not open to a Court acting *proprio motu* to appoint as guardian of the property of a minor a person who has not applied to be so appointed. **L. SAKINA BEGAM v. RAJA MUHAMMAD WALI ULLAH KHAN**, A. I. R. 1928 Lah. 456 397

ss. 7 (3), 39, 41—Testamentary guardian, removal of.

A Court should not appoint a fresh guardian in place of a testamentary guardian under s. 7 of the Guardians and Wards Act until the powers of the latter have ceased under the provisions of the Act. **B. NATHABHAI DEVIDASS v. VAGHJIBHAI JHAVERBHAI**, 29 Bom. L. R. 1577; A. I. R. 1928 Bom. 20; 52 B. 32 49

s. 25 (1)—Application for custody of minor—Matters to be considered—Welfare of minor.

An order under s. 25 (1) Guardians and Wards Act cannot be made but for the welfare of the minor and in considering what will be for the welfare of the minor regard must be had to the age, sex and religion of the minor and where the minor is old enough to form an intelligent preference that must also be taken into consideration. **L. LACHHMI BAI v. DIWAN CHAND** 759

ss. 34, 45 (1)—Jurisdiction of Court, whether limited to accounts exhibited—Power of Court to call upon guardian to pay balance due on true account.

The power of a Court in dealing with accounts exhibited by a guardian, under s. 34 of the Guardians and Wards Act, is not limited to such balance as the guardian chooses to show therein. The Court has jurisdiction to call upon a guardian to pay into Court such sum as the Court may find to be due after a scrutiny of the accounts exhibited by him and, if he fails to pay the balance due upon a true account, to deal with him under s. 45 of the Act. **PAT MUHAMMAD FARIDUDDIN AHMAD v. AHMAD ABDUL WAHAB**, 7 Pat. 144; A. I. R. 1928 Pat. 255; 9 P. L. T. 383 152

Hindu Law, *See* LIMITATION ACT, 1908, SOH. I, ART. 144 616

Alienation by father—Sham alienation—Father's share, whether passes—Finding that transfer was not bona fide—Remand by Appellate Court for definite finding as to whether transfer was real, legality of—Decree conditional on payment of amounts defrayed by transferee—Appellate Court—Reversal of decree in favour of defendants who have not appealed.

The plaintiff sued to set aside two sale-deeds executed in favour of the third and fourth defendants and a gift deed executed in favour of the fifth defendant and for recovery of possession of the properties covered by the deed. The first sale-deed was executed by the plaintiff's grandfather and the second by the plaintiff's grandfather and the plaintiff's father jointly, and the deed of gift was executed by the plaintiff's father alone. The Subordinate Judge found that the sale-deeds were invalid as against the plaintiff and his share, and that the gift deed was wholly invalid. On appeal by the third and fourth defendants the District Judge held that the sale-deeds were not *bona fide* ones and made a decree that the plaintiff should recover the properties covered by the sale-deeds on payment to the fourth defendant of a certain sum of money which

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was found to have been used for defraying family debts. On second appeal, the High Court remanded the case for a formal decision on the question whether the sale-deeds effected a real alienation. The District Judge submitted a finding that no consideration really passed and that the transactions were not genuine, and the High Court declared that the sale-deeds and the gift deeds were null and void and decreed possession of the properties covered by the deeds. On Letters Patent appeal the Judges accepted the finding that the transactions were purely sham, but made the decree for possession of the properties dependent upon payment by the plaintiff of the amount specified by the District Judge. On appeal by the plaintiff to the Privy Council:

Held, (1) that the decree made in Letters Patent appeal was erroneous in so far as it made the recovery of the properties covered by the gift deed also conditional on payment of the sum specified inasmuch as the fifth defendant had not preferred any appeal from the decision of the Subordinate Judge, and the decree so far as he was concerned had become final;

(2) that the Division Bench of the High Court did not act wrongly in calling for a definite finding on the question whether the sale-deeds effected real transfers;

(3) that the finding of the District Judge that the transfers were sham and that there was no consideration for them must be considered to have eradicated his previous finding that the fourth defendant had discharged certain family debts, and that the decree of the Letters Patent Bench was, consequently, wrong in so far as it made recovery of possession conditional on payment of the amounts specified in the decree of the District Judge;

(4) that in view of the finding of the District Judge that no real transfers were intended or effected between the parties, it was not necessary to consider the question whether the third and fourth defendants were entitled to the share of the transferors. **P C KRISHNA REDDI v. GANDAVARAM RAGHAVA REDDI**, 32 O. W. N. 3; 53 M. L. J. 700; I. L. T. 40 Mad. 1; A. I. R. 1927 P. C. 257 **449**

—Alienation—Mortgage—Father's right to mortgage ancestral estate for antecedent debt—'Antecedent debt,' meaning of.

An alienation by a Hindu father of the undivided family estate for an antecedent debt is binding on the estate.

An antecedent debt means a debt, antecedent in time as well as in fact, that is to say, that the debt must be truly independent and not part of the transaction impeached. **L. ABDUL GHANI v. SANSAR CHAND**, A. I. R. 1928 Lah. 101 **385**

—Construction of deed of trust—Gift to settlor's daughter for life, and after her death to her 'male heirs'—Gift of income, carries the whole estate—Rule in Shelley's case, inapplicable.

The settlor, a Hindu dwelling in Bombay, on the 1st May, 1889, in consideration of the natural love and affection which he bore to his children and grand children, conveyed by deed of that date certain immoveable properties to trustees upon trust to pay the income to the settlor for life; and after his death upon certain trusts expressed in the following words:—"As to one-quarter of the said rents, dividends and profits upon trust to pay the same to my daughter Krishnabai during her life for

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her sole and separate use and after her death in trust for the male heirs of the said Krishnabai share and share alike". On July 14th, 1894, the settlor died, Krishnabai survived the settlor and died in 1897, leaving six sons, all of whom were living at the date of the settlement. The question arose as to the true meaning of the gift in favour of Krishnabai and her male heirs. The heirs of the settlor contended that the limitations in favour of her (Krishnabai's) male heirs after her death were contrary to Hindu Law and void, and that in consequence there was a resulting trust in favour of the settlor:

Held, (overruling this contention) that the gift in favour of Krishnabai's male heirs was a valid gift under the Hindu Law, inasmuch as they did not take by inheritance from her and it was by virtue of a wholly independent gift that they were beneficiaries under the deed.

Held, also, that the gift, though in the form of a gift of income, carried the whole estate.

[Technical meaning given to similar words in the English Law, disregarded, and the rule in *Shelley's case* held to be inapplicable.] **P C MADHAVRAO GANPAT-RAO DESAI v. BALABHAI RAGHUNATH AGASKAR**, A. I. R. 1928 P. C. 33; 30 Bom. L. R. 282; 47 C. L. J. 198; 54 M. L. J. 245; 27 L. W. 400; I. L. T. 40 Bom. 86; 52 B. 176; 26 A. L. J. 560; 32 C. W. N. 925 **119**

—Co-widows—Alienation of husband's estate by one without consent of the other, legality of—Reversioners, whether bound by such alienation.

Under the Hindu Law a co-widow can, for legal necessity, alienate her husband's estate in her possession without the consent of the other co-widow. **A JAI NARAIN SINGH v. MUNNA LAL**, A. I. R. 1928 All. 92; 26 A. L. J. 268 **699**

—Debts of father—Liability of son—Illegal and immoral debts—Burden of proof—Direct connection between debt and immorality, proof of, whether necessary—Open reckless life—Duty of creditors—Want of inquiry, effect of—Constructive notice.

Although in the case of a joint Hindu family the sons are ordinarily liable for their father's debts even if the debts are contracted by the father for his own benefit without any legal necessity so long as the debts are not incurred for an unlawful or immoral purpose, yet where a youngman who has just attained majority and who has inherited valuable property which would yield an income more than sufficient to keep him in comfort having regard to the position of the family and its requirements, leads an openly reckless and immoral life and borrows large sums of moneys, which will not in the ordinary circumstances be necessary for any lawful purpose, and the lenders make no enquiries and are merely satisfied with the fact that there were antecedent debts or with the statement of the borrower that he wants money for family expenses, the lenders cannot as against the minor sons of such borrower get the protection which is usually given to *bona fide* lenders, unless they prove that they made reasonable enquiries.

It is not necessary in such a case that direct connection should be shown between the debt and the purpose for which it was borrowed. Constructive notice or the absence of any enquiry would be sufficient.

It is not the law that in order to absolve themselves from liability, the sons must prove not merely the purpose for which such loans were contracted but also

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that the lenders knew of the immoral purpose of the loan. It would be quite sufficient to prove that the borrower was at that time leading a licentious life beyond his means, indulging in drink, riot, prostitution and debauchery, and that at the same time he was without any business or occupation upon which the money might legitimately have been spent without showing on which particular act of immorality the money was spent. If it is proved clearly that at the time the borrower was notoriously wasting his substance on riotous living and spending large sums beyond his income and above his station in life in this way only, a loan contracted in the midst of such living and spent upon it would be a loan contracted for immoral purposes. *M GURUMOORTHY IYER v. P. S. SUBRAMANIAM* 401

Debts—Mortgage-decree against father—Suit by sons to set aside decree—Sons whether bound to prove illegality of debt—Absence of necessity, effect of—Suit against karta and junior members—Decree, effect of—Presumption as to nature of suit.

Per Walsh, J.—When the karta of a joint Hindu family together with the other members of the joint family is sued, it must be taken that he enjoys the dual capacity which he enjoys in the family, that is to say, he is sued both as the karta representing the family and managing the family, and as a member of it, having an undivided interest.

The proposition laid down by the Judicial Committee in *Brij Narain Rai v. Mangla Prasad Rai* (2) that if the managing co-parcener is the father and the reversioners are the sons, he may, by incurring debts so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt, is applicable to decrees on mortgages as well as simple money-decrees.

Per Iqbal Ahmad, J.—The answer to the question whether a Hindu son is entitled to challenge a decree obtained against his father for sale of the joint family property without asserting and proving that the debt secured by the mortgage was incurred for illegal or immoral purposes must depend upon the question whether or not the father was sued as karta and manager of the joint family. If he was, the answer must be in the negative. If he was not, the answer must be in the affirmative.

The proposition that once the joint ancestral property has passed out of the joint family in execution of a decree for the father's debt his sons cannot recover that property unless they show that the debt in respect of which the decree was obtained was a debt incurred for illegal and immoral purposes has reference only to simple money debts which the father is under a personal obligation to pay and simple money-decrees obtained against the father for recovery of such debts. In the case of a debt incurred on the security of the family property by the father, when the mortgagee has not sued for recovery of the debt within six years of the date of accrual of the cause of action, and has thus allowed his right to a simple money-decree against the father to become time-barred, the personal obligation of the father disappears, and the mortgagee is then only entitled to recover the debt by sale of the mortgaged property, and in such case the sons labour under no pious obligation to discharge that debt for the simple reason that the debt is not due from their father. Consequently, if the mortgagee has obtained a decree for sale of the joint family

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property without impleading the sons or without suing the father in his representative capacity, the sons are entitled to challenge the validity of that decree on the ground that they being no parties to that decree are not bound by the same, and in such a suit, unless the mortgagee succeeds in proving that the debt secured by the mortgage was for legal necessity, the sons will be entitled to avoid the decree.

When the manager of a joint Hindu family is impleaded as a defendant to the suit, the presumption is that he is sued in that capacity. But if, along with the manager, certain other members of the family are joined as defendants to the suit, the presumption must be the other way. *A LAL SINGH v. JAGEAJ SINGH, A. I. R. 1928 All. 86; 26 A. L. J. 229. 693*

Debts—Son separate from father, whether bound to pay debt of father.

A Hindu son is not under a pious obligation to pay his father's debt out of his separated property either in his father's lifetime or after his father's death. *O MATHURA v. SHAMBHOO DAYAL, 5 O. W. N. 80; A. I. R. 1928 Oudh 225 884*

Deed of affiliation—Construction—Practice—Suit to declare adoption void and alienations not binding—Consideration partly used for discharge of binding debts—Equitable relief for refund of binding portion of consideration, whether can be granted.

A person purporting to affiliate a son executed in his favour a document which provided: "further you, becoming a son to me, will be such an owner of all my properties as a son is," and there were no other words of disposition to make a deed of gift or Will. A reversioner sued after the death of the executant for a declaration that the said affiliated son was not entitled to the rights of an adopted son and that alienations made by him were not binding beyond the lifetime of the widow:

Held, (1) that the document, not being a Will or gift, did not operate to transfer any interest in favour of the affiliated son;

(2) that having regard to the frame of the suit and the relief prayed for, no directions could be given to the plaintiff to pay the binding portion of the considerations for the alienations since it was impossible to determine in the suit what the equities were between the parties. *M SURAPPA v. SUNDARAMA, A. I. R. 1928 Mad. 176 141*

Gift by husband to wife—Stridhan—Widow's power to transfer—Viramitrodaya, authority of—Transfer as special gift to be enjoyed from generation to generation—Construction—Full proprietary rights, whether conveyed.

When a husband who is governed by the Mitakshara Law makes a gift in favour of his wife, the property transferred by gift becomes her stridhan and if it is considered as self-acquired property she has ordinarily the power to transfer it and further such stridhan descends to her heirs and not to her husband's heirs.

There are, however, peculiar restrictions, according to legal authority on the Mitakshara Law, to the widow's right to transfer landed property if the gift has been made in a particular fashion.

Where a husband transferred property to his wife as a special gift describing it as the property in

Hindu Law—contd.

his exclusive proprietary right and stating that he transferred all the rights held by him to her, that she was to hold it generation after generation, that neither himself nor his own heirs were ever to make a claim against her and that no one except her was to have any connection with the property:

Held, that the gift must be construed as a transfer of full proprietary rights with full rights of transfer.

The Viramitrodaya is receivable as an exposition of what may have been left doubtful by the Mitakshara and declaratory of the law of the Benares School. **O JAGMOHAN SINGH v. SRI NATH**, 5 O. W. N. 1; A. I. R. 1928 Oudh 203 **866**

Inheritance—Illegitimate sons, right of, to succeed when collaterals exist—Illegitimate daughters, right of, to maintenance.

Under the Hindu Law illegitimate sons are not entitled to a share in the family property, when there are collaterals in the family.

Illegitimate daughters are not entitled to maintenance from their father's family. **M NAGARATHNAMMAL v. CHINNU SAH**, (1927) M. W. N. 750; 53 M. L. J. 861; A. I. R. 1928 Mad. 127 **419**

Joint family—Alienation by father—Absence of legal necessity—Suit by son to set aside alienation—Alienee, whether entitled to refund of consideration.

A Hindu son is entitled to get a decree setting aside an alienation by his father of joint family property, which has not been effected for legal necessity or for the payment of an antecedent debt, without any condition being imposed upon him to refund the consideration paid by the alienee to the father. **L DAYA RAM v. HAROHARAN DAS**, 29 P. L. R. 72; A. I. R. 1928 Lah. 111; 8 Lah. 678 **781**

Alienation by manager—Alienation supported by necessity—Necessity for portion of consideration not specified—Validity of sale—Purchaser, whether bound to refund such surplus.

Where a purchaser of joint family property from the manager of the family has acted in good faith and after due enquiry and the sale itself is justified by legal necessity, it cannot be set aside merely because a certain portion of the consideration was taken in cash by the vendors without specification of the nature of the necessity; nor is the purchaser bound to make re-payment of such surplus to the members of the family challenging the sale. **O NAGESHAR NATH SINGH v. RAM JANKI**, 4 O. W. N. 1112; A. I. R. 1927 Oudh 590 **555**

Alienation by manager—Legal necessity—Actual enquiry by creditor, whether invariably necessary—Belief as to legal necessity, when sufficient—Absence of legal necessity—Money spent for use of family—Loan, whether binding on family.

In order to make an alienation by the manager of a joint Hindu family, binding on the members, it is not necessary in every case to prove actual enquiry by the creditor as to whether there was legal necessity for it; it would be sufficient if it is proved that the creditor had the belief that there was such necessity provided that it was based on information that could reasonably give rise to such belief, whether that information was obtained by direct or indirect enquiries or in any other way. The question of enquiry into the necessity, or of reason to believe in its existence, can only arise when there is no

Hindu Law—contd.

proof of its existence or proof that it did not exist; then the lender is covered by proof, that he believed it to exist even if it did not. But when the lender is familiar with all the circumstances of the family to which the money was lent, the only way in which the family could be made liable in such a case would be by proof that the necessity did exist.

Even in the absence of proof of actual existence of necessity the family would be liable to re-pay the loan, if it is proved that the loan was taken for the family and spent for it, irrespective of the question whether the person borrowing the loan had or had not the authority to borrow it. **N RAMBHAU v. WAMAN RAO**, A. I. R. 1928 Nag. 251 **657**

Joint family—Manager—Mixing up of family funds and self-acquired funds, effect of—Using self-acquired funds for support of family—Accumulations from mixed funds, nature of.

Where two separate funds are mixed, one being joint family property and the other separate property, the mingling makes them both joint family property.

Where the manager of a Hindu family having joint family funds in his hands, spends on the maintenance of his family not only the joint family funds but also a considerable part of his self-acquired property, the reasonable inference is that he means to treat that part of his self-acquired property as joint family property and even the accumulations and the remainder of his earnings which have not been kept distinct and separate become joint family property. **M KRISHNAMACHARIAR v. CHELLAMAL**, A. I. R. 1928 Mad. 561 **641**

Mortgage—Inquiries by alienee, sufficiency of—Release, if amounts to partition.

Where a member of a joint family executes a deed of release, the burden of proving that it was intended to be inoperative is upon the person who sets up such a case.

Where a transaction of release by a member of a joint family amounts to a partition, the minor sons of the person executing the release will be held to have been represented by the father although they were not parties to the deed.

Where a person lends money on mortgage to the manager of a joint Hindu family for discharging debts contracted for purposes of a family business, after making all reasonable inquiries and being honestly satisfied that the money was required, the mortgage is binding on all the members of the family. **M BALASUNDARACHARI v. KANNIAPPACHARI**, 39 M. L. T. 443 A. I. R. 1927 Mad. 1165 **132;**

Partnership between manager and stranger—Power of manager to dissolve partnership—Alienation by manager—Alienation for necessity, but for inadequate price, validity of—Alienation of moveables—Disposal of moveables by vendee, effect of—Equitable compensation, whether can be allowed.

The manager of a joint Hindu family has power to dissolve a partnership which he has entered into with a stranger. He cannot be compelled to continue the partnership merely because he has a minor son, who, along with himself, is interested in it, especially when he considers that he is incapable of giving assistance as a partner.

Per Ashworth, J.—When once it is shown that a sale by a Hindu father and manager is necessary, no

Hindu Law—contd.

Suit will lie against the vendee on the ground of inadequacy of the price in the absence of fraud or collusion on the part of the vendee.

Per *Sulaiman, J.*—The restrictions on the power of a Hindu father to alienate immoveable property are equally applicable to transfers of moveables.

The equitable relief of compensation can be granted to the members of a joint Hindu family in the case of an improper alienation of moveables by the manager even where the goods have been disposed of by the defendant-vendee.

The members of a joint Hindu family are entitled to question an alienation by the manager of the family where the consideration is grossly inadequate, even though necessity for the alienation is proved. *A BANKY LAL v. NATTHA RAM* 576

Joint family—Sale for family necessity—Part of consideration not applied for purposes of necessity—Sale, whether liable to be set aside.

A sale of joint family property will not be set aside merely because a part of the proceeds is not proved to have been applied to purposes of necessity. The real question that has to be considered is whether the sale itself was justified by necessity. If the purchaser has acted honestly if the existence of a family necessity for the sale is made out, and the price is not unreasonably low, he (the purchaser) is not bound to account for the application of the price.

The practice under which, although it be completely established that by far the most substantial part of the consideration was for family necessity, yet if a certain balance of the price remains unaccounted for, or insufficiently proved, then by that result the parties' interests are judged, and the sale is set aside, conditionally upon the re-payment by the vendor or his representatives of the substantial part referred to is erroneous.

Transactions of sale of family property which in their real essence and substance, are sales made for family necessity, will not be narrowly scrutinized, especially when such transactions have stood unchallenged for a considerable length of time and go back beyond the stage at which direct evidence could possibly be expected from the vendees.

Where a sale of family property for the sum of Rs. 4,000 was justified by necessity to the extent of Rs. 3,500 and there was an unaccounted balance of Rs. 500 and the High Court held the sale invalid, subject to the condition of payment to the vendees of the items proved (namely), the said sum of Rs. 3,500:

Held, that the sale could not be set aside. *P C GAURI SHANKAR v. JIWAN SINGH*, 53 M. L. J. 786; 4 O. W. N. 1192; A. I. R. 1927 P. O. 246; 25 A. L. J. 967; 47 C. L. J. 7; 30 Bom. L. R. 64; I. L. T. 40 All. 1; 32 C. W. N. 257; (1928) M. W. N. 1; 27 L. W. 203; 9 P. L. T. 277 4

Marriage with maternal aunt, legality of—Chadar andazi, whether recognised by Hindu Law.

An Arora Hindu cannot under Hindu Law contract a valid marriage with his maternal aunt.

Marriage by *chadar andazi* is not recognised by Hindu Law as a valid marriage. *L SAUDAGAR v. EMPEROR*, 29 Cr. L. J. 210; A. I. R. 1928 Lah. 165; 9 A. I. Cr. R. 413 98

Partition between step-brothers—Mother, whether entitled to share—Effect of partition on prior debts.

In a partition between two step-brothers, the mother of one of them is entitled to a share equal

Hindu Law—contd.

to that of her son, i. e., to one-third of the property liable to be partitioned.

Payments made towards debts reduce the divisible assets by so much and debts due before partition remain jointly due after it. *N HONIA MALI v. OHINDHIA* 528

Partition—Suit for partition—Father's debt—Son's liability—Debts not immoral or illegal—Institution of suit, effect of, on son's liability to pay.

Where, in a partition suit, a Hindu son asks for a declaration that certain debts incurred by his father are not binding upon him, it is for him to show that those debts were incurred for illegal or immoral purposes and he can get relief only if he is able to show that. Otherwise the debts would be binding upon him.

In such a suit, the son cannot escape liability for a debt which is not illegal or immoral by the mere fact that he has filed a suit for partition, and a mortgagee-creditor who is able to obtain a personal decree against the father, after exhausting his remedy against the father's share, would be entitled to proceed against the son's share of the family property to the extent of the balance remaining due after executing the decree against the father's share. *M KANDASAMI GOUNDAN v. MARUDACHALA GOUNDAN*, 39 M. L. T. 562; A. I. R. 1928 Mad. 105 129

Stridhan other than Saudayik—Alienation without husband's consent, validity of.

A Hindu female cannot alienate or devise her *stridhan* other than *Saudayik* during coverture without her husband's consent. *N VITHU v. MAROTI*, A. I. R. 1928 Nag. 92; 10 N. L. J. 266 198

Widow—Adverse possession—Property acquired, whether stridhan.

The interest acquired by a Hindu widow by adverse possession would be her *stridhan* and would not be an accretion to her husband's estate, unless it is shown that she took adverse possession as representing her husband's estate. *PAT SURAJ BALI SINGH v. TILAKDHARI SINGH*, 7 Pat. 163; A. I. R. 1928 Pat. 220; 9 P. L. T. 310 151

Alienation—Necessity—Consent of father, whether binding on son.

Where a Hindu widow, holding the usual 'widow's estate' in her deceased husband's property, executed a mortgage of it, and it was found that the income from the lands at the material time was hardly sufficient to meet the ordinary expenses of the family, that she had no alternative and was compelled to resort to borrowing in order to meet the extraordinary expenses of the marriages of her daughters:

Held, on the evidence, that necessity for the alienation had been established.

Where the managing member of a joint Hindu family acting not only on behalf of himself, but also on behalf of all the members of the family who were alive at that time consented to and acquiesced in a mortgage executed by a Hindu widow:

Held, that his son, who was not then born, was not entitled to contest the validity of the mortgage, inasmuch as at the time when it was executed he had no interest in the family property. *P C BHAGWAN SINGH v. UJAGAR SINGH*, A. I. R. 1928 P. O. 20; 30 Bom. L. R. 267; 47 C. L. J. 189; 54 M. L. J. 254; 29 P. L. R. 182; 32 C. W. N. 538; I. L. T. 40 Lah. 49; 27 L. W. 672; 26 A. L. J. 553 20

Hindu Law—contd.

Widow—Gift by widow—Nearest reversioner joining in execution—Validity of gift.

A deed of gift executed by a Hindu widow with the consent of her husband's nearest reversioner who actually joins in the execution thereof is valid and cannot be challenged by him or his transferees. *O GAYA DEEN SINGH v. MADHO SINGH*, 4 O. W. N. 1101; A. I. R. 1927 Oudh 558 180

Property acquired before marriage and after marriage—Power of disposition of such property—Possession of Hindu widow over property at time of her death—Presumption of absolute estate—Burden of proof.

Property obtained by a Hindu female before marriage and property acquired by her subsequent to her marriage in her own interest, either by purchase from the savings of her income or in other ways, is property which she is competent to dispose of in her lifetime.

There is no presumption of law that property which is in the possession of a Hindu widow and the acquisition of which is not explained, originally belonged to her husband, even though the husband died possessed of considerable property. On the other hand, the presumption under the general rule of law is that she is the owner thereof and has absolute power of disposal over it. *O RAJ BACHAN SINGH v. SOORAJ KUNWAR RAM*, 4 O. W. N. 1179; A. I. R. 1927 Oudh 618 321

Property inherited from husband—Custom conferring absolute power of disposal—Property, whether stridhan for purposes of devolution.

Under the Mitakshara School of Law there is no distinction between the word 'stridhan' and the expression 'property that a woman can deal with at her pleasure.'

Consequently, when a custom is proved as affecting persons otherwise subject to the Mitakshara School of Hindu Law, *e.g.* the Jains, and that custom is said to confer upon the widow a right to deal with property inherited from her husband, at her will, it must be held to mean that the property is her stridhan and will devolve as stridhan. *A HUKUM CHAND v. SITAL PRASAD*, 25 A. L. J. 922; A. I. R. 1928 All. 52; 50 A. 232 244

Right to maintenance—Non-residence with relatives of deceased husband, whether ground for reducing amount of maintenance—Prayer for arrears of maintenance—Court-fee—Court Fees Act (VII of 1870), s. 7, cls. (i), (ii).

Refusal of a Hindu widow to live with her husband's relatives is not a ground for reducing the amount of maintenance payable to her.

Where the plaintiff claims only arrears of maintenance and asks for no relief as to the declaration of her future right to maintenance, she is liable to pay Court-fee on the amount claimed under cl. (i) of s. 7 of the Court Fees Act and not under cl. (ii) of the said section. *O BHATRON DEE v. RAM SEWAK LAL*, 1 Luck. Cas 648; A. I. R. 1927 Oudh 623 552

Right of residence in family house sold in execution of decree for binding debts.

The widow of a co-parcener has no right to reside in the family house, which has been sold in execution of a decree for family debts. *M BALASUNDARA CHARI v. KANNIAPPAOHARI*, 39 M. L. T. 443; A. I. R. 1927 Mad. 1165 132

Surrender—Alienation by widow—

Hindu Law—contd.

Subsequent surrender to next reversioner—Validity of surrender.

A Hindu widow who has parted with her property to the extent of her estate or interest as a widow cannot thereafter make a valid surrender to the next reversioner.

A Hindu widow made a gift of estate inherited by her from her husband to her husband's brother's son. She then made a gift of the same to her daughter, the next reversioner, and again, made an adoption. The adopted son sued the daughter for possession.

Held, that the gift to the daughter was invalid inasmuch as the widow had put it out of her power to make a valid surrender by the earlier gift. *B SAKHARAM BALA NIKAM v. THAMA BALA NIKAM*, 29 Bom. L. R. 1571; 51 B. 1019; A. I. R. 1928 Bom. 26 265

Hindu Wills Act (XXI of 1870), s. 2. See ADMINISTRATOR 747

Idol—Shebait's right to sue.

Although an idol may be regarded as a juridical person capable of holding properties, it is only true in an ideal sense, and the right of management and possession is vested in the shebait.

A suit for declaration of shebaitship, for administration of the debutter estate and for setting aside alienations of the idol's properties is a suit in which the idol is interested even though it is not formally made a party to the suit. *C In re K. O. BANNERJEE*, A. I. R. 1928 Cal. 402 738

Impartible estate—Proof of impartibility—Regard, effect of—Amgaon zemindari (Central Provinces)—Onus of proof of special custom modifying ordinary law of succession—"Raj."

A special custom modifying the ordinary law of succession must be ancient and invariable and must be established to be so by clear and unambiguous evidence.

Where there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance according to which custom the estate is to be held by a single member and, as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom.

If an impartible estate existed as such from before the advent of British rule, any settlement or re-grant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession by special custom.

The word 'raj' by itself does not necessarily imply impartibility.

Unless considerable age can be ascribed to any particular zemindari, of whichever class it may be, it cannot claim to be governed by either ancient or invariable custom.

Neither by the terms of the grant, nor by territorial or family custom, any more than by its inherent nature, can the zemindari of Amgaon (in the Central Provinces) be considered an impartible estate subject to the rule of single succession.

Impartible estate—consolid.

[History of the *semindari* tenure in the Central Provinces discussed.] **P O MARTAND RAO v. MALHAR RAO**, A. I. R. 1928 P. O. 10; 47 C. L. J. 150; 30 Bom. L. R. 251; 27 L. W. 350; 54 M. L. J. 397; 32 C. W. N. 621; 24 N. L. R. 25; 11 N. L. J. 26; 55 C. 403 **7**

Inam—Service inam—Resumption by Government on ground of land having been dissociated from office in fact, legality of.

Where the Government resume a service inam, the motive of the Government in making the resumption and their conduct after the resumption do not affect the legality or illegality of their action.

Where a land which had been granted in inam by the Government for proper service in a temple is found to have been for a long time entirely dissociated from the office for the support of which it had been granted and no part of the income of the land was going towards the remuneration of the office-holder, which had to be provided otherwise by the temple trustee and the service did not continue to be performed according to the conditions of the grant within the meaning of rule III (1) of the Inam Rules:

Held, that it was open to the Government to resume the inam and that such resumption was not illegal. **M VELLU PILLAI v. SECRETARY OF STATE FOR INDIA**, A. I. R. 1928 Mad. 552 **785**

Income Tax Act (VII of 1918), s. 4—Income from villages in Nizam's Territory brought into Berar, whether taxable.

Income derived from rents realized from tenants of revenue-free villages situated in Nizam's Territory and brought into Berar is taxable under the Income Tax Act. **N COMMISSIONER OF INCOME TAX v. MOHOMAD NURULLA KHAN**, A. I. R. 1928 Nag. 146 **661**

Income Tax Act (XI of 1922), ss. 2 (1) (a), 4—Usufructuary mortgage and lease back—Rent, whether liable to taxation—'Agricultural income', meaning of.

Where a person carrying on money-lending business lends money in the course of such business on the security of lands of which he takes a usufructuary mortgage, and immediately leases those lands back to the mortgagor with a stipulation for fixed annual payments, which amount to a definite percentage on the sum advanced, the annual payments should be excluded from the assessment of the profits and gains of his business as being 'agricultural income' within the meaning of s. 2 (1) (a) of the Income Tax Act, 1922. **A In the matter of MUKUND SARUP**, A. I. R. 1928 All. 81; 26 A. L. J. 280 **683**

s. 4—"Mutual Benefit Society," what is—Object of fund not inconsistent with making profit—Fund, liability of, to be assessed to income-tax.

The question whether a Fund is a society constituted essentially for the mutual benefit of its members, the income of which is not liable to be assessed to income-tax, or whether it is an ordinary money-lending Bank engaging in money with a view to earning profit for distribution among its shareholders is one of fact to be decided on the circumstances of each case.

The object of the Trichinopoly Hindu Permanent Fund as set out in its Memorandum of Association was "to enable persons to save money" and "to secure loans at favourable rates of interest." The capital, paid up or subscribed, was made up of shares limited in number and in value, and the share-

Income Tax Act—1922—consolid.

holders and subscribers constituted the controlling authority while membership was restricted to such share-holders or subscribers. Outside these members was a class called monthly depositors who were by a bye-law practically on the same footing as subscribers but were not subject to the losses and liabilities of the Fund. Loans were granted to any one and were of two kinds, 'term loans' restricted to subscribers and monthly depositors and 'temporary loans' to any constituent. There was no special concession whatever which was confined to share-holders and subscribers. They were exactly on the same footing as outsiders, for example, monthly depositors. Profits were distributed in the way of dividends in the ordinary business fashion and were expressed to be "out of the net profit arising from the business of the Fund".

Held, that the Fund was not one which did not aim at making profit by lending money on interest, that in the constitution and object there was no purpose of mutual benefit, and that the Fund was, therefore, liable to be assessed to income-tax as a Company. **M COMMISSIONER OF INCOME TAX, MADRAS v. TRICHINOPOLY TENNORE HINDU PERMANENT FUND**, A. I. R. 1927 Mad. 1078; 53 M. L. J. 881 **291**

Inherent power of Courts to extend time, See **PROVINCIAL INSOLVENCY ACT, 1920, s. 27 (2)** **830**

Injunction. See C. P. O., 1908, s. 151 **753**

Insolvency. See C. P. O., 1908, O. IX, r. 2 **842**

Instalment decree—Acceptance by decree-holder of overdue instalment—Waiver of default clause.

It is open to a decree-holder to expressly state when accepting an overdue instalment that he does so without prejudice to his rights which have already accrued owing to the default or to show by his conduct at the time of accepting the instalment that he does not waive his right under the default clause. In the absence of such indications to the contrary tender by the debtor and acceptance by the creditor of an overdue instalment must be deemed to amount to a waiver and condonation of the default. **L GOPAL MAL v. GOPAL SINGH-HARI SINGH**, A. I. R. 1928 Lah 378 **392**

Interest—Damdupat, rule of, whether applicable to possessory mortgages.

The rule of *damdupat* is applicable to all mortgages whether the mortgagee is in possession or not, although in some cases where the mortgagee is in possession it does not apply, in the sense of being of any effect, because the payments made every year from the income of the property keep the amount of the interest below the amount of the capital. In each case it is merely a matter of calculation. **N SAKHU v. KASHIBA**, A. I. R. 1928 Nag. 126 **199**

High rate of interest—Interference by Court—Compound interest, whether allowable in the absence of express agreement.

Although the agreed rate of interest be high, it will not be disallowed by the Court unless there is evidence to show that in the circumstances the agreement as to interest is so unconscionable that effect ought not to be given to it.

"Rate of interest must vary with the risk run" and in considering the question of risk the Court should take into account, *inter alia*, the financial condition of the debtor and the rate of interest he has hitherto been paying:

Interest—concl'd.

Held, under the circumstances, that interest at 21 per cent. per annum on a mortgage security was not excessive.

Compound interest, unless agreed to, cannot be allowed. *P C JEWAN LAL DAGA v. NILMANI CHAUDHURI*, 26 A. L. J. 124; 30 Bom. L. R. 305; (1928) M. W. N. 154; 54 M. L. J. 325; 47 C. L. J. 302; A. I. R. 1928 P. C. 80; 32 C. W. N. 565; 27 L. W. 740; 7 Pat. 305 337

Rule of damdupat, meaning of.

Under the rule of *damdupat* interest ceases to run altogether when it equals the principal. The rule does not mean that the amount of interest that may be recovered at any one time shall not exceed the principal and that the excess that may remain may still be recovered, though not at that time. *N GOVIND V. MALKARJUNAPPA*, A. I. R. 1928 Nag. 133 205

Unconscionable rate of interest—No undue influence—Power of Court to interfere—Compound interest at same rate as principal, whether penal.

The mere fact that a rate of interest is harsh or unconscionable is not a sufficient ground for not enforcing the contract between the parties.

The rule of law is now firmly established that in the absence of proof of undue influence, a provision for charging compound interest at the same rate as simple interest on the failure of the mortgagor to pay the principal or interest on the due date is perfectly legal and cannot be relieved against on the mere ground of hardship. *L TIRKHA RAM-CHUNI LAL v. HAIDAR*, 10 Lah. L. J. 48; 1 L. T. 40 Lah. 68 617

Interpretation of Statutes—Retrospective operation—Land Acquisition Act (I of 1894)—Interest on compensation awarded.

Generally speaking, a Statute conferring or dealing with substantive rights has no retrospective operation. Accordingly, s. 17 of the Sydney Corporation Act, 1924 (corresponding, in India, to the Land Acquisition Act, 1894), declaring that "the rate of interest payable upon compensation for land acquired by the Council by resumption—or by any compulsory purchase, shall be six per centum. per annum" cannot be construed retrospectively so as to affect the rate at which interest was payable before the Act came into operation. *P C MUNICIPAL COUNCIL, SYDNEY v. MARGARET ALEXANDRA TROY*, 47 C. L. J. 284; A. I. R. 1928 P. C. 128 455

Jamabandi—Entry as tenant, meaning of.

The fact that a person is entered as a tenant in the *jamabandi* merely shows that he is not the owner and that he is in cultivating possession thereof. It does not necessarily show that he is in possession with the permission of the owner. *L NUR KHAN v. FAQIR ABDULLAH* 779

Joshipana Income, suit for, whether maintainable in C. P.—Right to hereditary *Joshipana*, whether question of fact—Civil Procedure Code (Act V of 1908), s. 100.

A suit for *Joshipana income* is maintainable in Central Provinces proper.

The question whether a particular person is a hereditary *Joshi* of a village, entitled to do the duties of the village *Joshi*, and to exclude anybody else from doing so, is a question of fact and not of law. *N NATHU BOWA v. PANDURANG*, A. I. R. 1928 Nag. 150 911

Jurisdiction—Suit between rival tenants for declaration of title to occupancy lands—Cognisance by Civil Court.

Jurisdiction—concl'd.

A suit by a tenant of occupancy lands for declaration of his occupancy right against a rival tenant claiming such right in the lands is cognisable by the Civil Court. *O SAHEB DIN v. MAHABIR SINGH*, 1 Luck. Cas. 677; A. I. R. 1928 Oudh 95 326

Suit on hundi—Endorsement, whether part of cause of action—Cause of action, meaning of—Suit on hundi or in the alternative for compensation, maintainability of—Civil Procedure Code (Act V of 1908), s. 20, O. XXXVII—Negotiable Instruments Act (XXVI of 1881), ss. 32, 117 (c).

A suit based on a *hundi* can be instituted in a Court within whose jurisdiction there was an endorsement of the *hundi* and payment of the amount thereof to the endorsee after dishonour.

A suit claiming in the alternative on the contract contained in a negotiable instrument or for compensation under ss. 32 and 117 (c) of the Negotiable Instruments Act can be maintained, and such a suit can be instituted under the summary procedure provided by O. XXXVII of the Code of Civil Procedure.

"Cause of action" includes all the facts, which the plaintiff has to prove to sustain his action, in fact everything which, if not proved, will give the defendant the right to judgment. *S NARAIN DAS & Co. v. CHANDIRAM & Co.*, A. I. R. 1928 Sind 86 218

Jury trial—Statement of approver—Charge to Jury—Duty of Judge—Legality of conviction.

A conviction based upon the uncorroborated evidence of an approver would ordinarily not be sustainable unless the Judge had explained carefully to the Jury that they were taking a grave risk in convicting upon uncorroborated evidence. But a conviction cannot be upset on this ground where the evidence of the approver is corroborated and the Judge explains to the Jury in his charge the nature of the corroboration and directs the Jury to arrive at their verdict after considering the evidence of the approver and the evidence of the corroboration together. *O MANI RAM v. EMPEROR*, 5 O. W. N. 33; A. I. R. 1928 Oudh 207; 29 Cr. L. J. 311 876

Khojas, law applicable to.

The principles of Hindu Law relating to joint family are not applicable to *Khojas*; it applies only with regard to questions of succession and inheritance. *S MAHOMED KASSIM v. NATHO BHANO* 211

Land acquisition—Acquisition of land belonging to idol—Suit by shebais for administration of estate—Appointment of Receiver—Power of Receiver to get compensation money deposited with President of Improvement Tribunal—Compensation money, whether vests in acquisition Court.

The compensation money representing the estate of an incompetent person partakes of the nature of real property and does not lose its character as such because it has been transformed in shape.

Section 32 of the Land Acquisition Act does not vest the acquisition Court with such power over the acquisition money as to empower it to retain the money in its possession in spite of the direction of a competent Civil Court. *C. In re K. O. BONNERJEE*, A. I. R. 1928 Cal. 402 738

Land Acquisition Act (I of 1894)—Interest on compensation. See INTERPRETATION OF STATUTES 455

Rival claims to compensation—Burden of proof of title—Presumption in favour of person in possession.

Land Acquisition Act—contd.

Where land is compulsorily acquired by the Government for public purposes, and rival claims are made in respect of the compensation awarded for such land, the *prima facie* title to the money is with the party who was in sole and exclusive possession of the land at the time of its acquisition by the Government, and the onus is on the party claiming that he has a better or superior title to such money to prove such title. *P C MANOHE ANEGE AKUE v. MANOHO KOJO ABABIO IV*, 47 C. L. J. 337; A. I. R. 1927 P. O. 262; 30 Bom. L. R. 755 347

— ss. 18, 21—"Person interested", meaning of—Application for reference by party in pending suit with respect to title to property—Right of party held entitled in appeal, to continue land acquisition proceedings—Agricultural land fit for building purposes, valuation of—Valuation of land—General principles—Prospective user and potentialities, whether to be considered.

Where during the pendency of a suit or appeal a person who has a decree in his favour and who is *prima facie* entitled to the property institutes or defends proceedings in respect of the property, the proceedings can be continued by the person who ultimately succeeds in the litigation. Any order passed in respect of the property would enure for the benefit of the successful litigant and he is the person who on the reversal of the judgment of the lower Court would be entitled to continue the proceedings.

In a litigation between two persons as to title to a property one of them was held entitled to it, and during the pendency of an appeal therefrom, the successful party applied in land acquisition proceedings with regard to the property, for reference to the Court under s. 18 of the Land Acquisition Act. In appeal the property was held to belong to the other party:

Held, that such other party was entitled to avail himself of the reference made at the instance of his opponent who was the person interested at the time in making the application for reference within the meaning of s. 18 (1), Land Acquisition Act.

The proper way to value lands is to ascertain what would be their market value if put to the most lucrative use having regard to their condition. In assessing compensation not only is the present purpose to which the land is applied to be taken into consideration, but any other more beneficial purpose to which in the course of events the land might within a reasonable period be applied should also be considered. The special adaptability of lands for building purposes is an element to be considered in fixing the compensation even though the lands are used for agricultural purposes at the time of acquisition. *M VENKATA KRISHNAYYA GARU v. SECRETARY OF STATE FOR INDIA*, 39 M. L. T. 551; A. I. R. 1928 Mad. 59; 27 L. W. 253 503

— s. 23, sub-s. 1 (1) as amended by U. P. Town Improvement Act (VIII of 1919), Sch. I, para. 10 (3), interpretation of—Calculation of market value—Use to which land is put on date of notice, whether sole criterion—Land not used, value of.

The correct interpretation of s. 23, sub-s. (1) clause first of the Land Acquisition Act as amended by para. 10, cl. (3) of the Schedule to the U. P. Town Improvement Act, 1919 (U. P. Act VIII of 1919) is

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that the market value of the land to be acquired is to be calculated exclusively in accordance with the use to which the land is being put on the date on which notice issues under s. 29 or s. 36 of the U. P. Town Improvement Act; and where on such date the land to be acquired is not being put to any use its market value may be nil. *A SECRETARY OF STATE FOR INDIA v. MAKHAN DAS*, 26 A. L. J. 69; I. L. T. 40 All. 58; A. I. R. 1928 All. 147 587

Landlord and tenant—Assignment by landlord—Possession, whether transferred ipso facto as against tenant.

A mere assignment or transfer is not sufficient to put the assignee or transferee in possession as against persons claiming to hold under the assignor or transferor. *C NIBARAN CHANDRA SIKDAR v. ABDUL HARIM*, A. I. R. 1928 Cal. 418 751

— Covenant to repair—New building, whether covered by covenant—General covenant and covenant to repair demised premises only, distinction between.

A general covenant to repair in a lease deed includes not only buildings in existence when the demise is made but all those which may be erected during the term. A covenant to repair the demised premises applies only to those existing at the date of the demise unless the new buildings are made a part of the old ones.

An indenture of lease provided that the lessee shall "at all times during the said term of years keep the said premises in good and substantial repair and the same in good and substantial repair deliver up to the lessor, his heirs or assigns at the expiration or sooner determination of the said term." There was also a subsequent clause which ran as follows: "And it is hereby agreed and declared by and between the parties hereto notwithstanding anything heretofore contained that the said lessee shall be at liberty to make all necessary additions and alterations to the demised premises to improve the buildings with the written consent of the lessor at his own costs during the continuance of the said term and all such changes, additions, fittings and fixtures so made shall become and be considered the property of the said lessor and the lessee shall have no right to remove the same either before or after the expiration of this lease." The lessee erected certain new buildings which formed additions to and became part of the buildings originally demised:

Held, (1) that the covenant to repair was a general one and applied to the new buildings;

(2) that even if it was a covenant to repair the demised premises alone it applied to the new buildings as they were so erected as to become a part of the old buildings. *C EZRA MEYER AARON COHEN v. DEBENDRA LALL KHAN*, 32 C. W. N. 154; 46 C. L. J. 607; A. I. R. 1928 Cal. 89 86

— Encroachment by tenant—Landlord's right to encroachment—Presumption.

Where during the continuance of the tenancy, a tenant encroaches upon land belonging to a third person, his possession of the land so encroached upon is *prima facie* for the benefit of the landlord unless it appears by some evidence that the tenant, at the time the encroachment was made, intended it for his own exclusive benefit. The presumption in such cases is that encroachments made by the tenant are a part of the holding, and on the termination of the tenancy the tenant must render them up to the

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landlord whether he has directly undertaken to do so or not. *L. NANAK CHAND v. GAMAN*, A. I. R. 1928 Lah. 351

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—Kabuliyat—Nature of tenancy—Construction of deed.

The material portion of a *kabuliyat* relating to a tank with its banks and a plot of land adjoining thereto ran as follows: "I shall graze cattle on the banks after fencing them all round, I shall rear new fish and catch them and shall not make any objection to your catching the old fish. I shall enjoy the fruits of the fruit-bearing trees now existing on the banks." The *kabuliyat* was further headed as a 'Kabuliyat for nine years' and the executant was described as cultivator for nine years:

Held, that the tenancy created was an agricultural tenancy. *C. MAKHUL ALI v. SASI KUMAR MALLA*, A. I. R. 1928 Cal. 305

468

—Lease for cultivating purposes—Trespass by third person—Removal of earth—Suit by lessee for damages—Measure of damages.

In a suit for damages by a lessee of a piece of land for cultivating and grazing purposes against a trespasser who has encroached upon a portion of the land and removed a quantity of earth therefrom, the lessee is entitled to claim as damages only the loss which he has incurred by reason of the deprivation of the use of the portion of the land encroached upon. He is not entitled to recover damages on the basis of the value of the earth removed.

'Damages vary considerably according to a party's interest in the land'. *R. BURMA RAILWAYS CO. v. MAUNG HLA TIN*, 5 R. 813; A. I. R. 1928 Rang. 85

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—Lease for fixed term—Provision for payment of enhanced rent if tenant remains in possession after expiry of term, whether penal.

A provision in a *kabuliyat* for a specified term that if the tenant should remain in possession of the land after the expiry of the term without taking a fresh *patta*, he should pay an enhanced rate of rent is not penal.

Such a clause is not introduced to compel the performance of any act stipulated for but merely gives an option to the lessee which he may accept or reject as he chooses. *PAT KUMAR DASS v. TILAKDHARI SINGH*, 9 P. L. T. 184; I. L. T. 40 Pat. 94

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—Lease by thekadar—Lessee's right to possession as against landlord.

A tenant who has come into possession of land under a *thekadar* without having any reason to believe that the *thekadar* was acting contrary to law in leasing the properties to him is entitled to hold the land as against the landlord until he is ejected according to law. *O. GUR SARAN v. JAGANNATH*, 5 O. W. N. 42; A. I. R. 1928 Oudh 240; 12 R. D. 46

896

—Loss of proprietary or under-proprietary right—Presumption of acquisition of occupancy right.

There is no presumption that a person in occupation of land who has lost his proprietary or under-proprietary right is a mere trespasser. The presumption is just the other way and the very fact that he has lost his proprietary or under-proprietary right, of itself, would lead to an inference that he has acquired occupancy rights. *O. JANWANTI KUER v. RAM TIRATH*, A. I. R. 1928 Oudh 302

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—Mortgage of house by tenant in town—Zemin-

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dar's right of re-entry—Presumption of tenant to sell house site.

Unless a custom to the contrary is established, occupiers of houses in town should be considered to have a power to transfer the right to occupy the land on which their houses stand along with a sale of the materials thereof. The presumption applicable to an agricultural village does not obtain in towns.

Where a house has been transferred by the tenant by way of mortgage and not by way of sale, the proprietor is not entitled to re-enter unless there is express provision in the *wajib-ul-arz*, or any satisfactory evidence as to the existence of a custom, giving the proprietor a right of forfeiture or re-entry in case of a breach of the rule against alienation by way of mortgage. *O. MOHAMMAD ALI KHAN v. BADRUNNISA*, 4 O. W. N. 1106; A. I. R. 1928 Oudh 92

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—Permanent, heritable and transferable tenure—Rent, whether enhancible—Presumption of fixity of rent.

There is no presumption that because a tenure is permanent, heritable and transferable, its rent is fixed. On the other hand, unless there is something to indicate that the landlord has abandoned his right to enhancement, such right must be taken to exist even in the case of a permanent, heritable and transferable tenure. *C. UPENDRA LAL GUPTA v. JAGESH CHANDRA ROY*, 47 C. L. J. 112; A. I. R. 1928 Cal. 186

730

—Permanent tenancy—Inference from proved facts—Question of law—Burden of proof of permanency—Mere unaltered rent and transfer of holding, effect of—Permanent structures—Amalgamation of permanent and precarious holdings—Consequences—Admission of permanency by gomashita in rent receipt, whether binding on landlord—Gomashita's powers.

The question whether a tenancy is permanent or precarious is a question of legal inference from proved facts and, consequently, a question of law.

When a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant.

An entry with regard to the nature of the tenancy in a rent receipt is superfluous and unnecessary in the case of tenancies governed by the Transfer of Property Act and the admission of the nature of tenancy by a *gomashita* in such rent receipt is gratuitous and not binding on the landlord.

There is no inflexible rule of law that a landlord is bound by every statement made by his *gomashita* in a rent receipt.

Ordinarily the *gomashita* is authorised to receive rents, to give a discharge to tenants for such rents and in some cases even to recognise the transferee of an occupancy holding, but it certainly is not usual for a *gomashita* to confer any permanent right on tenants or to make any admission in respect of tenants' rights which may be binding on the landlord.

Mere unaltered rents for a number of years and a single instance of transfer of the holding are not sufficient to raise the inference of permanency.

The fact that holdings which were not permanent were amalgamated with a holding on which at one time a *pucca* structure stood cannot give these holdings the character of permanency.

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of amalgamation of four holdings not change the respective incidents in the absence of a contract to the effect that it was intended to change those incidents and give a higher status to the tenant of the amalgamated holding.

A document in which a right is asserted is admissible under s. 13 of the Evidence Act even though it is not *inter partes*. **C MONMATHA NATH MITRA v. RAJESWAR RAI**, 32 C. W. N. 184; 55 C. 355; A. I. R. 1928 Cal. 315 **81**

Suit for bhaoli rent—Plaintiff's evidence unreliable—Court, whether bound to act on defendant's admission—Duty of Court to arrive at an estimate on available materials.

In a suit for bhaoli rent an estimate as to the amount of rent payable has to be arrived at from the materials at the disposal of the Court, and the Court is not bound, therefore, to rely upon the admission of the defendant alone even though it has discarded the evidence of the plaintiff in its entirety. **PAT RAMESHWAR KURR v. LACHMAN PRASAD SAHI** **844**

Zarpeshgi lease—Instalment bond for lease money—Bond, whether mere security or extinguishes liability under lease—Tests—Intention.

Where a lease is executed and simultaneously, or as part of the same transaction, the lessee purports to pay in advance the lease money by executing a bond making himself liable to pay the lease money in certain instalments, the question, whether the bond is executed as a mere security for the due payment of the lease money or whether it entirely puts an end to the liability of the lessee under the lease, depends on the intention of the parties as indicated by the documents and by the surrounding circumstances. **A NAJAF ALI KHAN v. MUHAMMAD FAZAL HLI KHAN**, A. I. R. 1928 All. 255 **249**

Letters Patent (Mad.), cl. 15—Civil Procedure Code (Act V of 1908), s. 115—Interlocutory orders in revision petitions, appealability of.

Orders passed on applications in civil revision petitions are dealt with by the High Court in the exercise of revisional jurisdiction and are, therefore, not appealable under cl. 15 of the Letters Patent of the Madras High Court. **M SATAKA MUHAMMAD v. HAYATH BATCHA SAHIB**, 27 L. W. 18; (1928) M. W. N. 30; A. I. R. 1928 Mad. 169; 54 M. L. J. 323; 51 M. 165 **813**

cl. 15—Order refusing transfer of suit from one subordinate Court to another, whether judgment—Appeal.

An order of a Single Judge of the High Court, refusing to transfer a suit from the file of the City Civil Court to a District Munsif's Court is not a judgment and is not appealable. **M NARASA REDDI v. TAR MAHOMED AYUB SAIT**, 27 L. W. 164; A. I. R. 1928 Mad. 209; 51 M. 330; 54 M. L. J. 710 **806**

cl. 15—Order of Single Judge, Original Side, referring back report of Official Referee for further consideration, whether judgment—Appeal, maintainability of.

An order of a Single Judge on the Original Side of the High Court referring back a report of the Official Referee in a pending suit for further consideration is not a judgment within the meaning of cl. 15 of the Letters Patent and is, therefore, not appealable. **M MANECKJI RUSTOMJI v. H. H. WADIA**, 54 M. L. J. 136; 27 L. W. 172; (1928) M. W. N. 45; 51 M. 335; A. I. R. 1928 Mad. 470 **639**

License. See CUSTOMARY RIGHT **522**

Limitation. See TRANSFER OF PROPERTY ACT, 1882, s. 55 **412**

Execution application with relief different from earlier, whether can be continuation of previous application.

An application for execution of a decree cannot be said to be a continuation of an earlier application where the later application is for reliefs entirely different from those of the earlier one. **M BORORO CHARCHI v. ODHKARI BASUDEBE DAS**, I. L. T. 40 Mad. 11; (1928) M. W. N. 83; A. I. R. 1928 Mad. 152 **653**

Limitation Act (XIV of 1859), s. 1, cl. 15—Limitation Act (IX of 1871), s. 29—Limitation Acts (XV of 1877 and IX of 1908), s. 19—Acknowledgment by manager of joint family, validity of—Right to sue for redemption barred under Act of 1859—Revival by later Acts.

The plaintiff's great-grandfather mortgaged to the defendant's predecessor-in-interest certain property in 1807. In 1860, the mortgagee's son who was the manager of the joint family at that time acknowledged this mortgage in a sub-mortgage executed by him. The plaintiff sued for redemption in 1920:

Held, (1) that the acknowledgment of 1860 was not a valid one inasmuch as the manager of a joint family could not bind the family by an acknowledgment under the Limitation Act of 1859;

(2) that the suit for redemption became barred in 1868 and the mortgagor's rights were extinguished under the provisions of s. 29 of the Limitation Act of 1871;

(3) that the rights were not in any way revived by the Limitation Acts of 1877 and 1908 and that the plaintiff's suit for redemption could not be maintained. **B NARAYAN BALAJI BANDIVDEKAR v. GOVIND SAKHARAM NIMKAR**, 29 Bom. L. R. 1563; A. I. R. 1928 Bom. 28 **60**

Limitation Act (IX of 1871), s. 29. See LIMITATION ACT, 1859, s. 1, cl. 15 **60**

Limitation Act (XV of 1877), s. 19. See LIMITATION ACT, 1859, s. 1, cl. 15 **60**

Limitation Act (IX of 1908), s. 5. See C. P. C., 1908, s. 151 **193**

s. 10, Sch. I, Art. 98—Trust for specific purpose—Limitation—Art. 98, applicability of.

A Hindu widow handed over a certain sum of money to her brother in 1904 for the benefit and education of her sons. The brother misappropriated a portion of it. He died in 1918 and the widow sued his representatives in 1924 for an account and refund of the portion of the amount not spent for the children. The latter contended that the suit was barred by limitation:

Held, that s. 10 of the Limitation Act was applicable as there was an express trust for a specific purpose and that the suit was not time-barred.

Article 98 of Sch. I of the Limitation Act applies only to breaches of trust not covered by s. 10 of the Act. **B CHINTAMAN RAOJI NAIK v. KHANDERAO PANDURANG THAKUR**, 30 Bom. L. R. 45; A. I. R. 1928 Bom. 58; I. L. T. 40 Bom. 77; 52 B. 184 **705**

s. 19. See LIMITATION ACT, 1859, s. 1, cl. 15 **60**

s. 19, Sch. I, Arts. 85, 115—'Mutual, that and current account', meaning of—Acknowledgment of liability, essentials of—Letter expressing willingness to pay if anything is found—Settlement of accounts, whether saves limitation—A mutual, open and current account between parties is such as consists in reciprocity of dealing between them and not merely of items on one side, though made up of debits and credits. In such an

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account each party should be able to say that he has an account against the other.

Although a shifting balance is a test of mutuality its absence is not a conclusive proof against mutuality.

A statement contained in a letter that, if upon a comparison of accounts any amount is found due by the writer of the letter, he is prepared to pay it is a sufficient acknowledgment of liability under s. 19 of the Limitation Act. *PAT JOHARMAL MATHURADAS v. HIRA LAL SHEWCHAND ROY*, 7 Pat. 238; A. I. R. 1929 Pat. 221; I. L. T. 40 Pat. 90 533

— s. 20—Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Application for execution—Limitation—Payment of decree debt—Time, whether runs from date of payment or date of certification—Contemporaneous certification, effect of.

In applying the provisions of s. 20 of the Limitation Act to an application for execution of a decree, the Executing Court must compute limitation not from the date of payment but from the date of certification of the payment under O. XXI, r. 2 of the Civil Procedure Code.

This certificate under O. XXI, r. 2 (3) of the Code in such a case has always to precede the application for execution and cannot follow it. *A. PEARE MOHAN PRASAD v. RAGHUNATH LAL*, 25 A. L. J. 933; A. I. R. 1938 All. 53; 50 A. 259 40

— s. 21 (2)—Acknowledgment by co-obligors—Successive endorsements by each co-obligor on different occasions, sufficiency of—Ratification of prior endorsements by conduct.

Where nothing more appears than that one of several co-obligors has made a payment, or an acknowledgment of liability, such payment or acknowledgment will not save limitation against the other obligors of the debt. It has to be shown that he made such payment or acknowledgment not only on behalf of himself but also as the duly authorised agent of his co-obligors. Such authority, however, need not be express; it may be inferred from the conduct of several co-obligors.

Where each one or several obligors of a bond, one after another, made a series of endorsements of payment on the bond on different dates:

Held, that the conduct of the parties was sufficient to warrant the conclusion that each had the implied authority to bind the other by his endorsement. *M. RANGASAMI ARYANGAR v. SOMASUNDARAM CHETTIAR*, 54 M. L. J. 150; A. I. R. 1928 Mad. 173; 27 L. W. 820 646

— s. 28, applicability of, to tenancy rights in Central Provinces—C. P. Tenancy Act (I of 1920), s. 104 (4).

Section 28 of the Limitation Act is not inapplicable to the right in a tenancy in the Central Provinces. *N. DHARMU v. DALSINGH*; A. I. R. 1927 Nag. 352 522

— Sch. I, Art. 10—Land which is not capable of physical possession, meaning of—Land in possession of trespasser—Sale—Suit for pre-emption—Limitation.

The words "does not admit of physical possession" Art. 10 of Sch. I of the Limitation Act do not merely refer to the inability of the vendor in fact to transfer possession to the purchaser but refer to inability both in fact and in law.

Where a vendor is in personal and immediate possession of the property sold or where the right of such possession thereof is in the vendor at the

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date of the registration of the sale-deed, the property is one admitting of physical possession.

Land in possession of a trespasser at the date of the registration of a sale-deed is not land which is not capable of physical possession within the meaning of Art. 10 of Sch. I of the Limitation Act. *N. MOHANLAL v. SATYABHAMA*, 23 N. L. R. 178; A. I. R. 1928 Nag. 89 194

— Sch. I, Arts. 30, 31, 36—Carrier conveying goods without passenger's permission—Loss of goods—Suit for price—Limitation.

For the presumption of an implied contract to carry goods, delivery of the goods to the carrier so as to enable the carrier to acquire lawful possession of the goods for the purpose of carriage, is an indispensable essential.

The plaintiff put certain goods on the defendant's ferry boat for conveyance and himself got on to it but finding that the boat was being overloaded got down and wanted to take down his goods. The defendant refused to allow him to do so. The boat capsized on the way and the goods were lost. The plaintiff sued for the price of the goods:

Held, that the suit was governed not by Art. 30 or Art. 31 but by Art. 36 of Sch. I of the Limitation Act. *C. NUJAFAR AHMED v. KARIM BUKSHA*, A. I. R. 1928 Cal. 306 723

— Art. 44—Void transfer of minor's property by guardian—Art. 44, whether applicable—Suit for setting aside transfer barred—Defence of invalidity, whether barred.

Where an alienation by a guardian is absolutely void, Art. 44 of Sch. I of the Limitation Act does not apply and the ward can bring a suit for possession against the alienee within 12 years of the date of sale.

The fact that the remedy of a suit to set aside a transfer is barred, does not necessarily bar the defence of invalidity of the transfer. *N. MAROTI SURYABHAN v. RAIWANT RAO* 897

— Arts. 49, 115, 145—Suit for recovery of gold delivered to defendant for making ornaments, or their value—Limitation—Deposit—Wrongful possession after demand, effect of.

A suit for recovery of gold and ornaments delivered to the defendant for making new ornaments, or the price thereof, is governed by Art. 145 of Sch. I of the Limitation Act and the mere fact that depository continued to retain possession of them after demand was made does not take the case out of the said Article. *C. JAJNESHWAR KARMAKAR v. KAILASH CHANDRA GHOSE* 473

— Arts. 57, 60—Loan or deposit—

Question of fact—Presumption.

Where there is a doubt as to whether a transaction amounts to a loan or a deposit, there is no presumption that it is a deposit and not a loan. The question is one of fact in each case. *M. MURUGIAH PILLAI v. PAKHRIA PILLAI*, A. I. R. 1928 Mad. 499 790

— Arts. 61, 115—Actions on contracts—Limitation—"Compensation", meaning of—Agreement to bear jointly cost of construction of shop—Suit to recover unpaid share of cost—Limitation.

The parties having jointly acquired a site from Government for the purpose of building a shop entered into a contract by which the plaintiff undertook to build a shop on the site and the defendant agreed to pay him one-third of the cost of con-

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struction thereof. In a suit for recovery of the unpaid part of the one-third cost of the construction:

Held, that the suit was governed by Art. 115 of Sch. I of the Limitation Act, and not by Art. 61.

Article 115, Limitation Act, is a general provision applying to all actions *ex contractu* not specially provided for otherwise. The word "compensation" in that Article as well as in Art. 116 has the same meaning as it has in s. 73 of the Contract Act and denotes a sum of money payable to a person on account of loss or damage caused to him by the breach of a contract. *L. SAUDAGAR MAL-LACHMAN DAS v. BAHADUR CHAND-HARI CHAND*, A. I. R. 1928 Lah. 442.

Sch. I, Art. 66. See C. P. C., 1908, O. XXXIV, R. 6.

Arts. 85, 115. See LIMITATION ACT, 1908, s. 19.

Art. 98. See LIMITATION ACT, 1908, s. 10.

Art. 113. See SPECIFIC PERFORMANCE.

Art. 115. See LIMITATION ACT, 1908, SCH. I, ART. 49.

Arts. 115, 116, 132—Vendor and purchaser—Amount reserved for payment of prior mortgage—Failure of vendee to pay—Suit by vendor for recovery of amount reserved—Prayer for enforcing lien—Limitation—Cause of action.

Where a sale-deed merely recites that the vendee should, out of the sale price, pay off a prior mortgage, without giving the vendee the option to pay it off at some future time or to pay it off whenever he pleased, the presumption is that the vendee is to pay immediately, or if not immediately, at any rate as soon as is reasonably possible, and limitation for a suit to recover the amounts so reserved from the vendee begins to run from the date of the sale-deed or at least within a reasonable time therefrom.

Article 132 of Sch. I of the Limitation Act applies to a relief for enforcement of a hypothecation lien. *A KALLU v. RAM DAS*, 26 A. L. J. 53.

Art. 142—Suit for possession—Plaintiff alleging possession and dispossession—Onus of possession within 12 years—Land remaining uncultivated for certain harvests, effect of, on defendant's possession.

Where in a suit for possession the plaintiff alleges possession and dispossession the onus of proving that he has been in possession, within 12 years of the suit lies on him even though the defendants are entered in revenue papers as tenants.

Where a person is shown to have been in possession of land for a number of years, the mere fact that the land was not cultivated during certain harvests does not make him out of possession during that period. *L. NUR KHAN v. FAKIR ABDULLAH* 779.

Art. 144—Joint Hindu family—Alienation not as guardian but as manager—Art. 144, whether applicable—Sale without legal necessity—Pre-emption, whether can be avoided by minor—Sale for antecedent debts of manager, not father, for no legal necessity, whether valid—Hindu Law.

Article 144 of the Limitation Act applies to a suit for setting aside an alienation of joint family property by the eldest managing member of the family though it does not apply to a suit to set aside an

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alienation of the property belonging to a minor by his guardian.

A pre-emptor of property sold by the managing member of joint Hindu family takes the property pre-empted by him, subject to the right of the minor co-parceners to avoid the transaction on the ground of want of legal necessity.

The Hindu Law doctrine of antecedent debts applies only to father's antecedent debts. It does not apply to those incurred by a managing member other than the father. *N WAMAN v. VISHNU*, A. I. R. 1928 Nag. 151.

Sch. I, Art. 144—Suit for possession of waste land—Limitation—Presumption of possession from title—Landlord and tenant—Bona fide settlement by de facto landlord—Right of true owner to eject tenant—Actual possession, necessity of.

In a suit for recovery of possession of waste lands if title is found with the plaintiff he must be presumed to have been in possession until he was dispossessed and in the absence of evidence as to entry by some other person on the land beyond twelve years of suit the question of limitation does not arise.

The principle that a tenant who has taken a settlement *bona fide* from a *de facto* landlord cannot be ejected by the true owner is applicable only to cases where the person claiming to be the *de facto* landlord was in actual possession. *G MOHESH CHANDRA v. HEMENDRA NATH*, 46 C. L. J. 575; *L. L. T. 40 Cal. 30*; A. I. R. 1928 Cal. 104.

Art. 145. See LIMITATION ACT, 1908, SCH. I, ART. 49.

Art. 158. See C. P. C., 1908, s. 149.

Art. 164—Application to set aside *ex parte* decree—Onus of proving date of knowledge of decree.

In an application for setting aside an *ex parte* decree the onus of proving that the applicant became aware of the decree within 30 days and not before lies on him. *L. RAJO v. ALI* 284.

Madras High Court (Original Side) Rules, r. 5 (a)—Third party procedure—Suit on mortgage—Mortgagor defendant claiming indemnity against another defendant—Procedure, applicability of—Third party application, principles relating to.

The third party procedure is applicable only to claims to indemnity and not to claims to damages.

An application for the issue of a third party notice should be made promptly and as a rule before the defence is delivered, so that the notice may be served within the time limited for delivering the defence, but in special cases the delay may be excused.

If the third party proceedings will prejudice, embarrass or delay the plaintiff, or where the whole dispute between the defendant and the third party cannot be disposed of in the action itself, the court may refuse to give directions, but the mere fact that the case presents some difficulty is not a reason for refusing directions.

On such an application, the question to be considered is, whether on the facts alleged, a right to indemnity exists. If the right is made out, the applicant has a *prima facie* claim and the Court should not inquire closely into the merits of that claim. *M. KRISHNASWAMI ATTAR v. RAGHAVIAH CHETTY*, 53 M. L. J. 101.

Madras High Court (Original Side) Rules—
concl'd.J. 679; 26 L. W. 687; 39 M. L. T. 472; A. I. R. 1928
Mad 43 423**Madras Irrigation Cess Act (VII of 1865), s. 1,**
proviso—Ryotwari tenant—Use of water flowing
from legitimate source on account of breach caused
by natural causes—Ryotwari tenant, whether liable
to pay water cess.A ryotwari tenant in possession of mamool wet
is not liable to pay penal assessment in respect of
water which has flowed into his land from a legiti-
mate source through breach caused by natural sources.
The question whether the ryot had any benefit from
the flow of such water or whether the water caused
him any damage is quite immaterial. **M BHOGARAJU**
KANAKAMMA v. SECRETARY OF STATE FOR INDIA, 39 M. L.
T. 600; A. I. R. 1928 Mad. 145; 51 M. L. J. 230; 27 L.
W. 791 643**Madras Local Boards Act (XIV of 1920), s. 166**—Motor vehicle—Plying car for hire along public
road without license—Offence—Liability of owner
and driver.Where a motor vehicle is plied for hire in a public
road without a license in contravention of the pro-
visions of s. 166 of the Madras Local Boards Act,
the owner of the car as well as the driver are liable
to be convicted.The responsibility of a driver who plies a car
knowingly without a license is not taken away
by the mere fact that the master is also liable.
M PRESIDENT, DISTRICT BOARD v. ISMAIL SAHIB, 27 L.
W. 2; 29 Cr. L. J. 251; A. I. R. 1927 Mad. 1195; 9 A. I.
Cr. R. 456; 51 M. J. 512 428**Malabar Law—Extinct tavazhi—Inheritance.**Under Malabar Law a *tavazhi* which has separated
1st and which is also the nearest in point of propi-
quity to the last member of an extinct *tavazhi* is
entitled to succeed to that *tavazhi* in preference to a
tavazhi whose only claim is its original connection
with the same *tarwad*. **M SANKUNNI PANNIKAR v.**
RAMA PANNIKAR 429—Karnavan, removal of, by decree of Court
—Next senior male member, right of, to become
karnavan without appointment—Karnavanship, how
lost—Decree restricting powers of karnavan, whether
binds successor.The right to the management of the *tarwad* affairs
in the case of a *marumakkathayam tarwad* devolves
on the senior most male member according to *maru-*
makkathayam Law. When a karnavan is removed,
there is no necessity for the Court to appoint the
next in point of age as manager. The next senior
in age becomes the *de jure* manager and karnavan
and steps into the position *ipso facto*, without any
sort of appointment by the Court.The only means by which rights of karnavanship
could be lost to the senior most member are (1) by
removal by decree of Court, (2) renunciation by act
of party, and (3) by death.Restrictions imposed by a decree of Court on a
person who is the then *de jure* karnavan would
prima facie cease to have operation on the death of
the particular karnavan concerned, unless there be
something specific in, or necessarily implied by, the
decree to the contrary.A, B, C and D were the senior most members of
a *tarwad* in the order of seniority. In a suit for
removal of A from karnavanship the plaintiffs prayed
that B may be appointed as karnavan and if neces-**Malabar Law—concl'd.**sary D may be associated with him in the manage-
ment. A decree was passed removing A from
karnavanship, and appointing B as karnavan and
associating D with him in the management. B died
and D sued for a declaration that he was entitled
to act as the karnavan in preference to C.Held, that C, who was the senior most member on
the death of B, was entitled to the karnavanship as
he had neither renounced his right nor had been
deprived by the Court of his right to karnavanship.
M SANKUNNI MANNADIAR v. KRISHNA MANNADIAR, 27 L.
W. 93; 1 L. T. 40 Mad. 70; A. I. R. 1928 Mad. 465; 51
M. 320; 54 M. L. J. 682 499—Nambudiris—Succession to self-acquisitions
of male member—Wife and children or tavazhi,
whether entitled to succeed in preference to tarwad
—Custom excluding tarwad; proof of.Their Lordships upheld a finding that there was no
special custom among the Payyanoor Nambudiri
families in Malabar by which the self-acquisition of
a male member dying intestate devolves upon his wife
and children or on his *tavazhi* in preference to the
tarwad. **M THALIYIL MANAYIL v. VALLA NARAYAN**, A. I.
R. 1928 Mad. 172 655**Mamlatdars' Courts Act (II of 1906), s. 26 (b)**—Has been the subject of previous proceedings,
meaning of—Jurisdiction of mamlatdar in respect
of matter pending in Civil Court.The words 'has been the subject of previous pro-
ceedings' in s. 26 (b) of the Mamlatdars' Courts Act
include pending proceedings in a Civil Court.A mamlatdar has, therefore, no jurisdiction to
entertain a suit in respect of any dispossession,
recovery of possession or disturbance of possession
which is the subject of a suit pending between the
parties in a Civil Court. **B MOTI JAGTA v. INDURAI**
BHAURAI DRSAL, 30 Bom. L. R. 98; A. I. R. 1928 Bom.
53; 52 B. 203 719**Mandatory Injunction. See PARTY WALL**

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Mortgage—Co-mortgagors—Decree against all—Re-
demption by one—Decree for contribution charging
shares of co-mortgagors—Charge, whether can be en-
forced in execution.One of several mortgagors who redeems the entire
mortgaged property by depositing the full amount
due to the mortgagee under a decree obtained by
the mortgagee against all the mortgagors, and
obtains a decree for contribution charging the pro-
portions of the other mortgagors for the respective
amounts due from them, is entitled to enforce his
charge in execution of his decree by sale of the pro-
perties charged by the decree, without bringing a
second suit to enforce his charge. **C BIRENDRA NATH**
ROY v. TARINI KANTA ROY, 47 O. L. J. 107; A. I. R. 1928
Cal. 191 724—Construction of deed—Provision for pay-
ment of interest every year and principal some years
hence and for payment of whole amount on default.
—Default in payment of interest for first year—
Payment of interest and portions of principal under
default clause—Option of mortgagee to sue—Demand
by mortgagee whether can be inferred—Cause of
action for suit on mortgage—Limitation.A mortgage-bond provided that interest on the
mortgage amount was payable on or before a fixed
date every year and the principal, after 5 years, and
that in default of payment of principal or interest on
such due dates, interest was to be added on to the

Mortgage—contd.

principal and paid 'whenever the mortgagee required' without regard to the date fixed in the bond. It was found that the mortgagor paid soon after a default in the payment of the interest, not only the interest payable under the default clause but also portions of the principal amount which under the primary clause was payable only at the end of 5 years;

Held, (1) that the stipulation gave only an option to the mortgagee to call in at once the principal amount and interest due on the mortgage-bond without reference to the period stipulated for payment;

(2) that, from the payments made, a reasonable presumption could be drawn that when the default occurred the mortgagee elected to exercise the option and pressed for payment of the entire amount, viz., the principal and interest due on the bond and that the payments were made in consequence of such demand;

(3) that the creditor having so exercised the option, the cause of action to sue on the mortgage arose from the date of default. *M RANGASWAMY PILLAY v. KUPPU-SWAMY DOOKSHATAR*, A. I. R. 1928 Mad 637 **650**

— *Lease by mortgagor—Payment of rent in advance—Sale of mortgaged property by mortgagee—Auction-purchaser's right to recover rent from date of sale—Transfer of Property Act (IV of 1882), s. 50.*

A lessee from a mortgagor cannot resist a suit for ejectment at the instance of an auction-purchaser from a prior mortgagee or refuse to pay rent to him which has accrued due since the purchase on the ground that it has been paid to the mortgagor in advance. In order to be entitled to the benefit of s. 50 of the Transfer of Property Act, the tenant must pay rent as rent and must not pay rent in advance which in the circumstances would be a mere loan to the mortgagor. *S OFFICIAL ASSIGNEE v. ABDUL HUSSAIN*, A. I. R. 1928 Sind 95 **209**

— *Mortgage by son—Suit against father and son—Plea of self-acquisition by father, whether can be gone into.*

Where in a suit against the members of a joint Hindu family on a mortgage executed by one of them, the father of the mortgagor pleaded that the property mortgaged was his own self-acquisition and that the mortgagor had no right to the property:

Held, that the father could not be said to be a stranger to the transaction and that the question whether the property was the father's self-acquisition or not ought to be determined in the suit. *M MUTHIAH SERVAI v. SOMASUNDARAM CHETTIAR*, A. I. R. 1928 Mad. 199; I. L. T. 40 Mad. 182 **814**

— *Mortgagee obtaining possession with consent of mortgagor—Liability to ejectment—Person claiming under mortgagee, whether trespasser—Purchaser of equity of redemption, rights of.*

The possession of a mortgagee, who though not entitled to possession under his mortgage, enters into possession of the mortgaged property with the express or tacit consent of the mortgagor, continues to be lawful until such assent is withdrawn, and neither the mortgagee nor a person who is holding under him can be treated as a trespasser by a purchaser of the mortgagor's rights.

"Owing to the exceptional severity with which a mortgagee in possession is treated in taking the accounts, the Courts are slow to decide that such possession has been taken, and will only do so when

Mortgage—contd.

it is proved that the mortgagee had no reasonable ground for believing himself entitled to take the rents and profits in any other capacity. The mortgagee may relieve himself of the liability to account as a mortgagee in possession by showing that he entered into possession in some other character. If he fails to establish that fact in order to exonerate himself from the liability to account as a mortgagee in possession he is held to be accountable as such." *C CHAMARIA & Co. v. SONATON PAL*, 46 C. L. J. 515; A. I. R. 1928 Cal. 158 **72**

— *Oral agreement between mortgagor and mortgagee—Portion of property to be retained by mortgagee in full satisfaction—Mortgage, whether extinguished.*

An oral agreement between a mortgagee and the mortgagor, whereby the mortgagee is to retain portion of the mortgaged property and return the other portion to the mortgagor and the mortgage is to be treated as extinguished results in the extinguishment of the mortgage lien, if the agreement is acted on by the parties. *N DAMODARDAS v. RODDA*, A. I. R. 1928 Nag. 206 **513**

— *Permanent lease by mortgagor in possession, validity of—Tests—Transfer of Property Act (IV of 1882), s. 66.*

It cannot be laid down as a proposition of law that the very act of granting a permanent lease of *bakashi* lands to a tenant is itself an act which is outside the scope of the authority of a mortgagor in possession. The test for determining whether such a lease is valid or void is that laid down in s. 66 of the Transfer of Property Act, namely, whether it is destructive or permanently injurious to the property and likely to render the mortgagee's security insufficient. *PAT NATHO SINGH v. LACHU SINGH*, A. I. R. 1928 Pat. 238 **156**

— *Prior and puisne mortgages—Purchaser under puisne mortgage, whether entitled to unconditional decree for possession against purchaser under prior mortgage—Power of Court to order redemption—Multiplicity of suits, avoidance of.*

In a suit for ejectment by a purchaser in execution of a decree on a puisne mortgage against a purchaser under a decree on a prior mortgage, the rights of the parties as purchasers under the two mortgage-decrees respectively should be determined and the plaintiff should be given a decree for possession only on condition of redeeming the defendant. *C BHODAI SHEIKH v. BARADA KANTA DUTTA*, 46 C. L. J. 570; A. I. R. 1928 Cal. 116; 55 C. 602 **355**

— *Simple mortgage—Subsequent delivery of possession to mortgagee—Extinguishment of simple mortgage—Suit for redemption—Plea of outright sale—Burden of proof—Adverse possession.*

A executed a simple mortgage to B in 1905. In 1906 A gave possession of the mortgaged properties to B. In 1926, the heirs of A sued B for redemption of the properties alleging that possession was given only for securing payment of interest on the mortgage-debt. B pleaded that the properties were made over to him by way of outright sale in satisfaction of the mortgage-debt and interest.

Held, (1) that whatever be the nature of the transaction of 1906, it had the effect of extinguishing the previous simple mortgage and that the suit for redemption could not be maintained;

(2) that inasmuch as the burden of proving title,

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regarding the suit as one based on title, was on the plaintiffs, it was for them to show that the defendant came into possession of the lands as alleged by them and that his possession was not adverse to the plaintiffs.

Per *Rulledge, C. J.*—It cannot be laid down as a proposition of law that when land is mortgaged without possession and possession is subsequently given to the mortgagee the burden of proving that the transaction in which possession was given was an outright sale lies on the mortgagee. In cases of long possession the onus is on the party out of possession. In cases, however, where the possession has been for less than 12 years and where title of the previous owner is admitted, the onus may properly be put on the person who alleges an outright sale. *R. MAUNG PWA v. MAUNG PO SA*, 5 R. 668; A. I. R. 1928 Rang. 44 165.

— *Sub-mortgage—Sub-mortgagee takes subject to state of accounts between mortgagee and mortgagor.*

Where a mortgage is transferred by way of sub-mortgage without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and the mortgagee at the date of transfer. *M. RAMNATH CHETTIAR v. SATHURAM MADIGE RAO*, 27 L. W. 47; I. L. T. 40 Mad. 85; A. I. R. 1928 Mad. 382 808.

— *Subrogation—Mortgagee directed to pay off prior mortgage, right of, to subrogation.*

The question of subrogation is really one of intention and has to be gathered with reference to the terms of the various documents concerned though there is always a presumption that a person discharging a prior mortgage intends to keep it alive for his benefit.

Where a person raises money to pay off a prior mortgage and the mortgagee pays as the agent of the mortgagor there can be no question of subrogation.

The mere fact that a mortgagee keeps money in his hands to pay off a prior encumbrance and does not run the risk he would otherwise incur if he pays money to the mortgagor to pay off the prior encumbrance and he does not do so, will not make the mortgagee an agent of the mortgagor. *M. GURUMOORTHY IYER v. P. S. SUBRAMANIAM* 401

— *Subrogation—Sale by mortgagor to discharge mortgage—Failure of purchaser to pay off mortgage-debt—Subsequent mortgage—Discharge of prior mortgage—Subsequent mortgagee's right of subrogation.*

A sold certain properties to B directing B to discharge a mortgage created by A. B did not discharge the mortgage. A subsequently executed a puisne mortgage to C empowering him to redeem the prior mortgage. C paid off the prior mortgage. In a suit by C to enforce the mortgage:

Held, that C was not a mere volunteer and was entitled to subrogation in respect of the prior mortgage. *M. C. MUNUSWAMI MUDALI v. JAWARMAL SOWCAR*, 39 M. L. T. 652; A. I. R. 1927 Mad. 1180 417

— *Suit for sale against mortgagor and purchaser of house standing on mortgaged property—Preliminary decree—Question of apportionment, when arises—Transfer of Property Act (IV of 1882), s. 82.*

A mortgagor instituted a suit for sale against the mortgagee and a person who had purchased and dismantled a house which stood on the mortgaged prop-

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erty. A preliminary decree for sale was passed against both and the purchaser appealed contending that the trial Court should have apportioned the mortgage-debt between himself and the mortgagee:

Held, that the question of the personal liability of the appellant could not arise until it became necessary to make a personal money-decree and that the appeal from the preliminary decree was, therefore, misconceived. *R. MAUNG PO SI v. K. P. A. P. FIRM*, 5 R. 764; A. I. R. 1928 Rang. 68 173

Motor Vehicles Act (VIII of 1914), s. 5. See *CR. P. C.*, 1898, s. 403 (1) 687

Muafi—Sale of muafi rights, whether void—Transfer of Property Act (IV of 1882), s. 43, applicability of.

Muafi rights are rights held by a tenant against the *zemindar* and against no one else. Such rights cannot be sold because they are resumable by the *zemindar* and the fact that such a sale is void as against the *zemindar* makes the sale absolutely void. Section 43 of the Transfer of Property Act has no application to a sale which is void such as the sale of muafi rights. *O. KUSHAR DAS v. BALBHADDAR SINGH*, 4 O. W. N. 1269; A. I. R. 1928 Oudh 153; 12 R. D. 84 872

Muhammadian Law—Dower—Interest of widow in possession in lieu of dower, whether transferable apart from dower-debt.

The interest of a Muhammadan widow in property of which she is in possession in lieu of dower can be validly transferred apart from the dower debt itself. *PAT SOGIA v. KITABAN*, 7 Pat. 141; A. I. R. 1928 Pat. 224; 9 P. L. T. 467 319;

— *Sharai dower—Transfer of property to wife after marriage towards dower, validity of.*

Where no dower is fixed at marriage it may be fixed at a later period and *sharai* dower has to be fixed only where no dower is fixed either at the time of marriage or subsequently.

A Muhammadan husband, some time after his marriage, transferred immoveable properties worth Rs. 2,000 to his wife under a deed which recited that the transfer was for a consideration of Rs. 2,000 due to his wife towards her claim of dower of Rs. 25,000. It was found that the alleged claim of dower of Rs. 25,000 was fictitious and it was contended, on the basis of this finding that the transfer was for an inadequate consideration as the wife would only be entitled to *sharai* dower:

Held, (1) that the husband must, under the circumstances, be held to have undertaken to pay Rs. 2,000 at least in discharge of his obligation for the dower-debt, that, there was, therefore, no case for fixing a *sharai* dower, and that the transfer could not consequently be said to have been made for an inadequate consideration;

(2) that the transfer could not be held to be invalid merely because the other creditors of the transferor were defeated thereby. *O. GHANI AHAMAD KHAN v. MEHDI BEGAM*, Luck. Cas. 645; A. I. R. 1927 Oudh 617 335.

— *Widow's right to retain possession of husband's estate in lieu of dower, basis of—Entry in assertion of right of dower, whether necessary.*

The right of a Muhammadan widow to retain possession of her husband's estate is founded on her power as a creditor for her dower.

A Muhammadan widow who obtains possession of her husband's estate peacefully and without fraud

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is, therefore, entitled to retain possession of the same till her dower-debt is paid, even though she does not actually enter into possession of the estate on the express assertion that she is taking possession in lieu of her dower-debt. **A MOHAMMAD SHOAIB KHAN v. ZAIB JAHAN BEGAM**, 26 A. L. J. 110; I. L. T. 40 All. 52; A. I. R. 1927 All. 850 **581**

Marriage within period of iddat—Fasid marriage—Rights of inheritance between married parties.

A marriage which is contracted within the period of iddat, being only a fasid marriage, can give rise to a right of inheritance between married parties.

A fasid marriage, which is vitiated only by some temporary defect, can become valid when the defect is removed. **O MOHAMMAD SHAFI v. RAUNAQ ALI**, 5 O. W. N. 20; A. I. R. 1928 Oudh 231 **882**

Mukhtyar—Right to appear in Criminal Courts. See CR. P. C., 1898, ss. 4 (1) (r), 435, 439 **56**

Negligence, when question of law. See AGRA TENANCY ACT, 1901, s. 164 **702**

Negotiable Instruments Act (XXVI of 1881), s. 32. See JURISDICTION **218**

s. 46. See EVIDENCE ACT, 1872, s. 92 **510**

s. 80—Promissory note payable on demand—No provision for interest or place of payment—Maker's liability to pay interest at 6 per cent. from date of note.

In a suit brought after demand made on a promissory note payable on demand which is silent as to interest and specifies no place of payment, interest is recoverable under the Negotiable Instruments Act from the maker of the note at six per cent. per annum from the date of the promissory note.

Per Marten, C. J.—Section 80 of the Negotiable Instruments Act gives interest as a matter of right in cases to which it applies. **B GANPAT TUKARAM MALI v. SOPANA TUKARAM MALI**, 30 Bom. L. R. 1; I. L. T. 40 Bom. 43; A. I. R. 1928 Bom. 35; 52 B. 88 **257**

s. 80—Pro-note silent as to interest—Interest from date of note, whether can be awarded.

The liability on a promissory note payable on demand arises from the date of the note from which date limitation begins to run and not from the date on which a demand is made for payment, and, therefore, where such a note is silent as to interest, interest is claimable under s. 80 of the Negotiable Instruments Act at 6 per cent. from the date of the note. **L KHURSHID HAQ v. RAMDITTA MALL** **753**

s. 117 (c). See JURISDICTION **218**

Official Assignee—Sale of properties sold by insolvent—Mere right to sue—Validity of sale—Duty of Official Assignee.

Sales by an Official Assignee of lands in possession of alienees from an insolvent are, in substance if not in form, nothing more than sales of the right to litigate, and, assuming that they do not come within the prohibition in the Transfer of Property Act against the transfer of a mere right to sue—which has not been contended—they are open to the same objections and are strongly to be deprecated.

It forms no part of the Official Assignee's duties as an officer of the Court charged with the realisation of insolvent estates either himself to prefer frivolous claims unsupported by reliable evidence or to transfer them to others and thus promote unnecessary and useless litigation. **P C V. P. R. V. CHOCKALINGAM CHETTY v. SRETHAI ACHE**, A. I. R. 1927 P. C. 252; 4 O.

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W. N. 1231; 27 L. W. 1; 54 M. L. J. 88; (1928) M. W. N. 20; 47 C. L. J. 136; 32 O. W. N. 281; I. L. T. 40 Rang. 18; 30 Bom. L. R. 220; 26 A. L. J. 371; 6 R. 29 **237**

Oudh Laws Act (XVIII of 1876), s. 9—Pre-emption—Vendee and pre-emptor equally entitled—Drawing of lots.

Section 9 of the Oudh Laws Act applies to a case where the vendee and the pre-emptor stand in the same position with regard to their right of pre-emption. **O RAM SUKH DUDE v. RAMPAT TIWARI**, 5 O. W. N. 82; A. I. R. 1928 Oudh 218 **879**

Oudh Rent Act (XIX of 1868), s. 5—Decree of Settlement Court, finality of—Jurisdiction of Civil Court to go behind such decree.

Where a decree of a Settlement Court in Oudh has, from the necessity of the case, been unable to decide whether a man is or is not an under-proprietor, where a decree of a Settlement Court has left in doubt the fact whether he is or is not an under-proprietor, or where there is no decree of a Settlement Court deciding the point, then the question, as to whether a man has or has not under-proprietary rights, must be decided upon other evidence. But where the decree of the Settlement Court leaves no doubt as to the fact that certain persons are occupancy tenants and not under-proprietors, it is not open to the Civil Courts to go behind it.

Where a Settlement Court of Oudh has clearly decided that certain persons are only occupancy tenants within the meaning of s. 5 of Oudh Rent Act XIX of 1868, no subsequent statements that such tenants are under-proprietors, whether contained in the mouths of witnesses, in receipts for rent or in entries in the Revenue Registers, can avail to show that they are under-proprietors. **O MAHABIR BUX SINGH v. SITIA BUX SINGH**, 4 O. W. N. 1255; A. I. R. 1928 Oudh 152; 3 Luck. 167 **871**

Oudh Rent Act (XXII of 1886), s. 108. See TRANSFER OF PROPERTY ACT, 1882, s. 52 **556**

ss. 109, 119 (b), as amended by Acts IV of 1901 and I of 1923—Civil Procedure Code (Act V of 1908), s. 115—Suit for rent or profits decided by Assistant Collector of Second Class—Decree of District Judge in second appeal, whether open to revision by Chief Court.

The decree of a District Judge passed in an appeal from an appellate decree in a suit for rent or profits which does not exceed Rs. 5,000 in value and in which the original decree is passed by an Assistant Collector of the Second Class is not open to revision by the Chief Court under s. 115 of the Civil Procedure Code. **O NARAYAN v. BALDEO SINGH**, 4 O. W. N. 1258; A. I. R. 1928 Oudh 214; 12 R. D. 109; 3 Luck. 150 **877**

Part performance, doctrine of. See SPECIFIC PERFORMANCE **905**

Partition decree—Execution of decree by defendant, legality of.

A decree for partition is a joint declaration of the rights of all the co-sharers interested in the property of which partition is sought and each co-sharer is entitled to obtain possession of the share allotted to him under the decree by applying for execution of the decree whether he is a plaintiff or defendant. **L SARDAR MUHAMMAD v. ZAFAR DIN** **624**

Partnership—Joint Hindu family—Partnership—conducted by one co-parcener—All co-parceners; whe-

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ther partners—Contract Act (IX of 1872), s. 230—Signing plaints, and other documents as managing proprietor, whether proof of partnership.

The co-parceners of a joint Hindu family are not necessarily partners in a firm of which one of the co-parceners is interested merely because they are co-parceners. They cannot be held to be partners unless there is evidence to show that they agreed to combine their property, labour or skill and share the profits or losses of the concern.

The fact that a person filed suits in the name of the firm and signed process sheets in its name as managing proprietor does not necessarily lead to the inference that he is a partner inasmuch as even salaried managers in a firm often conduct legal proceedings and sign documents for the firm in their own names signing as managing proprietors. **S RAJMAL TRILOKCHAND v. ISHERDAS-KISHENCHAND, A. I. R. 1927 Sind 217. 221**

Party wall—Co-owner's right to raise wall—Acquiescence—Mandatory injunction.

It is settled law that one co-owner of a party wall is not entitled to raise its height without the consent or acquiescence of the others and if he does so he makes himself liable to an action for injunction or damages.

If a co-owner of a party wall stands by and suffers the building to proceed to a considerable extent, his acquiescence in the erection will be implied therefrom. **L BASANT SINGH v. SHIBBA MAL, 10 Lah. L. J. 17 481**

Patna High Court Rules, Ch. VII, r. 2—Letters Patent Appeal filed without vakalatnama by oversight—Extension of time.

A Letters Patent Appeal was presented without a vakalatnama on the last day of limitation. The vakalatnama was presented the next day and it appeared that the same was executed on the previous day and that the stamp was also purchased the same day but it was not annexed to the memorandum of appeal by pure oversight:

Held, that in the circumstances time might be extended under r. 2, Ch VII of the Patna High Court Rules. **PAT RAMKHELWAN SINGH v. DIPAL MAHTON, A. I. R. 1928 Pat. 240; I. L. T. 40 Pat. 91 537**

Penal Code (Act XLV of 1860), ss. 34, 114, 398

—S. 393, whether creates substantive offence—Charge for abetment of offence under s. 393, legality of.

Section 398 of the Penal Code does not create any substantive offence, but only regulates the punishment when certain facts are found to exist in the commission of the substantive offence of robbery.

Section 34 of the Penal Code has no application in the construction of s. 398 of the Code.

Where the accused were charged under two heads, viz., (1) that they committed the offence of robbery and aided and abetted each other in that offence, and (2) that they committed the robbery and at the time of committing such offence were armed with a deadly weapon, and aided and abetted each other in the commission of the said offence:

Held, that that part of the second charge which fell under s. 114 of the Penal Code read with s. 393, was illegal and should be withdrawn from the Jury. **B EMPEROR v. NABIBUX KARIMBUX MULLA, 30 Bom. L. R. 88; A. I. R. 1928 Bom. 52; 52 B. 163; 29 Cr. L. J. 333 705**

—s. 107—Abetment, what constitutes.

A, B and C had an altercation with D. B was armed with a lathi and C with a spear and A gave

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a general order to beat D. C thereupon inflicted a mortal blow on D with his spear:

Held, that A must be deemed to have intended all the results that followed from his general order, to beat, and was, therefore, guilty of the offence committed by C. **PAT GHANSHYAM SINGH v. EMPEROR, 6 Pat 627; A. I. R. 1928 Pat. 100; 9 A. I. Cr. R. 460; 29 Cr. L. J. 239 305**

—s. 114, See PENAL CODE, 1860, s. 34 705

—s. 173—"Preventing personal service", meaning of—Criminal Procedure Code (Act V of 1898), s. 69 (1)—Tender, meaning of.

A man who gets away from the serving officer with the obvious intention of not allowing him to hold any communication with him at all and shuts himself in his house, is intentionally preventing service either by tender or by delivery, and is guilty of an offence under s. 173, Penal Code.

Personal service under s. 69 (1), Criminal Procedure Code, may be made either by delivering or tendering, but the tender must be a real tender of a document which is understood by the person to be served, and he must have voluntarily waived actual delivery and indicated in some way that a tender was sufficient. The offence of preventing personal service is in each case, a question of fact. **A BUDHUA v. EMPEROR, L. R. 9 A. I. Cr.; 28 A. L. J. 107; 9 A. I. Cr. R. 52; A. I. R. 1928 All. 118; 29 Cr. L. J. 263 563**

—s. 191—Perjury—Statement not shown to be intentionally false—Deposition not read over to witness—Conviction for perjury, legality of—Deposition of witness, whether should be signed by all the Presiding Officers—Contradictory statements—Prosecution in respect of later statement alone, maintainability of.

In order to sustain an indictment for perjury the prosecution must establish, *inter alia*, two things: (1) that the statement was false, and (2) that it was known or believed to be false or not believed to be true; in other words, the statement must be intentionally false.

A person who has made two contradictory statements cannot be convicted for perjury on that ground unless it is clearly proved that the two statements are wholly irreconcilable.

The mere fact that a person had on a previous occasion made an inconsistent statement does not necessarily prove that the previous statement was true and that the latter statement is false, and does not, therefore, afford a basis in itself for a conviction of perjury in respect of the latter statement.

A deposition which is not read over to the witness in accordance with the requirements of the law under which it was taken cannot be used against him on a charge of perjury.

Where a Court is composed of more than one Judge the deposition of a witness need not necessarily be signed by all the Judges of the Court before whom the witness is examined and the fact that it is signed by only one of them alone does not vitiate the deposition. The object of requiring the Presiding Officer of the Court to sign the deposition of the witness examined by him is to ensure the accuracy of the record and it cannot reasonably be urged that that object can be achieved only if all the Judges composing the Court sign the record. **L TAJ MAHMUD v. EMPEROR, 29 P. L. R. 14; I. L. T. 40 Lah. 36; 29 Cr. L. J. 212; A. I. R. 1928 Lah. 125; 9 A. I. Cr. R. 505 100**

Penal Code--contd.

s. 225-3—Resistance to lawful arrest—Intention, necessity of.

An offence under s. 225-B, Penal Code, is committed only when the resistance to arrest is intentional. A person who makes the resistance not knowing that he is being, or is about to be, arrested cannot, therefore, be convicted of an offence under the said section. *L. HOLMES v. EMPEROR*, 29 Cr. L. J. 286; A. I. R. 1928 Lah. 324; 9 A. I. Cr. R. 499 **772**

s. 225-B—Resistance to warrant—Illegality of tax—Absence of seal of Court—Offence.

Under s. 225-B of the Penal Code resistance or obstruction to the apprehension of a person is punishable only if the apprehension is lawful. Where the imposition of tax for the non-payment of which the warrants are issued is itself illegal and *ultra vires*, the resistance to their execution is not punishable under the section.

The omission of the seal of the Court issuing it renders a warrant void and a person offering resistance to apprehension under such a warrant does not commit an offence under s. 225-B, Penal Code. *L. DASONDHI v. EMPEROR*, 29 Cr. L. J. 265; A. I. R. 1928 Lah. 332; 9 A. I. Cr. R. 488 **601**

s. 302—Blow aimed at one killing another—Offence—'Transferred malice', doctrine of.

Where a blow aimed at one person lights upon another and kills him, the offence committed by the assailant is the same as it would have been if the blow had struck the intended victim. *L. SUBA v. EMPEROR*, 29 Cr. L. J. 280; A. I. R. 1928 Lah. 344 **764**

s. 302—Brutal murder—Youth of accused, whether ground for lesser penalty.

When the murder committed is of a very brutal nature, the mere youth of the accused is no ground for imposing the lesser penalty of transportation. *L. MUHAMMAD SULTAN v. EMPEROR*, 29 Cr. L. J. 211; 9 A. I. Cr. R. 525 **99**

s. 302—Evidence regarding motive and production of corpse—Conviction for murder, propriety of—Circumstantial evidence—Suspicion as basis for conviction.

It is not safe to base a conviction under s. 302, Penal Code, where the only evidence against the accused is the presence of motive and the production of the corpse by him.

However suspicious the circumstances may be, suspicion alone cannot be regarded as sufficient for a conviction. *L. FARZAND ALI v. EMPEROR*, 29 P. L. R. 33; 29 Cr. L. J. 252; 9 A. I. Cr. R. 520 **482**

s. 302—Murder—Assailants engaged in brawl—Member of one party striking member of the other side who is empty-handed and not an active participant with hatchet—Offence—Sentence.

Where during a brawl in which the assailants on both sides are using sticks, a member of one side intervenes with a hatchet and strikes over the head of a member of the other side, who is empty-handed and taking no active part in the fight and kills him in consequence, he commits murder and not culpable homicide not amounting to murder. *O. MADARU v. EMPEROR*, 5 O. W. N. 29; 29 Cr. L. J. 230; A. I. R. 1928 Oudh 221; 9 A. I. Cr. R. 438 **177**

ss. 366, 376—Acts disclosing offences of kidnapping and rape—Conviction for both, legality of.

Where the series of acts proved against the accused establishes two distinct offences falling under ss. 366

Penal Code—contd.

and 376 of the Penal Code, the accused can be convicted separately for both the offences. *L. TEK SINGH v. EMPEROR*, 29 Cr. L. J. 248 **388**

s. 398. See PENAL CODE, 1860, s. 34—705**ss. 411, 413. See CR. P. C., 1898, ss. 231, 236, 238—241****s. 424—Mischief—Cutting of branches of trees—Knowledge of likelihood of loss—Offence.**

The cutting of the branches of a tree belonging to another with the knowledge that the cutting is likely to cause wrongful loss or damage to the owner amounts to mischief punishable under s. 426 of the Penal Code. *A. MUHAMMAD HASAN v. EMPEROR*, L. R. 8 A. 103 Cr.; 8 A. I. Cr. R. 60; A. I. R. 1927 All. 610; 29 Cr. L. J. 275 **691**

s. 498—Legal marriage, necessity of.

To sustain a conviction under s. 498 of the Penal Code it is necessary to establish that the marriage between the complainant and the enticed is a legally valid marriage. *L. SAUDAGAR v. EMPEROR*, 29 Cr. L. J. 210; A. I. R. 1928 Lah. 165; 9 A. I. Cr. R. 413 **98**

s. 498—Woman living with accused of her own free will—Refusal to accompany husband—Offence.

Where a woman was living with the accused of her own free will, and refused to go back to her husband and the only evidence against the accused was that he helped the woman in her not being taken away by force by the complainant:

Held, that the accused could not be convicted under s. 498, Penal Code. *A. OCHACHAL AHIR v. EMPEROR*, L. R. 9 A. 15 Cr.; 9 A. I. Cr. R. 106; 26 A. L. J. 403; 29 Cr. L. J. 273; A. I. R. 1928 All. 194 **689**

Pensions Act (XXIII of 1871), ss. 3, 4, 5, 6, 23—

Charitable grant—Management entrusted to trustees—Suit to recover moneys under grant—Collector's certificate, whether necessary—Suit filed without certificate, whether ab initio bad—Procedure—Construction of the Act, principles relating to.

Suits relating to grants for religious or pious purposes are not outside the purview of s. 4 of the Pensions Act.

The mere circumstance that a grant is not directly paid by the British Government but is distributed through a non-official agency does not take the case out of the purview of the Pensions Act.

A suit falling within the purview of the Pensions Act, which is filed without a certificate from the Collector is not bad *ab initio* and liable to be dismissed summarily but the plaintiff should be given an opportunity of producing the certificate at a later stage.

The Pensions Act, being one which tends to restrict the ordinary legal rights of the subject to have recourse to the Court for remedy of grievances is one to be strictly construed. *N. RAJE BAHADUR RAGHOJI RAO v. SITARAM DAJIBA PANDE*, 11 N. L. J. 14; A. I. R. 1928 Nag 189 **899**

Permanent tenancy. See ADVERSE POSSESSION—52**Pleader lending money on interest, legality of.**

See CONTRACT ACT, 1872, s. 23 **903**

Pleading—Change of case at final hearing—

Amendment, necessity of.

A party cannot be allowed to change his case at the last moment, without even having made an application to amend his plaint. *S. RAHIMBUX KADERBUX v. TOPANDAS HARBHAGWANDAS*, A. I. R. 1928 Sind 103 **440**

Police Act (V of 1861), s. 29—'Violation of duty,'
meaning of—Mere neglect, whether offence.

The expression "violation of duty" as used in s. 29, Police Act, connotes something more than mere non-performance of duty. It may, under certain circumstances, include illegal omission but such omission must be of some positive duty imposed by law and it is the duty of the prosecution affirmatively to prove what, under the circumstances disclosed, a person who is alleged to have been guilty of violation of duty should have done and that he wilfully failed to do that.

Every negligence does not amount to violation of duty as violation implies a certain amount of volition. **L. MUHAMMAD ALI v. EMPEROR**, 29 P. L. R. 30; 29 Cr. L. J. 285; A. I. R. 1928 Lah. 161 **771**

Power-of-attorney — Construction — 'Security,'
meaning of—Power to transfer 'securities', whether includes power to endorse promissory notes.

Security is anything that makes the money more assured in its payment or more readily recoverable, as distinguished from a document which is merely evidence of a debt. The word 'security' is not confined to a document which gives a charge on specific property but includes personal securities for money, such as demand promissory notes.

Power to negotiate 'securities' of any description whatever includes power to endorse on demand promissory notes. **S. CHETUMAL BULOHAND v. NOORBHAY JAFFERI**, A. I. R. 1928 Sind 89 **213**

Mukhtarnama authorising filing of appeal
in High Court—'Appeal', whether includes revision.

Where a mukhtarnama authorises the filing of an appeal in the High Court the word 'appeal' should be liberally construed and should be taken to include revision also. **L. ATMA DEVI v. SHIB DEVI**, A. I. R. 1928 Lah. 244 **390**

Practice—Appellate Court—Finding of fact of trial
Judge, not liable to be interfered with on appeal except for cogent reasons.

Where the trial Judge has had the opportunity of seeing the witnesses and hearing them give their evidence, he is in a much better position to gauge the truth and value of the oral evidence than the Judges of the Appellate Court, and, consequently, a finding of fact arrived at, on such evidence, by the trial Judge ought not to be interfered with by the Appellate Court except for cogent reasons. **P. C. ARUNCHALA NAYADU v. BALAKRISHNA**, A. I. R. 1927 P. C. 266; 47 C. L. J. 576 **349**

Appellate Court—Finding of fact of trial
Judge, weight attaching to.

Due regard ought to be paid to the findings of a Judge who has decided matters of fact deposed to by witnesses at the trial before him. **P. C. LIM YAM HONG v. LAM OHOON & Co**, 47 C. L. J. 288; A. I. R. 1928 P. C. 127; 30 Bom. L. R. 757 **457**

Appellate Court—Weight attaching to
findings of fact of trial Court which had not seen the witnesses.

Where in a case which entirely depends upon questions of fact, the Judge of the trial Court pronounces judgment merely upon the record of evidence made by his predecessor-in-office and has not had the benefit of seeing the witnesses give their evidence, and the Appellate Court, on the same evidence, comes to the opposite conclusion as to the facts, their Lordships of the Judicial Committee will not attach the same importance as they otherwise would to the findings of fact of the trial Court, and

Practice—contd.

will be slow to disturb the judgment of the Appellate Court unless convinced that it is wrong. **P. C. MAGANMAL v. DARBARILAL**, A. I. R. 1928 P. C. 39; 54 M. L. J. 208; 30 Bom. L. R. 296; 5 O. W. N. 226; 47 C. L. J. 222; 27 L. W. 523; I. L. T. 40 Cal. 124; 24 N. L. R. 40 **113**

Counsel's right to argue, limits of.

So long as a Counsel is not guilty of unnecessary repetition or of irrelevant arguments he is entitled to present his client's case as he thinks best and it is no ground for a Judge to decline to hear him or to cut short his argument merely because he is expected by the superior Courts to turn out a certain amount of work within a fixed time. **L. MUHAMMAD BAKSH v. EMPEROR**, 29 Cr. L. J. 279; A. I. R. 1928 Lah. 319 **763**

Court entering into correspondence on matter
judicially before Court—Taking notice of statements in such correspondence, legality of.

It is objectionable for a Court to enter into correspondence with a person with regard to a matter pending judicially before it, and it is illegal to take notice of the statements made in such correspondence by such person who has not chosen to substantiate them either by himself going into the witness-box or by leading other evidence. **L. SAKINA BEGAM v. RAJA MUHAMMAD WALI ULLAH KHAN**, A. I. R. 1928 Lah. 456 **397**

Court hours—Sitting after Court hours
without consent of parties, legality of—Party's right to adjournment.

The hours prescribed by the rules of the High Courts for sitting are intended not only to suit the convenience of the Courts but also of the parties, and a Court has no right to take up any case after the prescribed Court hours without the consent of the parties.

"The Courts in the Mofussil, no doubt, take it as their right and privilege to sit at any time they like regardless of the convenience of the parties concerned. The parties being suitors before them do not boldly object to the prolonging of Court hours or taking up of cases late in the day for fear of incurring the displeasure of the Presiding Officers of the Courts. The Courts should not take advantage of this weakness of the parties". **PAT GULAI JHA v. EMPEROR**, 29 Cr. L. J. 299; 9 P. L. T. 314; A. I. R. 1928 Pat. 277 **827**

Criminal trial—Conducting trial on public
holiday, propriety of—Transfer of case—Criminal
Procedure Code (Act V of 1898), s. 526.

It is highly objectionable on the part of a Magistrate to commence a trial on a gazetted public holiday and to examine all the prosecution witnesses on such day.

Where a Magistrate did so in compliance with the request of a Police Officer:

Held, that there was sufficient ground for transfer inasmuch as the act of the Magistrate was sufficient to create an impression in the mind of the accused that he would not have a fair and impartial trial. **L. RAM DIVA v. EMPEROR**, 29 Cr. L. J. 294; A. I. R. 1928 Lah. 334; 10 A. I. Cr. R. 22 **779**

Dispute in Appellate Court as to what took
place in trial Court—Contradictory affidavits by
Pleaders on both sides filed long after event—Pro-
cedure.

Where a dispute arises before an Appellate Court,

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as to what took place in the trial Court in respect of a certain matter and there is a direct contradiction between the affidavits of the Pleaders on opposite sides, and the affidavits are filed after a long time has elapsed, the proper procedure to adopt would be to rely upon the note of the Judge made at the time and presume that it correctly represents what took place. *M ARUMUGAM CHETTIAR v. DEVARAYA CHETTIAR*, A. I. R. 1928 Mad. 625 648

Evidence adduced on both sides—Question of onus of proof immaterial.

The question of burden of proof is merely one of procedure and where both parties have led evidence the question loses all its importance. *A KIRTARATH RAI v. SRIPAT RAI*, A. I. R. 1928 All. 307 254

Findings to be confined to pleadings and issues.

Where there are definite pleadings and a definite issue on those pleadings is framed, the finding must be confined to matters raised in the issue, even though the parties produce evidence on matters which do not form part of the issues. *N DOMAJI v. TUESIRAM*, A. I. R. 1928 Nag. 179 514

Finding of trial Court after close and intelligent attention—Duty of Appellate Court.

Where the issue is one of fact and the only question is which set of witnesses is to be believed, the verdict of a Judge trying the case who has given a close and intelligent attention to the evidence and written a well-reasoned judgment should not be lightly disregarded in appeal. *O RAJ BACHAN SINGH v. SOORAJKUNWAR RAM*, 4 O. W. N. 1179; A. I. R. 1927 Oudh 618 321

Omission to produce books at proper stage—Remand for fresh evidence, legality of.

A party who does not assist the Court by placing the relevant books which are admittedly in his possession before the Court cannot in appeal ask for the indulgence of the Appellate Court so as to have a fresh opportunity of going into the accounts on remand. *L BUDHA MAL v. RALLIA RAM* 620

Pleader's fees—Method of calculation.

The proper Pleader's fee to be allowed in a suit is not the sum calculated to the last pie on the valuation of the suit according to the rates stated in the rules made under the Legal Practitioners Act, but is what is actually paid or what may reasonably have been paid, whichever is less. The rules are a good general guide to the sum that may have reasonably been paid, but no more.

There are several factors to be considered in fixing the Pleader's fee, in addition to the valuation of the suit, and even that must be its real value, not the arbitrary or artificial valuation which is often sufficient for all other purposes. *N. KAMOD SINGH v. KHEMKARAN*, A. I. R. 1928 Nag. 175 662

Pleas of Law—Duty of Court to find and examine them.

The Court must find and examine all pleas of law that may possibly apply to the facts for itself and must not wait for the parties even to suggest them, still less for the parties to plead them. *N DAMODAR DAS v. RODBA*, A. I. R. 1928 Nag. 206 513

Precedents.

It is dangerous to apply the principles given in peculiar cases to cases in which the facts are totally different. *R BURMA RAILWAY COMPANY v. MAUNG HLA TIN*, 5 R. 813; A. I. R. 1928 Rang. 85 175

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Precedents—Rulings of High Court to which a Court is not subordinate, whether binding.

The conclusions in any judgment of the Privy Council or in a judgment of the High Court to which a Court is subordinate, which is officially published must be accepted as correct by the subordinate Court but a conclusion in any other judgment, taken by itself and apart from the reasons for it, is not even relevant and much less is it to be accepted blindly, though the judgment will usually be of the greatest use as an exposition of the reasons for coming to the same conclusion. *N SECRETARY OF STATE v. NANDALAL*, A. I. R. 1928 Nag. 52 206

Putting parties to box after hearing to note their demeanour, legality of.

The procedure of putting the plaintiff and the defendant to the witness-box, after the case has been concluded without putting them on oath to see them confront each other and to note their demeanour is not warranted by law. *C KASIRADDIN PARAMANIK v. KASIR MANDAL*, A. I. R. 1928 Cal. 227 469

Res judicata, plea of, whether can be raised in second appeal for first time.

A plea of *res judicata* cannot be raised for the first time in second appeal where it involves questions of law and fact. *N SADASHIO RAO DESHMUKH v. LAXMAN RAO KALAR*, A. I. R. 1928 Nag. 227 910

Precedents—Assumption of certain view of law, how far binding.

Per Ashworth, J.—The assumption of a certain view of law in a judgment for the purpose of deciding another question cannot be regarded as a binding decision. It has even less force than an *obiter dictum* for it is not necessary to prove or decide what is admitted. *A HUKUM CHAND v. SITAL PRASAD*, 25 A. L. J. 922; A. I. R. 1928 All. 52; 50 A. 232 244

Pre-emption. See LIMITATION ACT, 1908, SCH. I, ART. 144 516

Presidency Towns Insolvency Act (III of 1909), s. 12 (2)—Application by secured creditor—Estimate of security—Revision by Court—Application for adjudication—Withdrawal—Fraudulent preference—Prejudice to other creditors.

Where a secured creditor who applies for adjudication of his debtor as an insolvent gives an estimate of the value of his security, the Court will not enquire into its correctness if it is a genuine estimate.

A Court should not allow a creditor who has applied to adjudicate his debtor as an insolvent, to withdraw his application where such withdrawal would result in a fraudulent preference of the petitioning creditor to the detriment of the other creditors. *R. M. E. MOOLLA v. CHARTERED BANK*, 5 R. 685; A. I. R. 1928 Rang. 36 860

s. 29 (iv)—Composition not objected to by creditors—Court, whether bound to sanction. A Court is not bound to accept a composition proposed by an insolvent and accepted by a majority in number and three-fourths in value of creditors who have proved their claim, simply because none of the creditors opposes its approval by the Court. Before accepting a proposed composition or scheme a Court should satisfy itself that such composition or scheme fulfils certain conditions, *inter alia*, that it is both reasonable and for the benefit of the general body of the creditors. If it is deficient in either of those qualities, it fails.

A composition or scheme is neither reasonable nor

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for the benefit of the general body of the creditors unless it affords some advantage to the creditors which they would not have if the insolvency proceedings were allowed to continue. *In re Gopal Das Varsimal*, A. I. R. 1928 Sind 90 **433**

s. 56—Provincial Insolvency Act (V of 1920), s. 54—Singapore Bankruptcy Ordinance, s. 51.
(1)—Fraudulent preference—“With a view to prefer”—Question of fact—Dominant motive of debtor—Onus of proof—Transfer to avert criminal prosecution for breach of trust.

The question whether a transfer by a debtor is to be deemed fraudulent and void as against the Official Assignee in the bankruptcy depends on the answer to be given to the question, was the transfer made ‘with a view of giving a preference over the other creditors’?

The question to be determined is one of fact, namely, was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character? As the solution of this question involves an enquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence.

Where the proper inference to draw from the facts is that the dominant motive actuating the debtor was that, in making the transfer to his creditor, he (the debtor) was only doing what he felt himself bound or compelled to do, and where it must have appeared to him that the alternative to handing over, was a prosecution for criminal breach of trust, the case is not one of fraudulent preference within the Statute.

When the Official Assignee in the bankruptcy seeks to establish that a transfer by the debtor is void as a fraudulent preference, the onus of proof is on the assignee to show that the case is within the Statute.

When all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on the question of onus becomes immaterial and the decision must be come to on the whole of the circumstances so ascertained, and the question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it. *P C Sims Darby & Co. v. Official Assignee*, 30 Bom. L. R. 290; 54 M. L. T. 337; A. I. R. 1928 P. C. 77; 47 C. L. J. 339; I. L. T. 40 Cal. 104; 27 L. W. 744 **233**

Principal and agent—Ambiguous direction—Reasonable interpretation—Agent's liability.

Where a person gives an incomplete and ambiguous direction the party directed cannot be blamed if he reasonably interprets and acts upon it. *P C M. A. Sassoon & Sons v. International Banking Corporation*, 53 M. L. J. 42; A. I. R. 1927 P. C. 195; 1 Luck. Cas. 241; 25 A. L. J. 665; 29 Bom. L. R. 1181; 46 C. L. J. 61; (1927) M. W. N. 648; 32 C. W. N. 30; 39 M. L. T. 659; 54 I. A. 317; 27 L. W. 582; 55 C. 1 **225**

Principal and surety—Surety bond—Strict construction—Benefit of doubt—Security bond to Court, validity and mode of execution of—Civil Procedure Code (Act V of 1908), s. 145.

A surety bond must be construed strictly and a surety cannot be held liable except to the extent to

Principal and Surety—*conold.*

which he is clearly bound. The benefit of the doubt must be given to the surety.

Per Marten, C. J.—The fact that a security bond is given to the Court and not to a named individual does not render it void. *B. Jayappa Lokappa v. Shivangouda*, 30 Bom. L. R. 19; A. I. R. 1928 Bom. 42; 52 B. 72; I. L. T. 40 Bom. 66 **710**

Probate. See Allahabad High Court Rules, Chap. XVI, R. 2 **34**

Probate and Administration Act (V of 1881). See Administrator **747**

s. 50—Revocation of Probate, grounds for—Citation on minor—Procedure—Inference from non-registration of Will—Construction of Indian Statutes founded on English Law—Probate in ‘common form’ and ‘solemn form’—Onus of proof of genuineness of Will.

Where there is a positive enactment of the Indian Legislature, the proper course is to examine the language of that Statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English Law upon which it may be founded.

The Succession Act of 1865 and the Probate and Administration Act of 1881 (now consolidated by the Succession Act of 1925), while to a large extent embodying the rules of the English Law, yet depart in many particulars from those rules; and in the progress of the development of the law and practice in testamentary cases, the ecclesiastical origin of this jurisdiction of the Courts in England has been completely discarded; and the Indian Legislature has gradually evolved an independent system of its own, largely suggested, no doubt, by English Law but also differing much from that law, and purporting to be a self-contained system.

In interpreting, therefore, the statutory provisions of the Indian Legislature relating to testamentary cases, the Courts should proceed to examine the language of the Indian Statute uninfluenced by any consideration derived from the English Law upon which it may be founded.

The introduction into Indian practice of the difference in English Law between the grant of Probate in ‘common form’ and in ‘solemn form’, is to be deprecated.

Upon an application for Probate of a Will, the citation issued must be properly and effectively served, that is to say, so served as would give to the person whose interests are, or may be, adversely affected an opportunity either to oppose the grant of Probate or to require the Will to be proved in his presence.

Where a Will of which Probate is sought affects the interest of a minor, the prudent course for the proponent is to take steps to have the Will proved *per testes* (i.e., in solemn form) in the presence of an independent guardian *ad litem* for the minor.

Although registration of Wills is not compulsory, non-registration may, when coupled with other suspicious circumstances, throw considerable doubt upon the genuineness of the document.

Probate of a Will having been granted to the defendant, the plaintiff instituted proceedings under s. 50 of the Probate and Administration Act, 1881, (now re-enacted as s. 263 of the Succession Act, 1925) for revocation of the Probate on two grounds, viz., (1) that citations were not served on her before the grant of Probate, and (2) that the Will was a forgery.

Probate and Administration Act—contd.

The issues raised in the case were: (1) Was no citation served upon the plaintiff? (2) Is the Will propounded by the defendant, genuine or otherwise? :

Held, (1) that if these issues were tried separately and the plaintiff succeeded on the first issue, that, in itself, would be sufficient for revoking the Probate; but it would still be open to the defendant to prove the Will and, if he succeeded, the Probate would stand. If, on the other hand, the plaintiff failed on the first issue, that would not preclude him from proceeding to prove his second ground, viz., that the Will was forged, and the Probate would stand or fall, according to the result;

(2) that the fact that these two issues were not tried separately, and evidence was given by each party in support of their respective cases on both issues together did not, under the circumstances, prejudice either party;

(3) that in view of the finding of their Lordships for the plaintiff on the first issue, the onus of proof on the second issue as to whether the Will was forged or genuine, was upon the defendant;

(4) that the defendant had failed to discharge that onus.

[Independently of any question of onus, their Lordships were of opinion; on the facts of this case, that the Will was a fabricated document.] **P C RAMANANDI KUR v. KALAWATI KUR**, A. I. R. 1928 P. C. 2; 5 O. W. N. 96; I. L. T. 40 Pat. 19; 30 Bom. L. R. 227; 47 C. L. J. 171; 54 M. L. J. 281; 9 P. L. T. 97; 32 C. W. N. 402; 26 A. L. J. 385; (1928) M. W. N. 282; 7 Pat. 221; 27 L. W. 782

Properties burdened with trust, whether vest in Official Receiver. See WILL 786

Prosecution—Omission to examine material witness—Inference.

Failure of the prosecution to examine a material witness justifies an inference that the witness if examined would have deposed against the prosecution. **L. TAJ MOHAMED v. EMPEROR**, 29 P. L. R. 14; I. L. T. 40 Lah. 36; 29 Cr. L. J. 212; A. I. R. 1928 Lah. 125; 9 A. I. Cr. R. 505

Provincial Insolvency Act (V of 1920), s. 4. See WILL 786

ss. 4, 68, 75 (3)—Attachment by Receiver of property of third person—Application to District Judge to set aside Receiver's act—Order dismissing application whether appealable—'Person aggrieved,' meaning of.

A Receiver in insolvency attached certain properties of the petitioners and sold some of them as belonging to the insolvent. The petitioners applied to the District Judge to enquire into and rectify the acts of the Receiver, but the applications were dismissed by the District Judge on the ground that they were time-barred:

Held, (1) that the orders of the District Judge on the applications were appealable by leave under s. 75 (3) of the Provincial Insolvency Act;

(2) that even if they were not appealable by leave the matter decided was one under s. 4 of the Act and appealable as such;

(3) that the petitioners were persons aggrieved by the orders, and as such entitled to appeal against them.

The question whether a person is aggrieved or not by an order of Court is a question of fact. **C CHANDRA**

Provincial Insolvency Act—1920—contd.

NATH SEN v. NAGENDRA NATH GANGULY, A. I. R. 1928 Cal. 263

ss. 4, 75—Order dismissing claim of stranger to money ordered to be paid to Official Receiver—Appeal—Creditors, whether necessary parties.

An order of a District Judge dismissing a claim preferred by a stranger to money ordered to be paid to a Receiver in insolvency is a decision on a question of title within the meaning of s. 4 of the Provincial Insolvency Act and is appealable under s. 75 of that Act. The creditors of the insolvent are not necessary parties to an appeal from such an order. **L. MUNSHI RAM v. GHULAM DASTGIR**, A. I. R. 1928 Lah. 423

ss. 5 (1), 59 (a), 68—Civil Procedure Code (Act V of 1908), O. XXI—Sale by Receiver in insolvency—Deposit of amount due to creditors and 5 per cent. on purchase-money by insolvent—Sale, whether can be set aside—O. XXI, whether applies to sales by Receivers—Setting aside sales by Receivers—Principles.

An insolvent is not entitled to have a sale by the Receiver set aside on making a deposit of the amount due to his creditors and 5 per cent. of the purchase-money within 30 days of the sale. The provisions of O. XXI of the Civil Procedure Code do not apply to sales by Receivers in insolvency.

A sale by a Receiver is not a 'proceeding under the Act' within the meaning of s. 5 (1) of the Provincial Insolvency Act.

It is settled law that a Court has no jurisdiction to set aside a sale held or made by a Receiver which is not in excess of his authority in the absence of proof of fraud or collusion or material illegality or irregularity in conducting the sale or misconduct on his part causing injury to the estate. **R MAUNG THA DUN v. PO KA**, 5 R 768; A. I. R. 1928 Rang. 60

ss. 27 (2), 43—Application for discharge—Power of Court to extend time fixed at the instance of creditors or suo motu—'Period specified by Court,' meaning of.

It is open to an Insolvency Court to extend the period specified in the order of adjudication within which the debtor is to apply for his discharge on the application of the insolvent himself or on the application of the creditors or suo motu.

Where the period within which an insolvent is to apply for discharge has been extended under s. 27 (2) of the Provincial Insolvency Act, the words "period specified by the Court" in s. 43 of the Act, mean not the period specified by the Court in the first instance, but the period as extended by the Court under s. 27 (2). **L. RUP SINGH v. OFFICIAL RECEIVER, JHANG**, A. I. R. 1928 Lah. 82; 29 P. L. R. 122; 10 Lah. L. J. 156

ss. 27 (2), 43, 75—Order of adjudication—Duty of Court to fix time for applying for discharge—Power of Court to extend time even after expiry of period fixed—Expiry of time, whether ipso facto annuls adjudication—Notice to show cause against annulment, whether necessary—Order annulling adjudication for failure to apply for discharge—Appeal—Leave to appeal, whether necessary—Power of Appellate Court to grant leave—Admission by Division Bench, effect of—Inherent power of Courts to extend time.

An order of adjudication in insolvency is not ipso facto annulled by the expiry of the period fixed:

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for applying for discharge, but has to be determined by an order of annulment, and until the adjudication is so annulled, the Court has seisin of the case and has power to extend the time for making an application for discharge under s. 27 (2) of the Provincial Insolvency Act regardless of the expiry of the period originally fixed.

Section 27 of the Provincial Insolvency Act is imperative and a Court should, on making an order of adjudication, specify the time within which the debtor should make an application for discharge.

There is no provision of law for issuing a fresh notice upon an insolvent who has failed to apply for discharge within the prescribed period, to show cause why the adjudication should not be annulled.

An order annulling an adjudication on account of the failure of the debtor to apply for discharge within the time fixed by the Court falls within the purview of s. 43 of the Provincial Insolvency Act and cannot, therefore, be appealed from except with the leave of the Court.

The admission of an appeal from such an order by a Division Bench of the High Court may, under proper circumstances, amount virtually to the granting of leave to appeal.

It is open to the Appellate Court to grant such leave even after hearing the case.

Per *Jwala Prasad, J.*—A Court has inherent power to extend the period fixed by it for the doing of any act even though the period originally fixed by it may have expired. *Pat Gopal Ram v. Magni Ram*, 9 P. L. T. 329; 7 Pat. 375; A. I. R. 1928 Pat. 338 830

ss. 28, 31—Execution against insolvent—Leave of Court, necessity of.

A decree-holder is not competent to take out execution against the person of an insolvent judgment-debtor without obtaining leave of the Insolvency Court. *L. Partap Singh Pardhan Singh v. Mewa Singh-Jodha Singh*, A. I. R. 1928 Lah. 258 608

ss. 33 (3), 64—Notice of final dividend—Creditors whose claims are not entered in schedule, whether entitled to notice.

Under s. 64 of the Provincial Insolvency Act, the Official Receiver is bound to give notice of a final dividend not only to those creditors who have notified their claims and whose names are entered in the schedule by him but to all such creditors whose claims have been notified to the Official Receiver either by the creditors themselves or by the insolvent. The notice is not confined to debts referred to in s. 62, cl. (4), sub-cl. (b) and (c) but extends to debts referred to in sub-cl. (a) of that section; and if the Official Receiver has any assets in his hands he is bound to adjudicate on all such claims as are preferred to him in response to the notice of final dividend so issued by him. *S. In re Sunderji Bhimji*, A. I. R. 1928 Sind 105 439

s. 43.
See PROVINCIAL INSOLVENCY ACT, 1920, s. 27 (2) 394, 830

s. 54,
See O. P. C., 1938 s. 100 490
See PRESIDENCY TOWNS INSOLVENCY ACT, 1909, s. 56 233

s. 54—Onus of proof:
In applications under s. 51 of the Provincial Insolvency Act, the onus is, in the first instance, on

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the Official Receiver to prove that the dominant or the substantial or effective, though not necessarily the sole motive which the insolvent had in view was to prefer a particular creditor. But the onus is shifted on to the creditor or transferee to prove the contrary where the insolvent has made the payment or transfer of property, as the case may be, in discharge of an old debt, and on the eve of bankruptcy. And where the reason of such payment or transfer remains unexplained it is competent for the Court to hold that a *prima facie* case of fraudulent preference has been established and to act on it. *S. NECHALDAS v. OFFICIAL RECEIVER* 210

s. 59 (a). See PROVINCIAL INSOLVENCY ACT, 1920, ss. 5 (1) 172

s. 64. See PROVINCIAL INSOLVENCY ACT, 1920, ss. 33 (3); 64 439

s. 68.
See PROVINCIAL INSOLVENCY ACT, 1920, s. 4 467
See PROVINCIAL INSOLVENCY ACT, 1920, ss. 5 (1), 59 (a) 172

ss. 72, 79—Civil Procedure Code (Act V of 1908), O. XXX—General Clauses Act (X of 1897), s. 13 (2)—English Bankruptcy Act, 1914 (4 & 5 Geo. V, Ch. 59), s. 155—Adjudication of "debtor" which is a firm, effect of, on partners—"Obtaining credit", meaning of.

An application was presented on behalf of a firm for being adjudicated insolvent. The names of the partners of the firm were disclosed in the application and the Court passed an order that the applicant be adjudicated insolvent. One of the partners was adjudicated an insolvent some years later in another insolvency, and a question arose in respect of an application under s. 72, Provincial Insolvency Act, whether he was an undischarged insolvent with reference to the first insolvency:

Held, that the applicant in the first insolvency was the firm and not the individual partner who filed the application and the order of adjudication was an order against the firm and against each and every partner in that firm.

In considering an application under s. 72, Provincial Insolvency Act, the Court has to consider (a) if the opponent is an undischarged insolvent, (b) if he obtained credit to the extent of Rs. 50 or upwards, and (c) if he in fact informed the person from whom he obtained credit that he was an undischarged insolvent.

The expression "obtaining credit" would include within its ambit the securing of goods on trust that they will be sold and sale-proceeds handed over.

[Different meanings of the expression "credit" considered.]

For the purpose of giving sanction for prosecution under s. 72, Provincial Insolvency Act, against an individual partner of a firm, it is immaterial that credit was obtained by him as a partner of the firm. *S. In the matter of UTMA-MALLICK VISHENDAS*, A. I. R. 1928 Sind 114 442

s. 75. See PROVINCIAL INSOLVENCY ACT, 1920, s. 27 (2) 830

s. 75 (3). See PROVINCIAL INSOLVENCY ACT, 1920, s. 4 467

s. 79. See PROVINCIAL INSOLVENCY ACT, 1920, s. 72 442

Provincial Small Cause Courts Act (IX of 1887), s. 25—Erroneous decision of question of limitation—Revision—Interference.

Where a Judge trying a small cause suit in a carefully reasoned judgment decides, after considering the various authorities, the suit to be time-barred, the fact that the Judge has arrived at incorrect interpretation of the authorities is no ground for interference by the High Court. **O SHROPAL v. CHITORIA**, 4 O. W. N. 1123; A. I. R. 1927 Oudh 615. 191

Sch. II, Art. 8—'House rent,' whether includes shop rent.

The words 'house rent' as used in para. 8, Sch. II, Provincial Small Cause Courts Act, cover and include shop rent. **MAJWAL DASS v. NAND LAL**, A. I. R. 1928 Lah. 284. 273

Art. 31—'Suit for account,' meaning of—Suit for money involving accounting, whether suit for account.

A suit for money against a person who is alleged to have wrongfully realised monies due to the plaintiff does not fall within the purview of Art. 31 of Sch. II of the Provincial Small Cause Courts Act where no decree for accounts is asked for.

A suit in which accounting is involved is not necessarily a suit for an account. **C KHANTA KAMINI DUTT v. ASWINI KUMAR DUTT**, 32 C. W. N. 400; A. I. R. 1928 Cal. 424. 722

Art. 35 (II)—Suit for damages for use and occupation—Jurisdiction of Small Cause Court.

The plaintiff had obtained symbolical possession of certain land against the defendants. Litigation went on between the parties, and taking advantage of the said litigation the defendants continued in possession and took away the paddy that was standing on the land. They further raised fresh crops and appropriated the same to their own use. The plaintiff sued for damages for use and occupation:

Held, that the damages claimed by the plaintiff were not in respect of any act amounting to a criminal offence within the meaning of Chap. XVII of the Penal Code and that the suit was not, therefore, barred from the cognizance of Small Cause Courts by Art. 35 (ii) of the Provincial Small Cause Courts Act. **C BANI KANTA MONDAL v. HEMANTA KUMAR GHOSE**, A. I. R. 1928 Cal. 405. 721

Punjab Colonization of Government Lands

Act (V of 1912), s. 20 as amended by Punjab Act (III of 1920), application of—Devolution of tenancy. Section 20 of the Punjab Colonization of Government Lands Act provides only for the devolution of a tenancy in cases where after the commencement of the Act any original tenant dies. In other cases it is the general rule of custom by which the parties are governed which determines devolution. **L PIR BAKHSI v. GHULAM BISHI**, A. I. R. 1928 Lah. 305; 9 Lah. 352; 29 P. L. R. 475. 280

Punjab Courts Act (VI of 1918), s. 41—Second appeal—Finding of fact when not binding.

A finding of fact based on no evidence is not binding in second appeal. **L HIRA v. TEK CHAND**, 10 Lah. L. J. 21. 487

s. 44. See C. P. O. 1908, s. 115 273

s. 44—Interlocutory order—Revision—Interference—Order reviewing previous order setting aside ex parte proceedings, nature of.

Orders passed in a pending case are not orders passed in a "case which has been decided by a

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subordinate Court" within the meaning of s. 44 of the Punjab Courts Act but interlocutory orders, and are not, therefore, open to revision. **L RAMJI DAS v. JAI RAM DAS**, A. I. R. 1928 Lah. 304. 396

Punjab District Boards Act (XX of 1883), s. 30—Haisiyat tax, legality of.

A haisiyat tax which is not fixed at a flat rate for each profession but which varies according to the income of the assessee is in substance a tax on the income and cannot be imposed by a local body without the previous sanction of the Governor-General in Council. **L DASONDI v. EMPEROR**, 29 Cr. L. J. 265; A. I. R. 1928 Lah. 332; 9 A. I. Cr. R. 488. 601

Punjab Municipal Act (III of 1911), s. 153—Use of premises as brothel—Order directing vacation of premises, legality of—Proper order.

A Magistrate has no power under s. 153 of the Punjab Municipal Act to order a person who is using his premises as a brothel to vacate the premises altogether. The proper order to be passed under the section is one directing such person to discontinue using the premises as a brothel. **L H. BHARUCHA v. MUNICIPAL COMMITTEE, LAHORE**, 29 Cr. L. J. 250; A. I. R. 1928 Lah. 278; 9 A. I. Cr. R. 501; 9 Lah. 391. 391

Punjab Pre-emption Act (I of 1913), s. 15 (c), thirdly—'Owner of estate,' meaning of—Owner in shamilat, whether owner of estate.

If a person has no land in the khewat but owns a share in the shamilat which is culturable and is assessed to land revenue, he is an 'owner of the estate' within the meaning of s. 15 (c), thirdly, of the Punjab Pre-emption Act. **L GHULAM MOHAMMAD v. ABDUL MAJID**. 619

Punjab Tenancy Act (XVI of 1887), s. 77—Suit for possession against co-tenant—Jurisdiction of Civil Court.

A suit for possession by an occupancy tenant against a co-occupancy tenant as such is cognizable by a Civil Court even though the latter happens to be one of the landlords. **L DINA NATH v. BIR SINGH**, A. I. R. 1928 Lah. 334. 770

s. 77 (3) (d)—Suit by tenant to establish occupancy right—Jurisdiction of Revenue Court.

A suit by a tenant to establish his right of occupancy falls under cl. (d), sub-s. (3) of s. 77, Punjab Tenancy Act, and is cognizable by a Revenue Court. **L CHARAT SINGH v. SUKHDEV SINGH**, 9 Lah. L. J. 547; 29 P. L. R. 264; A. I. R. 1927 Lah. 848. 624

Railways Act (IX of 1890), s. 72—Risk Note Form B—Suit for non-delivery—Burden of proof of loss.

—Duty of Railway Company—Mere plea of loss, whether sufficient.

In a suit for damages for non-delivery of goods consigned to a Railway Administration for carriage the Railway Administration must prove that the goods consigned have been lost, before they take advantage of the agreement contained in the Risk Note to throw upon the plaintiff the onus of showing that the goods were lost by dishonesty or wilful negligence. It is not sufficient for the Railway Company to plead execution of the Risk Note and to plead loss; they must definitely prove that there has been loss of the goods. **PAT TARACHAND MARWARI v. BENGAL NAGPUR Ry. Co.**, A. I. R. 1928 Pat. 259. 158

s. 72—Risk Note, Form B—Signature of agent in time of Firm, effect of non-attestation of signature—Risk Note attaches immediately on

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delivery and acceptance of goods—"Wilful neglect"
—Destruction of goods by fire.

Under s. 72 of the Railways Act, 1890, an agreement (popularly known as a "Risk Note") limiting the liability of a Railway Company as bailee of goods delivered to it for carriage by Railway, is required to be "in writing signed by or on behalf of the person sending or delivering to the Railway Administration the goods." The appellant, who carried on business at Amalner in the name of Tamboli Brothers, delivered certain goods at the Amalner Station of the respondent company for transport to the appellant's business premises at Kurla. The Risk Note in respect of these goods bore the signature of Tamboli Brothers. It appeared, however, that the signature of Tamboli Brothers affixed to the Risk Note was in the handwriting, not of the appellant himself, but of his nephew, Jamsetji (who was admittedly the appellant's duly authorized agent in the matter), and it was contended on behalf of the appellant that a signature in the name of the firm was ineffective unless it appeared on the face of the document that the signature was affixed either by the sender of the goods himself or by the hand of an agent whose agency was disclosed.

Held, (overruling this objection), that as it was plain on the evidence that the nephew, Jamsetji, had full authority to sign the name of the firm, it was unnecessary that he should purport to sign it as agent and that the signature in question was, therefore, a sufficient compliance with the requirements of the Statute.

A form of Risk Note (Form H) approved by the Governor-General in Council under s. 72, sub-s. (2), (b) of the Railways Act, 1890, contained at the end of it space for the attestation of the execution of the document by two witnesses:

Held, that although attestation by two witnesses was contemplated in the form as approved, such attestation was not an essential part of the form and was not a condition precedent to the validity of the Risk Note, inasmuch as the section does not provide that the agreement (i.e., the Risk Note) shall be attested, and while it requires that the form shall be approved by the Governor-General in Council, it does not entrust that functionary with the duty of providing for the attestation of the document.

A Risk Note, in the prescribed form (Form H) and duly signed, protects the Railway Company from liability as soon as the goods are delivered to it for carriage and accepted by the Company. In other words, the Risk Note attaches to the goods immediately on such delivery and acceptance, and not merely from the time when the goods are actually despatched by the Company to their destination. Their Lordships rejected as untenable the contention that "until the goods had been loaded on waggons for transport, or at all events until the Railway Company had given a receipt for the goods specifying that they were to be carried at the reduced rate, the Risk Note had no application to them, and the Railway Company were mere ordinary bailees of the goods."

Where under the express terms of a Risk Note (in Form H), the Railway Company was exonerated from liability for loss, etc., and to goods except where the loss was due to its wilful neglect, and there was (in the present case) ample evidence of negligence on the part of the Company, it was held that the Company could not be made liable merely on

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this account, in the absence of evidence or finding of 'wilful neglect.' The latter expression means that the act is done deliberately and intentionally and not by accident or inadvertence, but so that the mind of the person who does the act goes with it.

Goods delivered to the respondent Company at Amalner for being carried to Bombay were, while lying on the station platform at Amalner awaiting transport, destroyed by fire. It was found that the respondent Company's servants had been guilty of negligence:

Held, that the Company was protected from liability by reason of the Risk Note (Form H), and as 'wilful neglect' was negatived, it was unnecessary for their Lordships to consider the effect of the final proviso to the Risk Note which declared (*inter alia*) that "the term 'wilful neglect' shall not be held to include fire." **P C ARDESHIR BHICAJI, TAMBOLI v. AGENT, G. I. P. Ry. Co., 54 M. L. J. 167; A. I. R. 1928 P. C. 24; 30 Bom. L. R. 275; 47 C. L. J. 214; 5 O. W. N. 219; 9 P. L. T. 171; 32 C. W. N. 544; 27 L. W. 667; 26 A. L. J. 545; 52 B. 169** 124

s. 75—Goods charged at lower rates—Recalculation at higher rates on destination when allowable.

If a Railway Company intentionally carries goods to their destination at owner's risk at a lower rate in spite of a general rule of the Company under which such goods can be carried only at Railway risk and at a higher rate, they are not entitled to charge the higher rate at the destination as if the goods had been carried at Railway risk under the rule. **N. SECRETARY OF STATE, G. I. P. Ry. Co. v. NANDALAL, A. I. R. 1923 Nag. 52** 206

s. 77—Non-delivery, whether constitutes 'loss'—Notice, whether necessary.

Non-delivery does not constitute loss within the meaning of s. 77 of the Railways Act and when non-delivery without more is pleaded no notice under s. 77 is required though it may turn out that the suit will fail for want of notice if it be established by the Railway Company that it is in fact a case of loss. If the Railway Company plead want of notice they must show that this case of non-delivery was a case of loss. **PAT G. I. P. Ry. Co. v. GOPI RAM-GOURI SHANKAR, 9 P. L. T. 163; 7 Pat. 192; A. I. R. 1928 Pat. 270** 540

Receiver—Appointment of Receiver, whether operates as injunction.

The appointment of a Receiver so far as regards parties bound by the order operates against them as an injunction. It is an injunction necessarily against interference with the Court's Receiver whether by withholding possession of property or otherwise. **C. SALAM CHAND KANAYRAM v. JOOGUL KISHORE RAMDEO, 32 C. W. N. 114; A. I. R. 1928 Cal. 462; 55 C. 777** 65

Setting aside sales by Receivers—Principles.
See **PROVINCIAL INSOLVENCY ACT, 1920, ss. 5 (1), 59 (a)** 172

Status and powers of Receiver appointed by Court—Officer of Court.

A Receiver, when he seeks to take possession of the subject-matter of the litigation under an order of Court does not claim as a representative or agent of the parties to the suit but as an officer of the Court. **C. In re K. C. BONNERJEE, A. I. R. 1928 Cal. 402** 738

Registration Act (XVI of 1908), s. 17. See EVIDENCE ACT, 1872, s. 62 808

Registration Act—concl'd.

s. 17—Document under which mortgagor gives up his rights to mortgagee, effect of—Necessity of registration.

A document under which a mortgagor gives up his right and possession of the properties mortgaged to the mortgagee and by so doing absolves himself from the mortgage-debt is in effect a document transferring all the right and interest of the mortgagor in the properties to the mortgagee in consideration of the mortgagee foregoing his right to recover the mortgage-debt and is, therefore, compulsorily registrable under s. 17 of the Registration Act. **C BARSIK NANDI MANDAL v. GURUDAS PAL**, 46 C. L. J. 573; A. I. R. 1928 Cal. 107 **474**

s. 17—Security bond executed to Court—Registration—Exemption of judicial proceedings, scope of.

A security bond executed to the Court by a surety for stay of execution under O. XLI, r. 5 of the Civil Procedure Code is a step in judicial procedure and is, therefore, exempt from registration under s. 17 of the Registration Act. **B JAYAPPA LOKAPPA v. SHIVANGUDA**, 30 Bom. L. R. 19, A. I. R. 1928 Bom. 42; 52 B. 72; I. L. T. 40 Bom. 66 **710**

s. 17 (b)—Assignment of decree relating immovable property—Registration, necessity of.

An assignment of a decree for possession of immovable property is not equivalent to a transfer of property and, therefore, does not require registration. **L JASWANT RAI DATTA CHOWDHRY v. LAJWANTI**, A. I. R. 1928 Lah. 70 **603**

s. 21. See TRUSTS ACT, 1882, s. 5 **461**

s. 28—Mortgage-deed—Land not intended to be mortgaged fraudulently included for getting deed registered in wrong district—Registration, whether valid as to personal covenants.

Where a mortgage-deed has been registered in a wrong district by fraudulently including land not intended to be mortgaged, the registration is wholly invalid and even personal covenants contained in the deed cannot be considered to be duly registered. **N VYANKATESH v. ANNASA LAD**, 23 N. L. R. 143; A. I. R. 1928 Nag. 1; 11 N. L. J. 49 **517**

s. 87—Document written on stamp of wrong description—Validity of registration.

The registration of a mortgage-bond is not invalidated by the mere fact that the document was written on a stamp paper of a wrong description. Section 87 of the Registration Act sufficiently covers such a case. **R S. R. M. M. A. CHETTYAR FIRM v. MA PWA MAY**, 5 R. 666; A. I. R. 1928 Rang. 50 **168**

Religious endowments—Idol—Property dedicated to idol—Management vested in panchas—No provision for appointment of substitute on death of pancha—Death of pancha—De facto manager's right to sue—Trusts Act (II of 1882), s. 76.

Where a deed dedicated certain property to an idol and appointed a certain number of panchas for the management of the property but failed to make any provision for the appointment of a new pancha if any of the panchas died and did not lay down that others would be incapable of acting unless a fresh one was appointed:

Held, that the de facto manager had a right to file suits on behalf of the idol relating to the management of the property dedicated to the idol. **N VIDYANATH v. SHETTY**, A. I. R. 1928 Nag. 217 **663**

Religious Institutions—Dasnami Goshains—Succession to private property—Devolution of property in spiritual line, whether raises presumption that property belongs to institution.

In the case of a mahant belonging to an order the members of which have to sever their relationship altogether with their natural family, the mere circumstance that certain properties have for several generations devolved in the spiritual line does not lead to any presumption that the properties are trust properties and not the private properties of the mahant. **A SHRO GHULAM PURI v. SHIAM LAL BHAGAT**, A. I. R. 1928 All. 257 **252**

Res judicata, plea of, whether can be raised in second appeal for first time. See PRACTICE **910**

Restitution of conjugal rights—Decree for restitution—Discretion of Courts—Husband neglecting to perform his obligation, effect of.

It is well-settled that the granting of a decree for restitution of conjugal rights is discretionary with the Courts and, though, ordinarily, such a decree will be refused only if the husband has been guilty of legal cruelty towards his wife, yet he may disentitle himself to this relief by his gross failure to perform the obligations which the marriage contract has imposed on him for the benefit of the wife. **L IMAN BAKHSH v. AMIRAN** **607**

Reversal of decree in favour of defendants who have not appealed. See HINDU LAW **449**

Revision. See C. P. C. 1908, C. XXIII, r. 1 **887**

Right of privacy—Custom in N.-W. P.—Infringement—Mandatory injunction—Equitable considerations—Courts, whether bound to order demolition of constructions where adequate remedy can otherwise be provided—Specific Relief Act (I of 1877), s. 55—End and object of law.

A customary right of privacy within certain limitations exists in the North-Western Provinces, and a material interference with such a right is an actionable wrong and affords a good cause of action to the person or persons affected thereby.

In view of the social conditions of this country which prescribe seclusion for females belonging to certain respectable classes of the Hindu and Muhammadan communities in answer to communal sentiment and as the practical result of the custom which has descended from olden times, the right of privacy has taken too deep a root to be dislodged by any *a priori* reasoning.

Mandatory injunction is essentially an equitable relief and the form in which the injunction is to be granted must necessarily vary with the posture of each particular case. This form of relief being discretionary must necessarily be flexible.

Where the infringement of the right of privacy complained of by the plaintiff can be adequately remedied by any means short of a total demolition of the constructions complained of, Indian Courts, in the exercise of their powers of a Court of Equity are not bound to direct a complete demolition of the building.

The end and objective of law is not vindictiveness but justice. **A FAZAL HAQ v. FAZAL HAQ**, 26 A. L. J. 49; A. I. R. 1928 All. 201 **584**

Rule in Shelley's case. See HINDU LAW **119**

Rules of the Court of the Judicial Commissioner of Sind, Ch. VI, r. 5. See C. P. C., 1908, s. 149 **223**

Second appeal—Question of fact, determination of.

A High Court has power to determine a question of fact in second appeal in order to save a remand.

Pat KULDIP NARAIN TEWARI v. RAM LAL MANDAL, 7 Pat. 260; A. I. R. 1928 Pat. 318 821

Singapore Bankruptcy Ordinance, s. 51 (1). See PRESIDENCY TOWNS INSOLVENCY ACT, 1909, s. 56 233

Specific performance—Agreement to sell by father—Possession given—Person in possession, whether can be ejected by son—Part performance, doctrine of.

A contract for sale of immoveable property made by a Hindu father can be specifically enforced against his sons if the father dies intestate and if the prospective vendee has obtained possession in pursuance of this agreement he can successfully resist a suit for ejectment by the sons.

The doctrine of part performance is applicable to such cases and the heir of the person who has benefited by the part performance of the contract will be estopped from taking advantage of the breach thereof.

Under Art. 113 of Sch. I of the Limitation Act 'limitation' for a suit for specific performance begins to run only from the date when the person, in whose favour the agreement is made learns that performance of the contract is refused. **N SHEIKH AHMAD v. AMIRKHAN**, A. I. R. 1928 Nag. 211 905

Specific Relief Act (I of 1877), s. 20. See COMPROMISE DECREE 25

s. 27—Specific performance against subsequent transferee for value—Burden of proof of want of notice.

Per **Ashworth, J.**—Where a plaintiff is seeking to take advantage of s. 27 of the Specific Relief Act, it is for him to show that he is entitled under every word of that section to the relief claimed.

Where a person has to prove that notice has been given to another person, the mere fact that the transaction in question might have been known to a considerable number of people will not amount to the necessary proof.

Per **Sulaiman, J.**—In a suit to enforce specific performance against a transferee for value, the burden of proving want of notice in the first instance lies on the defendant transferee. But, as he can do this by merely denying the fact on oath, the question of burden of proof loses much of its importance. **A KIRTARATH RAI v. SRIPAT RAI**, A. I. R. 1928 All. 307 254

s. 55. See RIGHT OF PRIVACY 584

Stamp Act (II of 1899), s. 27 (g). See C. P. O. 1908, SCH. II, PARA. 20 668

ss. 40 (b), 57—Mortgage-bond executed by surety for due performance of undertaking by decree-holder to restore property—Proper stamp—'To secure the due performance of a contract,' meaning of.

A deed of mortgage executed by a surety for the due performance of an undertaking given by a decree-holder to the Court for restoring certain properties to the judgment-debtor in event of the failure of the decree-holder in appeal is a deed executed 'to secure the due performance of a contract' within the meaning of Art. 57 of Sch. I of the Stamp Act and is liable to a stamp duty of Rs. 5 only. **O LAL HARIHAR PARTAB BAKSHI SINGH v. BISHESHAR BAKSHI SINGH**, 5 O. W. N. 15; A. I. R. 1928 Oudh 143 553

Succession Act (X of 1865), s. 269. See ADMINISTRATOR 747

Succession Act (XXXIX of 1925), s. 381—

Succession Certificate Act (VII of 1889), s. 16—Succession Certificate, conclusiveness of—Certificate in name of wrong person, whether invalid.

Under the 1st part of s. 16 of the Succession Certificate Act of 1889 (corresponding to s. 381 of the Succession Act of 1925), a Succession Certificate is conclusive against the debtor.

The fact that a Succession Certificate is issued in the name of a person different from that of the person ultimately found to be the real heir does not render the certificate invalid. **M PARAMANANDACHARI v. M. VEERAPPAN**, 39 M. L. T. 611; A. I. R. 1928 Mad. 213 431

Succession Certificate Act (VII of 1889), s. 16.

See SUCCESSION ACT, 1925, s. 381 431

Suit. See C. P. O., 1908, O. XXI, R. 29 79

Suits Valuation Act (VII of 1887), s. 8—Wrong

valuation—Power of Court to allow amendment. See COURT FEES ACT, 1870, s. 7 iv (c) 609

s. 11—Under valuation—Objection not taken at early stage—Absence of prejudice—Want of jurisdiction, effect of—Transfer of case—Proceedings before transfer, validity of.

The defect of jurisdiction on territorial or pecuniary ground will not render proceedings in a case void, if objection is not taken at the earliest opportunity and there has been no consequent failure of justice.

A suit for dissolution of partnership and rendition of accounts was valued at Rs. 1,100 and filed in the Court of a Sub-Judge, Second Class. No objection was taken by the defendant to this figure with the result that the parties proceeded to trial and ultimately a preliminary decree was passed. No objection as to valuation or jurisdiction was taken in appeal from the preliminary decree which was dismissed. In the meantime the trial Court appointed a Commissioner for examining the accounts who after examining the accounts submitted a report wherein he arrived at a sum of Rs. 14,369-15-9 which was to be distributed as nett profits between the partners. The case was then transferred to Court of competent jurisdiction which passed the decree. On appeal it was objected that the appointment of the Commissioner was without jurisdiction and consequently the whole of the proceedings including the Commissioner's report should have been discarded:

Held, that inasmuch as no objection was taken to the defect of jurisdiction at an early stage and as it was not suggested that the disposal of the case on merits had been prejudicially affected by wrong valuation, the case was covered by s. 11 of the Suits Valuation Act. **L BUDHA MAL v. RALLIA RAM** 620

Torts—Acts authorised by Legislature—Nuisance to private person—Remedies. See CITY OF RANGOON MUNICIPAL ACT, 1922, s. 25 849

Wrongful attachment—Property placed by Police in custody of third person—Damages to property during such custody—Suit for damages, maintainability of—Custody of Police, whether custody of Court—Criminal Procedure Code (Act V of 1898), ss. 107, 146.

Where possession of a certain property becomes the possession of the Court, a person at whose instance the rightful owner may have been deprived of his possession in respect of the property no longer remains liable for any damages that may be caused to it.

Torts—concl'd.

But where an attachment is made by the Police in the exercise of those powers which the Police have for the prevention of a breach of the peace, either with or without reference to a Magistrate, the latter acting not in his judicial capacity, the attachment cannot be said to have been made under an order passed by a Court of competent jurisdiction and the person in whose custody the property is kept cannot be said to be in possession on behalf of the Court.

The defendant applied for proceedings being taken against the plaintiff under s. 107 of the Criminal Procedure Code and while the said proceedings were either pending or in contemplation the paddy standing on the land in dispute was attached by the Police and kept in the custody of a third person. There was nothing to show that the attachment was made under s. 146, Criminal Procedure Code. The plaintiff to whom the property was finally restored sued the defendant for damages for injury caused to the crops during the time that it was in the custody of the third person:

Held, that the plaintiff was entitled to recover the damages claimed from the defendant. **C MADHAB CHANDRA DUTTA v. JAINO RAM**, A. I. R. 1928 Cal. 231 479

Transfer of Property Act (IV of 1882), ss. 6, 43
—*Hindu reversioner's interest, whether property—Transfer, validity of—S. 43, whether applicable.*

The interest of a reversioner expectant on the death of a Hindu female is a mere *spes successionis*, which is neither property nor clothed with the attribute of alienability incident thereto, and cannot, therefore, be validly transferred.

A transfer of such an interest is void *ab initio* and cannot be validated by recourse to the doctrine of estoppel.

Section 43 of the Transfer of Property Act has no application to such a transaction as the Transfer of Property Act does not regard *spes successionis* as property for purposes of transfer. **N MAROTI SURYABHAN v. RAIWANT RAO** 897

s. 43.

See MUAFI

See TRANSFER OF PROPERTY ACT, 1882, s. 6

s. 45—Joint purchase—Presumption of equality of shares.

In the case of a joint purchase by two or more persons there is a presumption, in the absence of specification of the shares, that the purchasers had equal shares. **PAT SHOUKHI SAO v. GAIBI SAO** 149

s. 51—Transfer by manager of joint Hindu family—Suit to set aside transfer—Transferee's right to compensation for improvements—Failure to enquire as to necessity, effect of—'Good faith,' meaning of.

Per Ashworth, J.—A transfer by a Hindu father and manager of a joint family is a valid transfer until it is avoided by the son, and a transferee who has made improvements on the property before the transfer is avoided must be held to have believed himself in good faith to be the absolute owner thereof within the meaning of s. 51 of the Transfer of Property Act even if he has failed to satisfy himself at the time of the sale that it was necessary.

Per Mukerji, J.—It is always a question of fact whether a transferee believes or not that he is absolutely entitled to a property. It is not possible to hold in every case of a transfer by a qualified

Transfer of Property Act—cont'd.

owner, alleging circumstances which would enable him to give absolute title, that the transferee should be treated as believing that he holds the property in good faith.

The definition of the term 'good faith' in s. 3 (20) of the General Clauses Act, 1897, as meaning merely 'honestly' is not applicable to the Transfer of Property Act. **A LACHMI PRASAD v. LACHMI NARAIN**, 25 A. L. J. 926; A. I. R. 1928 All. 41 36

s. 52—Lease during pendency of suit—Suit by successful claimant to avoid lease and eject lessee—Jurisdiction of Civil Court—Oudh Rent Act (XXII of 1886), s. 108—'Suit for ejectment of tenant'—*Lis pendens*—Transferee pendente lite whether bound by compromise decree.

The doctrine of *lis pendens* as enunciated in s. 52 of the Transfer of Property Act applies to transfers effected during the pendency of a contentious suit or proceeding even when such a suit or proceeding is subsequently compromised and a decree is passed in pursuance of such compromise.

During the pendency of a litigation between A and B with respect to the title to a certain piece of land B leased the same to C. B subsequently withdrew from the contest and a compromise decree was passed in A's favour. A then sued to eject C contending that the lease was not binding on him:

Held, (1) that the suit was cognizable by the Civil Court;

(2) that the lease was not binding on A in the absence of fraud or collusion between A and B. **O SAT NARAIN SINGH v. BADRI PRASAD SINGH**, 4 O. W. N. 1275; A. I. R. 1928 Oudh 146; 12 R. D. 99 556

s. 52—Mortgage suit—Sale during prosecution of execution proceedings, validity of.

The doctrine of *lis pendens* applies to an alienation made during the active prosecution of execution proceedings under a mortgage-decree. **N POKHARDASS v. GANPAT RAO** 195

s. 53—Preference of creditors, effect of.

In a case in which no consideration of the law of bankruptcy or insolvency applies, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for payment of the rest of his debts. **O GHANI AHAMAD KHAN v. MEHDI BEGAM**, 1 Luck. Cas. 645; A. I. R. 1927 Oudh 617 335

s. 55. See EVIDENCE ACT, 1872, s. 92 417

s. 55—Contract Act (IX of 1872), s. 69—Agreement for sale of leasehold interest—Purchaser put in possession—Suit for specific performance by purchaser—Pendency of unsuccessful appeals against decree—Payment by vendor of rents and charges on property—Suit by vendor for reimbursement after termination of litigation—Cause of action when arises—Suspension during pendency of appeals—Limitation.

A mere contract of sale of immoveable property does not confer any right to the property on the prospective vendee. His right is only to have a conveyance effected in his favour.

The liability of a person who agrees to purchase a leasehold interest in immoveable property to pay rent and charges in respect thereof ordinarily arises only on the date of the actual sale-deed.

But where the purchaser was put in possession under the agreement of transfer, and, during the

Transfer of Property Act—contd.

pendency of a suit by such purchaser for specific performance of the agreement of transfer against the vendor, the vendor paid the rents and charges on the land, and after the suit for specific performance was decreed and the sale-deed was executed by him, the vendor sued for recovery of the amounts from the purchaser:

Held, (1) that inasmuch as the possession of the defendant was not that of a trespasser but that of a transferee whose title had only to be perfected by the execution of a proper deed, the defendant was bound to pay the rent and charges on the property while he was in possession thereof;

(2) that under s. 69, Contract Act, plaintiff who paid the amounts was entitled to recover the same from the defendant;

(3) that Art. 61 of the Limitation Act, applied and the cause of action arose on the date of the several payments and not on the date of the execution of the actual deed;

(4) that during the pendency of the unsuccessful appeals of the plaintiff to the District Court and the High Court, the cause of action was not suspended. **M. SINTHAMANI CHETTI v. ARUNACHALAM CHETTIAR**, A. I. R. 1927 Mad. 1060 412

— s. 55 (1)—*Vendor's lien for unpaid purchase-money, whether lost by execution of pro-note by vendee for sale consideration—Recital in sale-deed that properties were not to be sold till pro-note was discharged, effect of.*

The vendor's lien for unpaid purchase-money is given by Statute and continues until there is a contract between the parties that it shall cease.

A purchaser of immoveable property executed a pro-note for the amount of the consideration for the sale but the sale-deed contained a distinct recital that the vendee was not to alienate the property until the pro-note had been discharged. The promissory note was subsequently renewed in the name of the vendor and his wife for either or survivor. In a suit after the death of the vendor by the wife to enforce vendor's lien:

Held, that the vendor's lien could not, under the circumstances, be held to have been abandoned. **M. BANSTLAL ABBEROHAND v. SRIRANGANACHARAMMAL**, I. L. T. 40 Mad. 59; A. I. R. 1928 Mad. 486 302

— s. 59—*Transfer of Property (Amendment) Acts XXVII of 1926 and X of 1927—"Attestation"—Endorsement by Sub-Registrar of admission of execution, whether amounts to attestation.*

A deed of mortgage, which has been attested by only one witness but in which there is an endorsement of the Sub-Registrar (of which judicial notice is to be taken) that the parties including the mortgagor, who were present before him and were duly identified, acknowledged having executed the document, is properly attested within the meaning of s. 59 of the Transfer of Property Act read with Act XXVII of 1926 and Act X of 1927. **S. BUDHAR PRAGJI v. RAHIM-TULLA KHAN**, A. I. R. 1928 Sind 93 216

— s. 66. See MORTGAGE 156

— ss. 67, 98—*Mortgage—Covenant to pay—Provision for mortgagee remaining in possession if debt is not re-paid—No provision for sale on non-payment—Anomalous mortgage—Remedies of mortgagee.*

A deed of mortgage under which possession was delivered to the mortgagee provided that the mortgagee was to pay out of the net income the interest

Transfer of Property Act—concl'd.

and then the principal and that the mortgagor was to pay the amount in five years and in default the mortgagee was to remain in possession. The mortgagor, however, took possession in 1906, but defaulted to pay the mortgage amount. In a suit by the mortgagee for sale:

Held, (1) that the mortgage was an anomalous one in which the parties were bound by the terms of the document;

(2) that the plaintiff's remedy was to sue on the covenant to pay and for possession within the time prescribed by law;

(3) that the suit for sale was not maintainable. **M. JAMMULA NARAYANAMURTHI v. NILAMBARA PRUDHIVISINGHI**, 39 M. L. T. 614; A. I. R. 1928 Mad. 226 511

— ss. 101, 111 (d)—*Lessor and lessee—Acquisition by lessor of lessee's interest—Merger—Intention to keep lessee's interest alive, whether material.*

Where the interests of the lessor and the lessee in the property leased become vested in the same person in the same right, the lease determines absolutely irrespective of any question of intention, express or implied, on the part of the acquirer to keep the subordinate interest alive. **PAT HIRDAY NARAIN SINGH v. KALI CHARAN SINGH**, A. I. R. 1928 Pat. 273 819

— s. 107. See EVIDENCE ACT, 1872, s. 92 417

— s. 111 (d). See TRANSFER OF PROPERTY ACT, 1882, s. 101 819

Transfer of Property (Amendment) Act (XXVII of 1926 and X of 1927). See TRANSFER OF PROPERTY ACT, 1882, s. 59 216

Trustee and cestui que trust—*Cestui que trust, right of, to indemnity against trustee.*

The right to indemnity may arise in several ways, by contract express or implied, or where the position of the parties is such that either in law or in equity there is an obligation on the one party to indemnify the other, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify or where a right to indemnity is given by Statute.

A right to indemnity exists on the part of a trustee against his *cestui que trust* and likewise on the part of the *cestui que trust*, against his trustee. **M. KRISHNASWAMI AYYAR v. THATHA RAGHAVIAH CHETTY**, 53 M. L. J. 679; 26 L. W. 687; 39 M. L. T. 472; A. I. R. 1928 Mad. 43 423

Trusts Act (II of 1882), s. 5—*Deed of trust—Description of property—Registration Act (XVI of 1908), s. 21.*

Where a deed of trust in relation to immoveable property is registered, the instrument must contain a description of such property sufficient to identify the same as required by s. 21 of the Registration Act, 1908. **P. C. CHOCKALINGAM CHETTYAR v. E. N. M. K. CHETTYAR FIRM**, A. I. R. 1928 P. C. 44; 5 O. W. N. 517; 6 R. 113; 47 C. L. J. 429; 30 Bom. L. R. 788; 32 G. W. N. 677; 27 L. W. 811 461

— ss. 73, 74—*Application for removal of trustee—Proper procedure.*

A person who is not the beneficiary has no right to apply for removal of a trustee under s. 74 of the Trusts Act.

An application for removal of a trustee should be

Trusts Act—concl'd:

brought by a suit, and where it is alleged that the trustees have committed a breach of trust, the suit should pray that the delinquent trustees should make good their breach of trust. Such a suit should further normally ask for the administration of the trust estate by the Court. **B NATHABHAI DEVIDAS v. VAGHJIBHAI JHAVERBHAI**, 29 Bom. L. R. 1577; A. I. L. 1928 Bom. 20; 52 B. 32 **49**

s. 76. See RELIGIOUS ENDOWMENTS 663

U. P. Co-operative Societies (Amendment) Act (III of 1919), s. 2. See Co-OPERATIVE SOCIETIES ACT, 1912, s. 52 243

U. P. Court of Wards Act (IV of 1912), ss. 37 (a), 55—Suit on hundi—Plea that defendant was a ward, —Burden of proof—Application for adjournment granting of.

In a suit instituted on the basis of a *hundi* the defendant pleaded that under s. 37 (a) of the U. P. Court of Wards Act of 1912 he was not competent to enter into the contract embodied in the *hundi* and that under s. 55 of the said Act he could not personally be sued. On the date fixed for hearing evidence, the defendant's Counsel asked for a short adjournment of a few hours in order that the Head Clerk of the Court of Wards could be produced with his record. This was refused by the Court, and the suit was decreed on the ground that the defendant had summoned no witnesses for the day and that there was nothing on the record to show that he was a ward on the date of the execution of the *hundi* or on the date of the institution of the suit.

Held, that the course adopted by the trial Court was too severe and had caused hardship to the defendant.

[The Government Notification was admitted as evidence in the appeal, the case was remanded to the Court below for substituting the name of the Collector and proceeding with the case according to law.] **A COLLECTOR OF CAWNPORE v. JUGAL KISHORE**, A. I. R. 1928 All. 355 **578**

U. P. Land Revenue Act (III of 1901), s. 99. See BENGAL ALLUVION AND DILUVION REGULATION, 1825, cl. 4 566

s. 111—Partition proceeding—Jurisdiction of Civil Court—Objection that land is jagir and not sir—No question of proprietary title—Refusal of Revenue Court to decide objection—Civil suit, maintainability of.

Under the U. P. Land Revenue Act, 1901, the jurisdiction of Civil Courts in matters relating to partition is expressly ousted, except in so far as is provided by the provisions of s. 111 of the Act and the conditions and qualifications annexed to the grant of jurisdiction must be strictly complied with.

An objection to partition which merely states that the land in question is not *sir* but *jagir* does not raise any question of proprietary or under-proprietary title and the Civil Court has consequently no jurisdiction to determine the matter even though the Revenue Court has erroneously left the question undetermined and referred the parties to the Civil Court. **O RAM SINGH v. BAKOODAS**, 4 O. W. N. 1196; A. I. R. 1928 Oudh 101 **333**

s. 146. See Co-OPERATIVE SOCIETIES ACT, 1912, s. 52 243

U. P. Municipalities Act (II of 1916), ss. 211, 307—Lease by Municipality—Prosecution of lessee for disobedience of notice under s. 211, before determining tenancy, legality of—Mere resolution of Municipality, effect of—Duty of Municipality to give notice terminating lease, necessity of.

A Municipal Board leased certain plots on a road-side. Subsequently, the Board passed a resolution that the roadside should not be leased and that the lessees then in possession must be told to quit. The Executive Officer of the Board promptly issued a notice to the lessees under s. 211 of the U. P. Municipalities Act treating them as trespassers encroaching on a public road, and the applicant, one of the lessees, was prosecuted for disobedience of the order.

Held, that the notice under s. 211 was illegal inasmuch as the applicant was at the time of the notice a lessee whose lease had not been validly determined, and not a trespasser, and that the applicant could not be prosecuted for disobedience of such notice. **A AMINULLAH v. EMPEROR**, A. I. R. 1928 All. 95; L. R. 9 A. 28 Cr.; 26 A. L. J. 328; 9 A. I. Cr. R. 197; 29 Cr. L. J. 274; I. L. T. 40 All. 100 **690**

U. P. Town Improvement Act (VIII of 1919), Sch. I, para. 10 (3). See LAND ACQUISITION ACT, 1894, s. 23, sub-s. 1 (1) 587

Usurious Loans Act (X of 1918), ss. 3, 4—High rate of interest—Power of Court to interfere.

Where the rate of interest is high a Court can give relief under s. 3 of the Usurious Loans Act without considering whether the lender was in a position to dominate the will of the borrower or not. The rate of interest may, by itself, be sufficient evidence that a transaction is substantially unfair. **G MOHAR ALI v. ABDUL KARIM SARKAR** **742**

Vendor and purchaser—Suit by purchaser against trespasser—Trespasser, whether entitled to question bona fides of sale or adequacy of consideration—'Paper transaction', meaning of—Transaction found to be sham—Order for refund of price, whether proper.

A sued B and C for recovery of possession of certain properties alleging that he had purchased the properties from C and prayed that if C was found to have had no interest at the time of the purchase the price paid might be decreed to him. B pleaded that he had purchased the same properties from C's predecessors-in-title long before the alleged sale to A. C contended that he had validly transferred the properties to A. The lower Appellate Court found that the sale set up by B was untrue, and that the sale set up by A was a mere 'paper transaction' created by C to enable A to bring the suit, and, while dismissing A's suit for possession, directed that the amount admitted by C to have been received from A should be refunded to A. In second appeal:

Held, (1) that B, being a trespasser, was not entitled to challenge the validity of the sale to A on the ground that it was a mere 'paper transaction' or was for inadequate consideration;

(2) that C having admitted that he had sold the properties and received the price therefor and A having admitted that he had purchased the properties and paid the consideration therefor, there was no principle of law under which C could be compelled to return the purchase-money to A. **C HARA CHANDRA MANDAL v. MOHANANDA MANDAL**, 47 O. L. J. 365; A. I. R. 1928 Cal. 299 **744**

Wajib-ul-arz—*Interpretation—Manure on gowthan right of proprietary body.*

The clause in the *wajib-ul-arz* that any one may collect manure from waste land does not apply to a *gowthan*, a place where cattle are collected in the morning before they are taken to graze on the waste land or elsewhere. The manure on the *gowthan* belongs to the entire proprietary body and a managing co-sharer who collects it cannot refuse to account for the profits received therefrom. *N DOMAJI v. TULSIRAM*, A. I. R. 1928 Nag. 179 514

Wild Birds and Animals Protection Act (VIII of 1912), s. 4—*Offence under the Act, what constitutes.*

To convict a person under the Wild Birds and Animals Protection Act, 1912, it is necessary to prove that he has either killed or attempted to kill one of the animals or birds mentioned in the Schedule to the Act.

Merely wandering about with a gun round a reserved nursery does not constitute an offence under the Act. *L. BATAN SINGH v. EMPEROR*, 29 Cr. L. J. 238; 9 A. I. Cr. R. 485 288

Will—Construction—Absolute estate in favour of daughters, with provision for devolution of property not disposed of by them—Nature of estate conferred—Santanam, 'If there is issue,' meanings of.

A Will under which a Hindu devised his properties to his two daughters and to his sister's sons provided as follows:

"My daughters, ... and my sister's sons, ... shall each enjoy, ... his or her respective portions of the property devised to them hereditarily and at their pleasure, with right of alienation by gift, sale or otherwise. If out of the said two daughters, to either there is no issue, her property shall after her death pass to the other to whom there is issue. If to neither of them there is issue, then the property remaining at the time of the death of the said two shall pass to the nephews of the testator".

Held, (1) that the Will conferred an absolute estate on the daughters with a provision for the devolution of whatever property may be left at their death, and that such an estate was not unknown to Hindu Law; (2) that the expression "there is issue" meant issue living at the time of the daughter's death and not merely that the daughter should have had a child born to her;

(3) that the reference to the word 'issue' being to the issue of a female, it did not include an adopted son.

The word '*santanam*' besides meaning child has a certain implication of succession or heirship. *M. POCHIRAJU KANNAMMA v. MANNAYA MACHAMMAL*, (1927) M. W. N. 909; 27 L. W. 156; A. I. R. 1923 Mad. 297 497

Construction—Provision for erecting choultry and carrying on worship—Balance of income to be utilised for family purposes—Properties, whether absolutely dedicated to trust or merely burdened with trust—Provincial Insolvency Act (V of 1920), s. 4—Properties burdened with trust, whether vest in Official Receiver.

A Hindu, by his Will, enjoined his son to build a choultry to instal the Kula Deivam in it for the purpose of family worship, and to conduct a charity, meeting the expenses from the income of the properties. The *patta* for the properties was directed to be transferred in the name of the deity worshipped in the choultry. There was a further provision to the effect that the testator's son and his heirs "from

Will—concl'd.

generation to generation according to the rule of primogeniture should, without alienating the properties in any manner, enjoy them paying *sircar kist* therefor and conduct the charity and utilise the balance of the income for family purposes." The last sentence of the Will contained a provision that the testator's son was to inherit all his other properties. It did not appear there were any other properties given to the son, but it was found that the expenditure for the charities even on a lavish scale could not consume any considerable portion of the income and a very large part of it would be left intact for the enjoyment of the family:

Held, on a proper construction of the Will,

(1) that the dominating purpose and intention of the testator in executing the Will was to provide for the members of his family, the maintenance and conduct of the charity having only a subsidiary importance;

(2) that the properties covered by the Will were not properties absolutely dedicated to a trust but were only properties burdened with a trust;

(3) that on the adjudication of the son as insolvent, the properties vested in the Official Receiver for the benefit of the creditors. *M. RAMAPPA NAIDU v. LAKSHMANAN CHETTIAR*, 27 L. W. 88; (1926) M. W. N. 88; A. I. R. 1928 Mad. 190; 54 M. L. J. 272 786

Probate—Grant of Probate, effect of—Caveat—Sufficient interest to support caveat, what amounts to—Testator dealing with objector's property, whether sufficient.

The function of a Court of Probate is to decide whether the Will propounded is the last Will of the testator and whether the right to represent the estate may be conferred upon an applicant for Probate. The Court of Probate does not profess to decide the disputed title to every item of property mentioned in the Will or the disposing power of the testator or the existence of any disposable property.

In dealing with the question whether a caveator has the necessary interest the test is, does the grant displace any right to which the caveator would otherwise be entitled? If so, he has such an interest, if not, he has not.

On an application for grant of Probate of a Will, a person who alleges that the testator has by the Will purported to dispose of such person's property as if it belonged to the testator himself does not possess sufficient interest to support a caveat and oppose the grant of Probate. *M. M. K. SOWBHAGYAMMAL v. KOMALANJAN AMMAL*, 27 L. W. 167; I. L. T. 40 Mad. 51; 51 M. L. J. 382; A. I. R. 1923 Mad. 803 420

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